

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 12 and 52

[FAR Case 94-791]

RIN 9000-AG47

Federal Acquisition Regulations;
Subcontracts for Commercial Items

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: At 60 FR 11198, March 1, 1995, a proposed rule was published in the **Federal Register** to amend the Federal Acquisition Regulation (FAR) to implement portions of Title VIII of the Federal Acquisition Streamlining Act of 1994 (the Act) dealing with the acquisition of commercial items. The background and the regulatory text of that proposed rule stated that the list of laws and the list of clauses would be published at a later date. This case provides the complete list of laws determined to be inapplicable to Executive agency contracts and subcontracts for commercial items and the clauses determined to be applicable to subcontracts for the acquisition of commercial items. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before May 22, 1995, to be considered in the formulation of a final rule.

Public Meeting: April 3, 1995, 1 p.m. at: General Services Administration Auditorium, 18th & F Streets, NW, First Floor, Washington, DC 20405.

Written and Oral Statements: Statements prepared for oral presentation must be sent to the FAR Secretariat at the address given below, not later than March 29, 1995.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 94-791 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Colonel Laurence M. Trowel, Commercial Items Team Leader, at (703)

695-3858 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-791.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a result of implementation of the Act include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and Introduction of the Federal Acquisition Computer Network (FACNET).

This notice announces proposed revisions developed under FAR Case 94-791, Subcontracts for Commercial Items. FAR Case 94-790, published as a proposed rule at 60 FR 11198, March 1, 1995, proposed revisions to the FAR to implement portions of Title VIII of the Federal Acquisition Streamlining Act of 1994. In the supplementary information, paragraph A, Background, and at the following three citations in that proposed rule, the **Federal Register** notice indicated that the list of laws determined to be inapplicable to subcontracts for the acquisition of commercial items in accordance with section 8003(a) of the Act and the list of clauses applicable to subcontracts for the acquisition of commercial items would be published in the **Federal Register** in a future proposed rule under FAR case 94-791:

- Proposed FAR 12.403, Applicability of certain laws to subcontracts for the acquisition of commercial items, at paragraphs (a), (b), and (c);
- Proposed FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, at paragraph (d); and
- Proposed FAR 52.244-XX, Subcontracts for Commercial Items and Commercial Components, at paragraph (d).

This proposed rule revises the earlier rule by providing the full list of laws determined to be inapplicable to prime contracts at 12.402, and provides the list of laws determined to be inapplicable to subcontracts at 12.403. In addition, this proposed rule includes the clauses determined to be applicable to subcontracts for the acquisition of commercial items at 52.212-5 paragraph (d) and 52.244-XX, paragraph (d).

An area of concern discussed extensively by the Team was the applicability of the Buy American Act (41 U.S.C. 10 (a)-(d)) and Trade Agreements Act (19 U.S.C. 2512(a)) to subcontracts. The Buy American Act requires that "only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use." The effect of this language is that prime contractors must consider the cost and origin of components in determining whether an end item manufactured in the United States meets the definition of a domestic end product. While the Act does not specifically use the terms "subcontract" or "subcontractors," concern was raised that including these two laws on the list of laws inapplicable to subcontracts would result in confusion regarding whether the cost and origin of subcontractor components needed to be considered for commercial items. Consequently, the decision was made to leave these two laws off the list at 12.403 and solicit further public comment on the issue.

The proposed rule at 12.402 and 12.403 includes the full list of laws (Civilian and DOD-unique) determined to be inapplicable at both the prime and subcontractor level. Including the full list of laws in this case provides the public with a complete view of the Government's implementation of Section 8003. The final disposition of the DOD-unique laws, with respect to inclusion in the FAR, will be determined during the resolution of public comments.

Public Meeting. The FAR Council is interested in an exchange of ideas and opinions on this rule. For that reason, the FAR Council is conducting a series of public meetings. A public meeting will be held on April 3, 1995, with respect to FAR Case 94-790, Acquisition of Commercial Items. This rule, FAR Case 94-791, will also be discussed at the April 3rd meeting. The public is encouraged to furnish its views; the Council anticipates that public comments will be very helpful in formulating final rules.

Persons or organizations wishing to make presentations will be allowed 10 minutes each, provided they notify the FAR Secretariat at (202) 501-4755 and submit written statements of the presentation by March 29, 1995. Persons or organizations with similar positions

are encouraged to select a common spokesman for presentation of their views. This meeting, in conjunction with the **Federal Register** notice soliciting public comments on the rule, will be the only opportunity for the public to present its views.

B. Regulatory Flexibility Act

This proposed rule will 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.* This rule will have a beneficial impact by significantly limiting the flow down of Government-unique terms and conditions to subcontractors at all levels thereby minimizing the burden on a significant number of small businesses.

An Initial Regulatory Flexibility Analysis (IRFA) was provided to the Chief Counsel for Advocacy for the Small Business Administration in conjunction with FAR Case 94-790, Acquisition of Commercial Items. That IRFA applies to this rule as well. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601 *et seq.* (FAR Case 94-791), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Parts 12 and 52

Government procurement.

Dated: March 20, 1995.

Edward Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Parts 12 and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 12 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. In the table of contents, the title of Part 12 is revised as set forth above.

3. Section 12.402 is revised to read as follows:

12.402 Applicability of certain laws to executive agency contracts for the acquisition of commercial items.

(a) The following laws are not applicable to executive agency contracts for the acquisition of commercial items:

(1) 41 U.S.C. 43, Walsh-Healey Act (see 48 CFR (FAR) part 22, subpart 22.6);

(2) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see 48 CFR (FAR) 3.404);

(3) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see 48 CFR (FAR) 5.203);

(4) 41 U.S.C. 701 *et seq.*, Drug-Free Workplace Act of 1988 (see 48 CFR (FAR) 23.501);

(5) 10 U.S.C. 2384(b), Requirement to Identify Suppliers and Sources of Supply (see 48 CFR (DFARS) part 217, subpart 217.73);

(6) 10 U.S.C. 2397, Reports by Employees or Former Employees of Defense Contractors;

(7) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials;

(8) 10 U.S.C. 2408, Prohibition on Persons Convicted of Defense-Related Felonies (see 48 CFR (DFARS) 203.57); and

(9) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards (see 48 CFR (DFARS) part 242, subpart 242.72).

(b) Certain requirements of the following laws have been eliminated for executive agency contracts for the acquisition of commercial items:

(1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see 48 CFR (FAR) 23.105);

(2) 40 U.S.C. 327 *et seq.*, Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see 48 CFR (FAR) 22.305);

(3) 41 U.S.C. 57(a) and (b), and 58, Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986 (see 48 CFR (FAR) 3.502);

(4) 41 U.S.C. 423e(1)(B), Requirement for certain certifications under the Procurement Integrity Act (see 48 CFR (FAR) 3.104-9);

(5) 42 U.S.C. 7606, Requirement for a certificate and clause under the Clean Air Act (see 48 CFR (FAR) 23.105); and

(6) 49 U.S.C. 40118, Requirement for a certificate and clause under Fly American provisions (see 48 CFR (FAR) 47.405).

(c) The applicability of the following laws have been modified in regards to executive agency contracts for the acquisition of commercial items:

(1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see 48 CFR (FAR) 3.503);

(2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see 48 CFR (FAR) 15.804);

(3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR (FAR) Part 99); and

(4) 10 U.S.C. 2397b, Limits on Employment for Certain Former DoD Officials (see 48 CFR (FAR) 203.170).

(d) The FAR prescription, provision or clause for each of these statutes has been revised in the appropriate part to reflect their proper application to the acquisition of commercial items.

4. Section 12.403 is revised to read as follows:

12.403 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) The following laws are not applicable to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items:

(1) 15 U.S.C. 644(d), Requirements relative to labor surplus areas under the Small Business Act (see 49 CFR (FAR) part 19, subpart 19.2);

(2) 41 U.S.C. 43, Walsh-Healey Act (see 48 CFR (FAR) part 22, subpart 22.6);

(3) 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (see 48 CFR (FAR) part 27, subpart 27.4);

(4) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see 48 CFR (FAR) part 3, subpart 3.4);

(5) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see 48 CFR (FAR) part 5, subpart 5.2);

(6) 41 U.S.C. 418a, Rights in Technical Data (see 48 CFR (FAR) part 27, subpart 27.4);

(7) 41 U.S.C. 701 *et seq.*, Drug-Free Workplace Act of 1988 (see 48 CFR (FAR) 23.5);

(8) 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see 48 CFR (FAR) part 47, subpart 47.5);

(9) 49 U.S.C. 40118, Fly American provisions (see 48 CFR (FAR) part 47, subpart 47.4);

(10) Pub. L. 90-469, William Langer Jewel Bearing Plant Special Act (see 48 CFR (FAR) part 8, subpart 8.2);

(11) 10 U.S.C. 2301, note, as amended by Section 2091, Pub. L. 103-355, Payment Protections for Subcontractors and Suppliers (see 48 CFR (FAR) part 28, subpart 28.1 and part 32, subpart 32.1);

(12) 10 U.S.C. 2241, note (Pub. L. 102-396, Section 9005, as amended by Pub. L. 103-139, Section 8005), Limitations on Procurement of Food, Clothing, and Specialty Metals Not Produced in the United States (see 48 CFR (DFARS) part 225, subpart 225.70);

(13) 10 U.S.C. 2320, Rights in Technical Data (see 48 CFR (DFARS) part 227, subpart 227.4);

(14) 10 U.S.C. 2321, Validation of Proprietary Data Restrictions (see 48 CFR (DFARS) part 227, subpart 227.4);

(15) 10 U.S.C. 2327, note (Pub. L. 103-160, Section 843), Reporting Requirement Regarding Dealings with Terrorist Countries (see 48 CFR (DFARS) part 209, subpart 209.1);

(16) 10 U.S.C. 2391, note (Pub. L. 101-510, Section 4201(a)(1)(B)), Notification of Substantial Impact on Employment (see 48 CFR (DFARS) part 249, subpart 249.70);

(17) 10 U.S.C. 2393, Prohibition Against Doing Business with Certain Offerors or Contractors (see 48 CFR (DFARS) part 209, subpart 209.4);

(18) 10 U.S.C. 2501, note (Pub. L. 103-160, Section 1372), Notification of Proposed Program Termination (see 48 CFR (DFARS) part 249, subpart 249.70);

(19) 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods other than United States Goods (see 48 CFR (DFARS) part 225, subparts 225.7004, 225.7007, 225.7010, and 225.7016);

(20) 10 U.S.C. 2631, Cargo Preference Act (see 48 CFR (DFARS) 247.5); and

(21) National Defense Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Purchases as follows: Pub. L. 100-202, Section 8088, Polyacrylonitrile Based Carbon Fiber; Pub. L. 101-511, Section 8041, Anchor and Mooring Chain; Pub. L. 102-172, Section 8111, Carbon, Alloy and Armor Steel Plates; Pub. L. 102-396, Section 9108, Four Ton Dolly Jacks; Pub. L. 102-484, Section 832, Anti friction Bearings; Pub. L. 103-139, Section 8090, Aircraft Fuel Cells; Pub. L. 103-139, Section 8124, Totally Enclosed Lifeboat Survival Systems; Pub. L. 103-335, Section 8023, Supercomputers; Pub. L. 103-335, Section 8050, Multibeam Sonar Mapping Systems; Pub. L. 103-335, Section 8115, Ship Propellers; and Pub. L. 103-335, Section 8120, 120 mm Mortars and Ammunition.

(b) Certain requirements of the following laws have been eliminated for

subcontracts under either a contract for the acquisition of commercial items or subcontract for the acquisition of commercial items:

(1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see 48 CFR (FAR) part 23, subpart 23.1);

(2) 40 U.S.C. 327 *et seq.*, Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see 48 CFR (FAR) part 22, subpart 22.3);

(3) 41 U.S.C. 423e(1)(B), Requirement for certain certifications under the Procurement Integrity Act (see 48 CFR (FAR) part 3, subpart 3.1); and

(4) 42 U.S.C. 7606, Requirements for a certificate and clause under the Clean Air Act (see 48 CFR (FAR) part 23, subpart 23.1).

(c) The applicability of the following laws have been modified in regards to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items:

(1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see 48 CFR (FAR) part 3, subpart 3.5);

(2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see 48 CFR (FAR) part 15, subpart 15.8); and

(3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR (FAR) part 99).

(d) The FAR prescription, provision or clause for each of these statutes has been revised in the appropriate part to reflect their proper application to the acquisition of commercial items.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 52.212-5 is revised to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

As prescribed in 12.302(b)(4), insert the following clause:

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (XXX 1995)

(a) The Contractor agrees to comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or executive orders applicable to acquisitions of commercial items:

(1) 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (15 U.S.C. 637 (d)(2) and (3));

(2) 52.222-3, Convict Labor (E.O. 11755); and

(3) 52.233-3, Protest After Award (31 U.S.C. 3553 and 40 U.S.C. 759).

(b) The Contractor agrees to comply with the following FAR and FIRMR clauses in this

paragraph (b) that are indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

____ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

____ (2) 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity (41 U.S.C. 423).

____ (3) 52.219-14, Limitation on Subcontracting (15 U.S.C. 637(a)(14)).

____ (4) 52.222-26, Equal Opportunity (E.O. 11246).

____ (5) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012).

____ (6) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

____ (7) 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 2012).

____ (8) 52.225-3, Buy American Act—Supplies (41 U.S.C. 10).

____ (9) 52.225-9, Buy American Act—Trade Agreements Act—Balance of Payments Program (41 U.S.C. 10, 19 U.S.C. 2501-2582).

____ (10) 52.225-17, Buy American Act—Supplies Under European Community Sanctions for End Products (E.O. 12849).

____ (11) 52.225-18, European Community Sanctions for End Products (E.O. 12849).

____ (12) 52.225-19, European Community Sanctions for Services (E.O. 12849).

____ (13) 52.225-21, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program (41 U.S.C. 10, Pub. L. 103-187).

____ (14) 52.247-64, Preference for Privately Owned US Flagged Commercial Vessels (46 U.S.C. 1241).

____ (15) 201-39.5202-3, Procurement Authority (FIRMR).

(This acquisition is being conducted under _____ delegation of GSA's exclusive procurement authority for FIP resources. The specific GSA DPA case number is _____.)

(c) The Contractor agrees to comply with the following FAR clauses in this paragraph (c), applicable to commercial services, that are indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

____ (1) 52.222-41, Service Contract Act of 1965, as amended (41 U.S.C. 351, *et seq.*).

____ (2) 52.222-42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

____ (3) 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351 *et seq.*).

____ (4) 52.222-44, Fair Labor Standards Act and Service Contract Act—Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351 *et seq.*).

____ (5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351 *et seq.*).

(d) Notwithstanding the requirements of the clauses in paragraphs (a), (b) or (c) of this clause, the Contractor is not required to include any FAR clause, other than those listed below, in a subcontract for commercial items or commercial components—

(1) 52.222-26, Equal Opportunity (E.O. 11246);

(2) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a)); and

(3) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).
(End of clause)

6. Section 52.244-XX is added to read as follows:

52.244-XX Subcontracts for Commercial Items and Commercial Components.

As prescribed in 44.403, insert the following clause:

Subcontracts for Commercial Items and Commercial Components (XXX 1995)

(a) *Definition. Commercial item*, as used in this clause, has the meaning contained in the clause at 52.202-1, Definitions.

Subcontract, as used in this clause, includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor.

(b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all levels to incorporate, commercial items or nondevelopmental items other than commercial items, as components of items to be supplied under this contract.

(c) If in awarding a subcontract for commercial items an exception under 15.804-1(a) does not apply, the subcontractor may be required to submit cost or pricing data and comply with the appropriate clauses prescribed in FAR Part 15.

(d) Notwithstanding any other clause of this contract, the Contractor is not required

to include any FAR provision or clause, other than those listed below and as may be required by paragraph (c) of this clause, in a subcontract for commercial items or commercial components:

(1) 52.203-12, Limitation on Payments to Influence Certain Federal Transactions (31 U.S.C. 1352);

(2) 52.222-26, Equal Opportunity (E.O. 11246);

(3) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a)); and

(4) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

(e) The Contractor shall include the terms of this clause, including this paragraph (e), in subcontracts awarded under this contract.

(End of clause)

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