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DESC-CPA

CONTRACTING INSTRUCTION (CI): 00-12  
MEMORANDUM FOR CI Distribution

SUBJECT: Guidance for Emergency Purchases and Repurchases Against a Defaulted Contract

This supersedes Contracting Instruction 91-41E and the enclosure to the CI in its entirety. New guidance is attached.

The referenced procedures have been revised to update monetary thresholds, delete country clearance requirements, update legal cites and to eliminate the "Substantial Impact on Employment" notification requirement, among other things.

Therefore, this CI is effective immediately and expires upon inclusion in the divisional SOPs. Point of contact is Mr. William Latimer, extension 8628.

A handwritten signature in black ink, appearing to read "Sharon L. Murphy".

SHARON L. MURPHY  
DESC Senior Procurement Official

Attachment



## GUIDANCE FOR EMERGENCY PURCHASES AND RE-PURCHASES AGAINST A DEFAULTED CONTRACT

This guidance is designed to assist contracting personnel in the conduct of emergency procurements and re-purchases against defaulted contracts. Contracting personnel should use discretion when conducting these types of procurements. For purposes of this guidance, a small emergency purchase/re-purchase is one for \$100,000 or less, and a large emergency purchase/re-purchase is one in excess of \$100,000. In determining the immediate need or emergency quantity to be solicited, consideration should be given to the quantity of product needed within such reasonable time as circumstances warrant, and the balance of the requirement that could be later purchased under a fully competitive procurement.

The Default clause provides the authority for a re-purchase after default. Past Comptroller General decisions have stated, "Although we review re-procurements to determine if the contracting agency acted reasonably, the statutes and regulations governing regular procurements are not strictly applicable." Additionally, the Comptroller General expressed concern that *competition and a reasonable price be obtained. Because contracting officers are provided wide discretion for such re-procurements, the guidance provided for re-purchase after termination for default should be viewed as recommendations to be followed in order to obtain competition to the extent practicable. There may be certain situations when it is clearly impossible to abide by each and every recommendation. In those cases, the file should be documented.*

### **PART I - EMERGENCY PURCHASE (Other than One Related to a Default Action)**

(a) An emergency purchase for reasons of unusual and compelling urgency is defined in FAR 6.302-2 and examples are provided at DFARS 206.302-2.

(b) No synopsis is required (Far 5.202(a)(2) and DLAD 5.202(a)(2)). However, contracting officers should consider synopsis even when FAR time frames cannot be met (DEPI 5.203).

(c) A written justification and approval (J&A) based upon urgent and compelling circumstances is required for large emergency purchases if other than full and open competition procedures are used. *Full and open competition as defined in FAR 6.003 means that all responsible sources are permitted to compete. If you do not solicit all responsible sources for a particular line item, you are limiting competition. Additionally if you do not synopsise you may be limiting competition (DLAD 6.101(a)(93)(iii)). The determination of whether full and open competition exists should be made on a case-by-case basis.*

(1) The J&A may be prepared and approved within a reasonable amount of time after contract award if preparation before award would unreasonably delay-the acquisition. (FAR 6.303-1(e)).

(2) Content and format should be in accordance with FAR 6.303-2(a) and DLAD 6.303-2.

(i) Each contracting activity should access the information needed to complete items 3 and 9(iii) of the justification content in FAR 6.303-2(a) and DLAD 6.303-2(a)(90) 3, and 6.303-2(a)(90) 9.

(ii) To satisfy the requirement of item 9(iii), provide a description of the stock position of the item. Explain why the item is out of stock, and the extent and nature of the harm to the Government. Make a statement that the quality required covers only that quantity needed to satisfy, i.e., minimum need, the unusual and compelling urgency and state the estimated cost (FAR 6.303-2(b) and DLAD 6.303-2(a)(90) 5).

(iii) Give a definitive description of the need that dictates use of FAR 6.302-2. Adequately describe the nature of the serious injury to the Government, i.e., what will or will not happen if the Government is not permitted to limit competition.

(3) The justification for other than full and open competition shall be approved in writing-

(i) For a proposed contract not exceeding \$500,000, the contracting officer's certification required by FAR 6.303-2(a)(12) would serve as approval unless a higher approving level is established in agency procedures.

(ii) For a proposed contract over \$500,000 but not exceeding \$10,000,000, by the competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in paragraph (a)(3) or (a)(4) of FAR section 6.304. This authority is not delegable.

(iii) For a proposed contract over \$10,000,000 but not exceeding \$50,000,000, refer to FAR 6.304(a)(3)-(4) and DLAD 6.304.

(iv) For a proposed contract over \$50,000,000, by the senior procurement executive of the agency designated pursuant to the OFPP Act (41 U.S.C. 414(3)) in accordance with agency procedures. This authority is not delegable except in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting as the senior procurement executive for the Department of Defense.

(d) For small emergency purchases using simplified acquisition procedures, no special justification for other than full and open competition is required (FAR 6.001(a)). [But see FAR 13.501 for requirements pertaining to sole source acquisitions of commercial items under Subpart 13.5]; For large emergency purchases, the requirements of FAR 5.202(a)(2) are satisfied--

(1) Upon execution of the above described justification (see FAR 6.302-2(c)(1); or

(2) Upon receipt by contracting personnel of the information described in 6.303-2(b). (The use of the exception to synopsisizing contained in FAR 5.202(a)(2) does not necessarily, in and of itself, preclude the use of full and open competition.)

(e) Whenever competition is limited pursuant to this authority, the historically lowest priced source(s) shall be solicited. An award may be made to other than the lowest priced offeror provided the premium paid is reasonable and consistent with the extent to which delivery is required to be expedited. Quoted prices and delivery terms for each source solicited shall be fully documented, along with rationale which clearly supports source selection. (See FAR 13.106(c)(1).)

(f) An oral solicitation may be used (FAR 13.106-1(c) and FAR 15.102). If an oral solicitation is used, see FAR 15.208 and 15.306 regarding timing and content.

(g) A waiver of the Trade Agreement Act may be required (DEPI 25.402(c)).

(h) The contracting officer shall set aside a portion of a domestic acquisition (FAR 19.000(b)) for small business participation when certain criteria apply (FAR 19.502-3). A large domestic emergency purchase does not necessarily preclude set-asides for small businesses (FAR 19.502-5(d)). The DD Form 2579 should give the contracting history of the procurement to support whatever decisions made. If there will be no set-aside, a statement must be included in the "remarks" section detailing why a set-aside is not contemplated. Stating that the proposed contract is being awarded to a large business under emergency procedures is not a sufficient justification for not setting aside the procurement.

(i) Except as described above, follow the same regulations, clauses, and forms that apply to simplified acquisitions when making a small emergency purchase.

(j) Except as described above, the same regulations, clauses, and forms that apply to procurements over the simplified acquisition threshold shall be adhered to when making a large emergency purchase.

## **PART II - SIMPLIFIED ACQUISITION EMERGENCY RE-PURCHASE AFTER A TERMINATION FOR DEFAULT**

(a) Obtain competition to the maximum extent practicable for the re-purchase (FAR 49.402-6(b) and DLAD 49.402-6(b)). However, no justification and approval for other than full and open competition is required when the authority for the re-purchase is the Termination for Default clause, if the re-purchase is only for the undelivered quantity terminated.

(b) No synopsis is required pursuant to FAR 5.202(a)(2). However, contracting officers should consider synopsis even when FAR time frames cannot be met (DEPI 5.203).

(c) The file should include the following:

(1) Copy of default notification.

(2) *Emergency re-purchase documentation.*

(3) For each delivery order/line item terminated the following information is required:

(i) Actual undelivered quantity at termination and:

(ii) Estimated quantity for a follow-on contract that will satisfy the immediate need.

Differentiate between the estimated quantity that will satisfy the immediate need, and the quantity not considered an emergency requirement. In determining the immediate need, consideration should be given to:

(A) The amount of product needed to satisfy the emergency requirement,

(B) The required award date,

(C) The amount of time normally required procuring the item,

(D) The extent of competition available,

(E) The type of item defaulted. For instance, a degree day/automatic fill may generate problems in separating the emergency and the non-emergency portion of the purchase.

(F) If the re-purchase is for a quantity over the undelivered quantity terminated, treat the entire quantity (i.e., the undelivered quantity plus additional quantity required) as a new acquisition. See FAR 49.402-6(b) for purposes of identifying the authority for the acquisition. However, excess costs may still be charged on the quantity not exceeding the defaulted quantity.

(d) Any excess re-procurement Costs on the undelivered quantity terminated shall be assessed against the defaulted contractor's account and the file documented (FAR 49.402-6(a)) as follows:

(1) Coordination as to the validity of the requirement.

(2) An explanation for any delay concerning the re-purchase/re-solicitation.

(3) Any changes to the terms and conditions of the defaulted contract in the re-purchase should be clearly documented, such as--

(i) Whether such changes affect the price.

(ii) Whether an adjustment in the excess cost chargeable to the contractor is required.

(iii) Whether it is determined that re-purchase against the defaulted contractor's account will not be made.

(e) If re-purchase is made at a price over the price of the supplies/services terminated, the administrative contracting officer shall make a written demand on the defaulted contractor for the total amount of the excess costs for the undelivered quantity. Document the file (FAR 49.402-6(c)) as follows:

(1) Document that the Government acted timely and reasonably in re-procuring the defaulted item;

- (2) Document that the defaulted items are the same or similar to the items originally under contract;
- (3) Document that the re-procurement costs were actually incurred; and
- (4) Document that the Government acted reasonably in mitigating the excess costs.
- (f) If re-purchase has not yet taken place, place a statement in the file that the demand will be issued and damages or excess costs related to the default claimed (FAR 32.602(a) and 49.402-6(c)).
- (h) Except as described above, follow the same regulations, clauses, and forms that apply to simplified acquisitions when making a simplified acquisition emergency re-purchase after default.
- (g) If the initial simplified acquisition at some point exceeds the \$100,000 threshold, then the procurement should normally be converted to a large purchase, (i.e., utilizing the clauses, certifications, and forms associated with a large purchase). The decision-making process, which concluded that the appropriate procedures were utilized, should be documented.
- (h) Two DD Form 350s must be prepared when quantities are terminated by contract modifications as follows:
  - (1) The form for the defaulted contractor should reflect the contract price minus the defaulted dollar amount. The resultant number should be entered in block B8 (enclosed in parenthesis to indicate a minus).
  - (2) The form for the new contractor should show the new contract dollar amount.

### **PART III - LARGE EMERGENCY RE-PURCHASE AFTER A TERMINATION FOR DEFAULT**

- (a) Obtain competition to the maximum extent practicable for the re-purchase (FAR 49,402-6(b) and DLAD 49.402-6(b)). However, no justification and approval for other than full and open competition is required when the authority for the re-purchase is the Termination for Default clause, if the re-purchase is only for the undelivered quantity terminated.
- (b) No synopsis is required pursuant to FAR 5.202(a)(2). However, contracting officers should consider synopsis even when FAR time frames cannot be met (DEPI 5.203).
- (c) The file should include the following:
  - (1) Copy of default notification.
  - (2) Emergency re-purchase documentation.
  - (3) For each delivery order/line item terminated the following information is required:
    - (i) Actual undelivered quantity at termination and;
    - (ii) Estimated quantity that will satisfy the remainder of the ordering period.

Differentiate between the estimated quantity, which will satisfy the immediate need, and the quantity not considered an emergency requirement. In determining the immediate need, consideration should be given to:

- (A) The amount of product needed to satisfy the emergency requirement;
- (B) The required award date;
- (C) The amount of time normally required to re-procure the item;
- (D) The extent of competition available;
- (E) The type of item defaulted. For instance, a degree day/ automatic fill may generate problems in separating the emergency and the non-emergency portion of the purchase.
- (F) If the re-purchase is for a quantity over the undelivered quantity terminated, treat the entire quantity (i.e., the undelivered quantity plus additional quantity required) as a new

acquisition. See Far 49.402-6(b) for purposes of identifying the authority for the acquisition. However, excess costs may still be charged on the quantity not exceeding the defaulted quantity.

(d) A waiver of the Trade Agreements Act may be required (DEPI 25.402(c)).

(e) Small business and/or Small Disadvantaged Business set-asides may be used to the extent they were used in the original solicitation.

(f) The evaluation preference for small disadvantaged businesses and Hub-zone may apply to re-purchases.

(g) Any excess re-procurement costs on the undelivered quantity terminated shall be assessed against the defaulted contractor's account and the file documented (FAR 49.402-6(a)) as follows:

(1) Coordination as to the validity of the requirement.

(2) An explanation for any undue delay concerning the re-purchase.

(3) Any changes to the terms and conditions of the defaulted contract in the re-purchase should be clearly documented such as:

(i) Whether such changes affect the price;

(ii) Whether an adjustment in the excess cost chargeable to the contractor is required.

(iii) Whether it is determined that re-purchase against the defaulted contractor's account will not be made.

(4) The Small Disadvantaged Business preference, if any, may be used in calculating excess re-procurement costs.

(h) If re-purchase is made at a price over the price of the supplies/services terminated, the administrative contracting officer shall make a written demand on the defaulted contractor for the total amount of the excess costs for the undelivered quantity. Document the file (FAR 49.402-6(c)) as follows:

(1) Document that the Government acted timely and reasonably in re-procuring the defaulted item;

(2) Document that the defaulted items are the same or similar to the items originally under contract;

(3) Document that the re-procurement costs were actually incurred; and

(4) Document that the Government acted reasonably in mitigating the excess costs.

(i) If re-purchase has not yet taken place, place a statement in the file that the demand will be issued and damages or excess costs related to the default will be claimed (FAR 32.602(a)) and FAR 49.402-6(c)).

(j) Except as described above, follow the same regulations, clauses, and forms that apply to procurements over the simplified acquisition threshold when making a large emergency re-purchase after default.

(k) Two DD Form 350s must be prepared when quantities are terminated by contract modifications as follows:

(1) The form for the defaulted contractor should reflect the contract price minus the defaulted dollar amount. The resultant number should be entered in block B8 (enclosed in parenthesis to indicate a minus).

(2) The form for the new contractor should show the new contract dollar amount.

## **PART IV - RE-PURCHASE AFTER TERMINATION FOR DEFAULT - NOT AN EMERGENCY**

(a) Obtain competition to the maximum extent practicable for the re-purchase (FAR. 49.402-6(b) and DLAD 49.402-(b)).

(b) Publicize/synopsisize the proposed procurement. For procedures for publicizing actions under \$25,000 refer to FAR 5.101(a)(2) and for acquisitions over \$25,000 refer to FAR 5.101(a)(1).

(c) The file should include the following:

(1) *Copy of default notification.*

(2) Re-purchase documentation.

(3) For each delivery order/line item terminated, the following information is required:

(i) Actual undelivered quantity at termination;

(ii) Any quantity re-purchases under termination for default emergency purchase procedures and;

(iii) Estimated quantity that will satisfy the remainder of the ordering period.

(iv) If the re-purchase is for a quantity over the undelivered quantity terminated, treat the entire quantity (i.e., the undelivered quantity plus additional quantity required) as a new acquisition. See FAR 49.402-6(b) for purposes of identifying the authority for the acquisition.

However, excess costs may still be charged on the quantity not exceeding the defaulted quantity.

(d) Small business and/or Small Disadvantaged Business set-asides may be used to the extent they were used in the original solicitation.

(e) The evaluation preference for small disadvantaged businesses and Hub-zone may apply to re-purchases.

(f) Any excess re-procurement costs on the undelivered quantity terminated shall be assessed against the defaulted contractor's account and the file documented (FAR 49.402-6(a)) as follows:

(1) Coordination as to the validity of the requirement.

(2) An explanation for any undue delay concerning the re-purchase.

(3) Any changes to the terms and conditions of the defaulted contract in the re-purchase should be clearly documented, such as --

(i) Whether such changes affect the price;

(ii) Whether an adjustment in the excess cost chargeable to the contractor is required;

(iii) Whether it is determined that re-purchase against the defaulted contractor's account will not be made.

(4) The Small Disadvantaged Business and/or Hub-zone preference, if any, may be used in calculating excess re-procurement costs.

(g) If re-purchase is made at a price over the price of the supplies/services terminated, the administrative contracting officer shall make a written demand on the defaulted contractor for the total amount of the excess costs for the undelivered quantity. Document the file (FAR 49.402-6(c)) as follows:

(1) Document that the Government acted timely and reasonable in re-procuring the defaulted item,

(2) Document that the defaulted items are the same or similar to the items originally under contract,

(3) Document that the re-procurement costs were actually incurred, and

(4) Document that the Government acted reasonably in mitigating the excess costs.

(h) If re-purchase has not yet taken place, place a statement in the file that the demand will be issued and damages or excess costs related to the default will be claimed (FAR 32.602(a) and FAR 49.402-6(c)).

(i) Except as described above, follow the same regulations, clauses, and forms that apply to simplified acquisitions when making a simplified acquisition non-emergency re-purchase after default.

(j) Except as described above, follow the same regulations, clauses, and forms that apply to procurement over the simplified acquisition threshold when making a large non-emergency re-purchase after default.

(k) Two DD Form 350s must be prepared when quantities are terminated by contract modifications as follows:

(1) The form for the defaulted contractor should reflect the contract price minus the defaulted dollar amount. The resultant number should be entered in block B8 (enclosed in parenthesis to indicate a minus).

(2) The form for the new contractor should show the new contract dollar amount.