

The following contains answers to 'Frequently Asked Questions' relating to the limitations placed on the Department of Defense for aggregate annual amounts available for contracted services in accordance with section 808 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112-81 and DFARS Class Deviation 2012-O0012, Limitation on Amounts Available for Contracted Services, dated July 31, 2012.

1. Are commercial items (services), competitively awarded contracts, or firm fixed-priced contracts exempt from the requirements of this class deviation?

No, the statute did not provide for such exemptions. However, in fulfilling the requirements of paragraph (1) of the deviation, contracting officers should not require offerors to provide cost information (i.e. rate data) that would not otherwise be required.

2. For existing contracts with priced options, do the requirements of the deviation at paragraph (1), to establish negotiation objectives or the requirements of paragraph (2) to secure higher level approval, apply?

No, priced options do not require the contracting officer to establish a negotiation objective; therefore paragraph (1) does not apply. Paragraph (2) does not apply because the exercise of an option is not the "award or issuance of any contract or task or delivery order."

3. Do section 808 restrictions apply to all contracted services?

No. See Deputy Secretary of Defense Memo, dated June 03, 2012, as attachment to the class deviation, for authorized exclusions to section 808.

4. Do section 808 limitations apply to contracted services under the GSA Schedule program or are they excluded by object class code 25.3?

Yes, section 808 limitations do apply to contracted services under the GSA Schedule program. Though section 808 limitations exclude object class code 25.3, "other goods and services from federal sources", it is not the most appropriate classification for orders under the GSA Schedule program. Object class 25.3 is most appropriate under interagency agreements where another Government agency (not under a contract with the private sector) performs the service on behalf of another agency. In accordance with OMB Circular No. A-11, object class code 25.3 does not include purchases from State and local governments, the private sector, and Government sponsored enterprises that are not otherwise classified.

5. Are task or delivery orders issued under indefinite-delivery type contracts (i.e., actions issued against established contracts for the performance of tasks or delivery of supplies during the period of that contract) subject to the restrictions of section 808?

Yes. Task orders requiring the performance of services with an estimated value of more than \$10M, issued in FY 2012 and FY 2013, are likely covered by the restrictions of section 808. Note, if a task order is issued covering a performance period of multiple years, the limitations are only applied to those annual requirements in FY 2012 greater than \$10M and/or annual requirements in FY 2013 greater than \$10M.

6. Is it the intent of the section 808 that cost type contracts and task orders will establish written binding maximum labor and overhead rates for billing and final payment purposes to ensure that the labor and overhead rates used to determine final costs paid do not exceed the FY 10 rates?

No. The requirement is for contracting officers to establish a negotiation objective for labor and overhead rates that are less than or equal to those paid to the same contractor for same or similar services in FY 2010. If after negotiations, contracts or task orders are to be awarded that provide for continuing services at an annual cost to the Government in FY 2012 or FY 2013 that exceed the annual cost paid in FY 2010 for the same or similar services, will require the Secretary of the Military Department or the Head of the Defense Agency/Field Activity to provide written approval prior to contract award or order issuance.

7. How will the Deviation apply to collective bargaining, previously legally bound FY11 contracted labor rates, or union set rates? Will this limit competition to companies without these agreements?

Section 808 does not place limits to competition or discriminate against companies with previously established and legally bound pricing rates. Section 808 places limits on labor and overhead rates at the FY 2010 level when establishing negotiating objectives.

8. Regarding paragraph (1) of the deviation, what does it mean “...unless the rates are otherwise established by law”?

Section 808 places a requirement on the contracting officer to establish negotiation objectives for labor and overhead rates that do not exceed the same rates paid to the same contractor in FY 2010. An exception to this requirement is if rates are otherwise established by law e.g. Service Contract Act or Davis-Bacon Act. Other similar laws may apply with regards to labor and overhead rates. Seek legal counsel support as necessary.

9. Is the \$10M limitation the total contract value or annual value of the services to be performed?

The \$10M limitation in section 808 means the total annual cost paid for contracted services or total annual contract value for contracted services.

10. In determining the applicability of Section 808, does the \$10M refer to continuing services for FY13 only (per year basis) or do we take into consideration the total estimated value of the entire requirement. For example: We have a requirement for continuing services for a 3 year effort estimated at \$30M with an estimated cost for FY13 of \$9M, \$11M in FY14 and \$10M in FY15. Since the FY13 effort is less than \$10M, would Section 808 apply?

The \$10M applies to the total value of the FY13 effort, which in this example, would be \$9M. Since the FY13 effort is less than \$10M, section 808 would not place limitations on this contract action.

11. With regard to paragraph (1) of the deviation - establishing negotiation objectives. Does this apply in a competitive situation where we receive multiple offers? For example, a proposal at \$10M, a proposal at \$9M and a proposal at \$11M. If we use 2010 labor and indirect rates it could impact the results of the competition. It would seem that only the second part of the memo applies.

The requirements at paragraph (1) of the deviation would not apply in a competitive situation; the limitations at paragraph (2) would still apply if the successful offeror was greater than \$10M.

12. With regard to paragraph (2) of the deviation, does the estimated value in excess of \$10M include all costs (Other direct costs such as material and travel costs) or just labor, indirect costs and fee (not including Other direct costs)? For example, in 2010, we paid \$10M for services (included in that \$10M was \$1M for material and travel costs set by Government) now in FY13 the continuing services now cost \$11M (included in that number is \$2M for other direct cost). The increase in cost is solely due to more material and travel. The \$2M figure was set by the Government.

It includes all costs.

13. Are Centrally Billed Accounts (CBAs) considered to be "established by law" and therefore exempt from the Sec 808 limitations?

CBA's are established by law; however, as it relates to the deviation, that only provides relief under paragraph (1) - setting negotiation objectives. It does not provide relieve of the requirement at paragraph (2) for approval of contracts, TO's or DO's exceeding \$10M.

14. The statute provides some exclusion for services "related to RDT&E, military construction, overseas contingency operations", etc. Many of our contracts are funded with mixed funding. Would there be different requirements within a contract dependant on funding?

If the services are funded out of overseas contingency operations funds, the services are not included in the scope of the section 808 limitation. NDAA § 808 (d)(1). Otherwise, section 808 applies to the services being provided regardless of the funding used to pay for it. "Contract Services" as defined in section 808, incorporates the definition of "contract services" in 10 U.S.C. § 235, which excludes "services relating to research and development and services relating to military construction, and makes no mention of funding source.

15. If an activity awards a service contract running from April 2013 to March 2014, does the activity look to performance through 2013 (specifically, September 30, 2013) to determine if the \$10M threshold is exceeded.

Yes. The July 31, 2012 class deviation states that "Prior to award or issuance of any contract or task order or delivery order that includes contract services, where the contract services have an estimated value in excess of \$10,000,000, IN FISCAL YEAR 2012 OR 2013..."

16. Are previously established Forward Pricing Rate Agreements excluded from paragraphs (c)(1) or (c)(2) of the deviation.

Forward Pricing Rate Agreements are not established by law and therefore not excluded from the Section 808 requirements. The July 31, 2012 class deviation directs that contracting officers shall coordinate with the Defense Contract Audit Agency and Defense Contract Management Agency (DCMA) to determine the applicable 2010 rates when establishing their negotiation objective. Typically, the Divisional Administrative Contracting Officer can provide the Procuring Contracting Officer both the current Forward Pricing Rate Agreements and the Forward Pricing Rate Recommendation, along with those rates for fiscal year 2010.

17. Are contracted services with the entire performance in the country of Afghanistan, exempt from the limitations of section 808 as implemented in the class deviation?

Yes. Section 808 excludes those services funded out of amounts made available for overseas contingency operations.