

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16, 48, and 52

[FAR Case 98-017]

RIN 9000-AI35

Federal Acquisition Regulation; Review of Award Fee Determinations (Burnside-Ott)

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR). The amendment implements rulings of the United States Court of Appeals and the United States Court of Federal Claims. The rulings are that the Contract Disputes Act applies to all disputes arising under Government contracts unless a more specific statute provides for other remedies arising from a contract dispute.

DATES: Comments should be submitted on or before July 6, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration FAR Secretariat (MVR), Attn: Laurie Duarte 1800 F Street, NW, Room 4035, Washington, DC 20405. E-mail comments submitted over Internet should be addressed to: farcase.98-017@gsa.gov. Please cite FAR case 98-017 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph DeStefano, Procurement Analyst, at (202) 501-1758. Please cite FAR case 98-017.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends the FAR to implement the rulings of the United States Court of Appeals in Burnside-Ott Aviation Training Center v. Dalton, Secretary of the Navy, 107 F.3d 854

(Fed. Cir. 1997) and of the United States Court of Federal Claims in Rig Masters, Inc. v. The United States, 1998 WL 835097 (Fed. Cl.). The rulings are that the Contract Disputes Act applies to all disputes arising under Government contracts unless a more specific statute provides for remedies arising from a contract dispute. FAR 16.405-2(a) is amended by deleting the statement that award-fee determinations are not subject to the disputes clause of the contract and inserting a statement that the determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government. FAR 16.406 is amended to conform with the newly revised 16.405-2(a). FAR part 48 is amended to remove references to the Contract Disputes Act and state that certain unilateral decisions are made solely at the discretion of the Government. The clauses at 52.248-1 and 52.248-3 are amended to conform with the newly revised part 48. The clauses at 52.219-10, 52.219-26 and 52.226-1 are amended to remove exemptions to the Contract Disputes Act.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This proposed rule is not expected to 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. because the rule implements court rulings relating to a statute that has been in effect since 1979. The proposed rule retains the government's unilateral decision authority in these matters. Therefore, we do not believe that the proposed rule will have an impact on small entities. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subparts also will be considered in accordance with 5 U.S.C. 601, et seq. (FAR Case 98-017), in correspondence

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that 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 16, 48, and 52

Government procurement.

Dated: April 30, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR parts 16, 48, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 16, 48, 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 16—TYPES OF CONTRACTS

2. Section 16.405-2 is amended by revising the last sentence of paragraph (a) to read as follows:

16.405-2 Cost-plus-award-fee contracts.

(a) * * * This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government.

* * * * *

3. Section 16.406 is amended by revising paragraph (e)(3) to read as follows:

16.406 Contract clauses.

* * * * *

(e) * * *

(3) Expressly provides that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the Government.

PART 48—VALUE ENGINEERING

4. Section 48.103 is amended by revising the introductory text of paragraph (c) to read as follows:

48.103 Processing value engineering change proposals.

* * * * *

(c) The following Government decisions are unilateral decisions made solely at the discretion of the Government:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTACT CLAUSES

5. Section 52.219-10 is amended by revising the date of the clause and the last sentence of paragraph (b) to read as follows:

52.219-10 Incentive Subcontracting Program.

* * * * *

Incentive Subcontracting Program (Date)

* * * * *

(b) * * * Determinations under this paragraph are unilateral decisions made solely at the discretion of the Government.

* * * * *

6. Section 52.219-26 is amended by revising the date of the clause and the

last sentence of paragraph (b) to read as follows:

52.219-26 Small Disadvantaged Business Participation Program—Incentive Subcontracting.

* * * * *

Small Disadvantaged Business Participation Program—Incentive Subcontracting (Date)

* * * * *

(b) * * * Determinations under this paragraph are unilateral decisions made solely at the discretion of the Government.

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7. Section 52.226-1 is amended by revising the date of the clause and removing the last sentence in paragraph (d).

52.226-1 Utilization of Indian Organizations and Indian-Owned Economic Enterprises.

* * * * *

Utilization of Indian Organizations and Indian-Owned Economic Enterprises (Date)

* * * * *

8. Section 52.248-1 is amended by revising the date of the clause; by revising the last sentences in paragraphs (e)(3) and (j), by revising the date of Alternate II and inserting a sentence at the end of paragraph (a) to read as follows:

52.248-1 Value Engineering.

* * * * *

Value Engineering (Date)

* * * * *

(e) * * *

(3) * * * The decision to accept or reject all or part of any VECP is a unilateral decision made solely at the discretion of the Contracting Officer.

* * * * *

(j) * * * The Contracting Officer shall be the sole determiner of the amount of collateral savings.

* * * * *

Alternate II (Date) * * *

(a) * * * The decision on which rate applies is a unilateral decision made solely at the discretion of the Government.

* * * * *

9. Section 52.248-3 is amended by revising the date of the clause and the last sentences in paragraphs (e)(3) and (g) to read as follows:

52.248-3 Value Engineering—Construction.

* * * * *

Value Engineering—Construction (Date)

* * * * *

(e) * * *

(3) * * * The decision to accept or reject all or part of any VECP is a unilateral decision made solely at the discretion of the Contracting Officer.

* * * * *

(g) * * * The Contracting Officer shall be the sole determiner of the amount of collateral savings.

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[FR Doc. 99-11324 Filed 5-5-99; 8:45 am]

BILLING CODE 6820-EP-P