

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12 and 52**

[FAR Case 94-791]

**Federal Acquisition Regulation;
Subcontracts for Commercial Items;
Correction**

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

ACTION: Proposed rule correction.

SUMMARY: In related actions Federal Acquisition Regulation (FAR) case 94-790 proposed to implement statutory authorities for the acquisition of commercial items and components by Federal Government agencies as well as contractors and subcontractors and FAR case 94-791 proposed a complete list of laws determined to be inapplicable to Executive agency contracts and subcontracts for commercial items and clauses applicable to subcontracts for the acquisition of commercial items. Neither of these cases addressed the statutory authority for the Comptroller General to examine the records of contractors. This amendment corrects that omission.

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

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 correction. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-791 correction.

SUPPLEMENTARY INFORMATION:**A. Background**

FAR cases 94-790, Acquisition of Commercial Items, and 94-791, Subcontracts for Commercial Items, were published as proposed rules with request for comment at 60 FR 11198; March 1, 1995 and 60 FR 15220; March

22, 1995, respectively. In addition to these changes, the Federal Acquisition Streamlining Act (FASA) of 1994 also consolidated audit provisions and made other related revisions to the Government's authority to examine records of contractors by amending 10 U.S.C. 2313 (section 2201(a)) and by adding 41 U.S.C. 254d (section 2251(a)). These audit related sections were proposed to be implemented by FAR case 94-740 published at 59 FR 66408; December 23, 1994. The proposed language contained in FAR case 94-740 includes the authority for both the Comptroller General and Agency examination of records in a single clause. However, the clause will only be included in contracts for the acquisition of commercial items, when an exception to the requirement for cost or pricing data under FAR 15.804-1(a) does not apply. As a result, contracts for commercial items that qualify for the exception to the requirements for cost or pricing data will not contain language providing the Comptroller General the authority to examine records as required by 10 U.S.C. 2313(c) and 41 U.S.C. 254d(c). To remedy this oversight, we propose to make the following amendments to FAR case 94-791:

- Revise the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, by adding a new paragraph (d) to address the Comptroller General authority granted in the two statutes. The balance of the clause remains unchanged from that published in the **Federal Register** at 60 FR 11198. This revision will provide the Comptroller General the authority to examine records when:

(1) The contract was awarded by other than sealed bid;

(2) The contract is above the simplified acquisition threshold; and

(3) The clause at 52.215-2, Audit and Records—Negotiation, is not included in the contract. When cost or pricing data is required, the contracting officer will incorporate the appropriate Part 15 clauses, to include the clause proposed at 52.215-2, Audit and Records—Negotiation (see FAR Case 94-740). This clause provides for both the Comptroller General and Agency authority to examine records. The Commercial Items Team has chosen to revise the clause at 52.212-5 to add coverage for the Comptroller General specifically tailored to the acquisition of commercial items rather than cite the applicable portions of the clause at 52.215-2. This approach will clearly and more simply establish the Comptroller General's right

to examine records for contracts for commercial items.

- Revise FAR 12.403, Applicability of certain laws to subcontracts for the acquisition of commercial items, to include 10 U.S.C. 2313(c) and 41 U.S.C. 254d(c) in the list of laws not applicable to subcontracts for commercial items. Paragraph (c) of these laws (which relate to the Comptroller General's authority) will not be applicable when the subcontractor is not required to submit cost or pricing data. When cost or pricing data is required, the clause at 52.215-2 will appear in both the prime and subcontract and authority to examine records of subcontractors will apply.

B. Corrections

1. At 60 FR 15221; March 22, 1995, in the third column section 12.403 is correctly 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 48 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. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see (FAR) part 15, subpart 15.1);

(6) 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);

(7) 41 U.S.C. 418a, Rights in Technical Data (see 48 CFR (FAR) part 27, subpart 27.4);

(8) 41 U.S.C. 701 *et seq.*, Drug-Free Workplace Act of 1988 (see 48 CFR (FAR) 23.5);

(9) 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);

(10) 49 U.S.C. 40118, Fly American provisions (see 48 CFR (FAR) part 47, subpart 47.4);

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

(12) 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) parts 28 and 32, subparts 28.1 and 32.1);

(13) 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);

(14) 10 U.S.C. 2320, Rights in Technical Data (see 48 CFR (DFARS) part 227, subpart 227.4);

(15) 10 U.S.C. 2321, Validation of Proprietary Data Restrictions. (see 48 CFR (DFARS) part 227, subpart 227.4);

(16) 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);

(17) 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);

(18) 10 U.S.C. 2393, Prohibition Against Doing Business with Certain Offerors or Contractors (see 48 CFR (DFARS) part 209, subpart 209.4);

(19) 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);

(20) 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);

(21) 10 U.S.C. 2631, Cargo Preference Act (see 48 CFR (DFARS) 247.5); and

(22) 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.

2. At 60 FR 15222; March 22, 1995, in the second column section 52.212-5 is correctly 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 (Date)

(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 FIRM 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 (FIRM). (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) *Comptroller General Examination of Record.* The Contractor agrees to comply

with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records—Negotiation:

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation, or for any longer period required by statute or by other

clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c) or (d)

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)

Dated: March 29, 1995.

Edward C. Loeb,

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

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