



OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, DC 20301

JUN 7 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Full and Open Competition Requirement for Congressionally Directed Spending Items and Earmarks Intended for “For-Profit” Entities

Section 8121 of the DoD Appropriations Act, 2010 (Pub. Law No. 111-118), imposes competition requirements on congressionally directed spending items and earmarks intended for award to a “for-profit” entity. The statutory competition requirements mandated by section 8121 are more stringent for congressionally directed spending items and earmarks intended for award to a “for-profit” entity sponsored solely by members of the House of Representatives than for those sponsored by members of the Senate. This memorandum provides compliance guidance with respect to section 8121.

Congress issued an explanatory statement in lieu of a conference report for the DoD Appropriations Act, 2010. The explanatory statement can be accessed at: <http://www.gpoaccess.gov/congress/house/appropriations/10dodappro.html>. Pages 433 through 532 of the explanatory statement contain a list of congressionally directed spending items and earmarks. That list indicates whether each project is sponsored solely by members of the House. The list does not indicate whether projects listed are intended for “for-profit” entities rather than non-profit entities such as universities.

Section 8121(c) requires use of full and open competition for contract awards involving congressionally directed spending items and earmarks sponsored solely by members of the House, except that any contract previously awarded using full and open competition that remains in effect during fiscal year (FY) 2010 satisfies the section 8121(c) competition requirement. Section 8121(a) governs Senate-sponsored earmarks, including those jointly sponsored by members of the House and the Senate. It requires the Department to apply acquisition regulation full and open competition rules to earmark awards intended for “for-profit” entities on the same basis as non-earmark spending on contracts with “for-profit” entities. Sections 8121(a) and (c) differ because subsection (c) does not allow DoD to apply exceptions to full and open competition provided for in the acquisition regulations.



Effective immediately, comptroller, contracting, and program/project management personnel should work collaboratively to identify the applicable “for-profit” earmarks sponsored solely by members of the House of Representatives and ensure section 8121(c) compliance. The earmark database currently in use by comptroller and contracting personnel should also be used to report information on earmarks associated with section 8121. All awards must be timely and accurately updated in the database.

Our points of contact are Mr. Jeff Grover, OUSD(AT&L), at 703-697-9352 or jeffrey.grover@osd.mil and Mr. Michael Benjamin, OUSD(C), at 703-571-9184 or michael.benjamin@osd.mil.



Robert F. Hale
Under Secretary of Defense
(Comptroller)



Ashton B. Carter
Under Secretary of Defense
(Acquisition, Technology, and Logistics)

Full and Open Competition Requirement for Congressionally Directed Spending

Sec. 8121. (a) Each congressionally directed spending item specified in this Act or the explanatory statement regarding this Act that is also identified in Senate Report 111-74 and intended for award to a for-profit entity shall be subject to acquisition regulations for full and open competition on the same basis as each spending item intended for a for-profit entity that is contained in the budget request of the President.

(b) Exceptions- Subsection (a) shall not apply to any contract awarded--

- (1) by a means that is required by Federal statute, including for a purchase made under a mandated preferential program;
- (2) pursuant to the Small Business Act (15 U.S.C. 631 et seq.); or
- (3) in an amount less than the simplified acquisition threshold described in section 302A(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252a(a)).

(c) Any congressionally directed spending item specified in this Act or the explanatory statement regarding this Act that is intended for award to a for-profit entity and is not covered by the competition requirement specified in subsection (a), shall be awarded under full and open competition, except that any contract previously awarded under full and open competition that remains in effect during fiscal year 2010 shall be considered to have satisfied the conditions of full and open competition.

(d) In this section, the term 'congressionally directed spending item' means the following:

- (1) A congressionally directed spending item, as defined in Rule XLIV of the Standing Rules of the Senate.
- (2) A congressional earmark for purposes of rule XXI of the House of Representatives.