

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 26 and 52**

[FAR Case 99-301]

RIN 9000-A152

**Federal Acquisition Regulation;
Utilization of Indian Organizations and
Indian-Owned Economic Enterprises**

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 (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to delete DoD-unique language pertaining to incentive payments made to prime contractors for the utilization of Indian organizations and Indian-owned economic enterprises.

DATES: Comments should be submitted on or before December 27, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Address e-mail comments submitted via the Internet to: farcase.99-301@gsa.gov.

Please submit comments only and cite FAR case 99-301 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAR case 99-301.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544) established the Indian Incentive Program. Annual DoD appropriations acts have restricted DoD payments under the Program to those contractors that submitted subcontracting plans pursuant to 15

U.S.C. 637(d) and those contractors participating in the test program for comprehensive small business subcontracting plans established by Section 854 of Pub. L. 101-189. Section 8024 of the DoD Appropriations Act for Fiscal Year 1999 (Pub. L. 105-262) eliminated the link between a DoD contractor's subcontracting plan requirement and the contractor's eligibility for participation in the Indian Incentive Program. This change now allows DoD to make incentive payments to small businesses that subcontract to Indian organizations or Indian-owned economic enterprises when the contract includes the clause at FAR 52.226-1, Utilization of Indian Organizations and Indian-owned Economic Enterprises. This rule proposes to remove obsolete DoD-unique implementing guidance from the FAR. The Defense Acquisition Regulations Council will add guidance to the Defense Federal Acquisition Regulation Supplement under a separate case to implement the change made in Section 8024 of Pub. L. 105-262.

This rule was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule 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 merely deletes DoD-unique requirements from the FAR. The rule will have no effect on small entities doing business with civilian agencies. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 99-301), 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 26 and 52

Government procurement.

Dated: October 20, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 26 and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 26 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 26—OTHER SOCIOECONOMIC PROGRAM**26.101 [Amended]**

2. Amend section 26.101 as follows:

a. In the definition "Indian", remove "which" and insert "that", in its place;

b. In the definition "Indian-owned economic enterprise" remove "shall constitute" and insert "constitutes", in its place; and

c. In the definition "Indian tribe", remove "which" and insert "that", in its place.

3. Revise section 26.104 to read as follows:

26.104 Contract clause.

Contracting Officers in civilian agencies may insert the clause at 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises, in solicitations and contracts if—

(a) In the opinion of the contracting officer, subcontracting possibilities exist for Indian organizations or Indian-owned economic enterprises; and

(b) Funds are available for any increased costs as described in paragraph (b)(2) of the clause at 52.226-1.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.226-1 as follows:

a. Revise the date of the clause;

b. Remove paragraph (a);

c. Redesignate paragraphs (b) through (d) as (a) through (c), respectively;

d. In the newly designated paragraph (a):

(1) Remove "which" from the definition "Indian" and insert "that", in its place;

(2) Remove "shall constitute" from the definition "Indian-owned economic enterprise" and insert "constitutes", in its place; and

(3) Remove "which" from the definition "Indian tribe" and insert "that", in its place.

e. Revise newly designated paragraphs (b) and (c).

The revised text reads as follows:

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

* * * * *

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

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(b) The Contractor shall use its best efforts to give Indian organizations and Indian-owned economic enterprises (25 U.S.C. 1544) the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with efficient performance of its contract.

(1) The Contracting Officer and the Contractor, acting in good faith, may rely on the representation of an Indian organization or Indian-owned economic enterprise as to its eligibility, unless an interested party challenges its status or the Contracting Officer has independent reason to question that status. In the event of a challenge to the representation of a subcontractor, the

Contracting Officer will refer the matter to the U.S. Department of the Interior, Bureau of Indian Affairs (BIA), Attn: Chief, Division of Contracting and Grants Administration, 1849 C Street, NW, MS 2626-MIB, Washington, DC 20240-4000. The BIA will determine the eligibility and notify the Contracting Officer. No incentive payment will be made within 50 working days of subcontract award or while a challenge is pending. If a subcontractor is determined to be an ineligible participant, no incentive payment will be made under the Indian Incentive Program.

(2) The Contractor may request an adjustment under the Indian Incentive Program to the following:

- (i) The estimated cost of a cost-type contract.
- (ii) The target cost of a cost-plus-incentive-fee prime contract.
- (iii) The target cost and ceiling price of a fixed-price incentive prime contract.
- (iv) The price of a firm-fixed-price prime contract.

(3) The amount of the adjustment to the prime contract is 5 percent of the estimated cost, target cost, or firm-fixed-price included in the subcontract initially awarded to the Indian organization or Indian-owned economic enterprise.

(4) The Contractor has the burden of proving the amount claimed and must assert its request for an adjustment prior to completion of contract performance.

(c) The Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the amount paid to the subcontractor. The Contracting Officer will seek funding in accordance with agency procedures. The Contracting Officer's decision is final and not subject to the Disputes clause of this contract.

(End of clause)

[FR Doc. 99-27857 Filed 10-26-99; 8:45 am]

BILLING CODE 6820-EP-P