

determination shall be multiplied by the actual number of hours expended for each craft involved in accomplishing the unit-priced work item. The product of this computation will then be divided by the actual number of units ordered in the preceding contract period. The total of these

computations for each craft will be added to the current contract unit price to obtain the new contract unit price. The extended amount for the contract line item will be obtained by multiplying the new unit price by the estimated quantity. If actual hours are not available from the preceding contract

period for computation of the adjustment for a specific contract unit of work, the Contractor, in agreement with the Contracting Officer, shall estimate the total hours per craft per contract unit of work.

EXAMPLE: ASPHALT PAVING—CURRENT PRICE \$3.38 PER SQUARE YARD

DBA craft	New WD	Hourly rate paid	Diff.	Actual hrs.	Actual units (sq. yard)	Increase/sq. yard
Equip. Opr.	\$18.50	—	\$18.00 =	\$.50 × 600 hrs./	3,000 sq. yrd.	= \$.10
Truck Driver	\$19.00	—	\$18.25 =	\$.75 × 525 hrs./	3,000 sq. yrd.	= \$.13
Laborer	\$11.50	—	\$11.25 =	\$.25 × 750 hrs./	3,000 sq. yrd.	= \$.06
Total increase per square yard						* \$.29
* Note: Adjustment for labor rate increases or decreases may be accompanied by social security and unemployment taxes and workers' compensation insurance.						
Current unit price (per square yard)	\$3.38					
Add DBA price adj.	+ .29					
New unit price (per square yard)	\$3.67					

(End of clause)

[FR Doc. 01-26296 Filed 10-19-01; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 12, 46, and 52

[FAC 2001-01; FAR Case 2000-303; Item II]

RIN 9000-A188

Federal Acquisition Regulation; Acquisition of Commercial Items

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement two statutory changes to the definition and application of "Commercial Items": Section 803(a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 to revise the definition of "commercial item" to provide specific guidance on the meaning and appropriate application of the terms "purposes other than government purposes" at 41 U.S.C. 403(12)(A); and Section 805 of the National Defense Authorization Act for

Fiscal Year 2000 to clarify the definition of "commercial item" with respect to associated services.

The final rule also makes changes related to the acquisition of commercial items, including conforming the coverage regarding contractor liability for property loss or damage to commercial practice.

DATES: *Effective Date:* December 21, 2001.

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 Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 2001-01, FAR case 2000-303.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Regulation Part 12, Acquisition of Commercial Items, was developed to implement Title VIII of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355). The regulations became effective on October 1, 1995.

The final rule revises—

- Paragraph (a) of the "commercial item" definition at FAR 2.101 and the corresponding definition in the clause at FAR 52.202-1, and FAR 12.102 to implement Section 803(a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261). Section 803(a)(2)(D) requires that the FAR be revised to provide specific guidance on the meaning and appropriate application of the term "purposes other than government purposes" in the definition

of "commercial item" at 41 U.S.C. 403(12)(A);

- Paragraph (e) of the "commercial item" definition at FAR 2.101 to implement Section 805 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106-65) (Clarification of Definition of Commercial Items with Respect to Associated Services). Section 805 clarifies that services ancillary to a commercial item, such as installation, maintenance, repair, training, and other support services, are considered a commercial service, regardless of whether the service is provided by the same vendor or at the same time as the item, if the service is provided contemporaneously to the general public under similar terms and conditions. The FAR clause at 52.202-1, Definitions, is similarly revised to make the new definition available to contractors and subcontractors;

- Paragraph (f) of the "commercial item" definition at FAR 2.101 to add definitions of "catalog price" and "market price" which provide guidance for identifying services that may be acquired under FAR Part 12;

- FAR 12.209 to add guidance concerning customary commercial terms and conditions related to the determination of price reasonableness when pricing commercial items;
- Subpart 46.8 to reconcile it with the coverage regarding contractor liability for property loss or damage with paragraph (p) in the clause at 52.212-4; and

- Paragraph (p) in the clause at 52.212-4 to conform to commercial practice (*i.e.*, deleting the phrase "or implied" permits industry to take advantage of the latitude provided by the Uniform Commercial Code which

allows sellers to exclude the application of an implied warranty through the terms of an express warranty).

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 52284, August 28, 2000. Six sources submitted comments in response to the proposed rule. The FAR Council considered all comments in the development of the final rule.

This is not a significant regulatory action and, therefore, was not subject to 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

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 changes made by the rule will primarily affect large businesses that are more likely than small businesses to have separate workforces for Federal contracts and to be ultimately liable for consequential damages. It clarifies the definition of commercial item to more closely parallel the statutory language and provide guidance for identifying services that may be acquired under FAR Part 12. The rule further conforms language regarding contractor liability to commercial practice.

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 2, 12, 46, and 52

Government procurement.

Dated: October 12, 2001.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 12, 46, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 12, 46, 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 2—DEFINITIONS OF WORDS AND TERMS

2. In section 2.101, amend the definition “Commercial item” by revising the introductory text of paragraph (1), and paragraphs (5) and (6) to read as follows:

2.101 Definitions.

* * * * *

Commercial item means—

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

* * * * *

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services—

(i) *Catalog price* means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) *Market prices* means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.102 by redesignating paragraph (d) as

paragraph (e) and by adding a new paragraph (d) to read as follows:

12.102 Applicability.

* * * * *

(d) The definition of commercial item in section 2.101 uses the phrase “purposes other than governmental purposes.” These purposes are those that are not unique to a government.

* * * * *

4. Revise section 12.209 to read as follows:

12.209 Determination of price reasonableness.

While the contracting officer must establish price reasonableness in accordance with 13.106–3, 14.408–2, or subpart 15.4, as applicable, the contracting officer should be aware of customary commercial terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller’s liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government’s need.

PART 46—QUALITY ASSURANCE

5. In section 46.801, revise the last sentence of paragraph (a) to read as follows:

46.801 Applicability.

(a) * * * This subpart does not apply to commercial items.

* * * * *

46.804 [Removed and Reserved]

6. Remove and reserve section 46.804.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. In section 52.202–1, revise the date of the clause and paragraphs (c)(1), (c)(5), and (c)(6) to read as follows:

52.202–1 Definitions.

* * * * *

Definitions (Dec 2001)

* * * * *

(c) * * *

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

* * * * *

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraph (c)(1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services—

(i) *Catalog price* means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) *Market prices* means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

* * * * *

52.212-4 [Amended]

8. Amend section 52.212-4 by revising the date in the clause heading to read "(Dec 2001)"; and by removing "or implied" from paragraph (p).

[FR Doc. 01-26297 Filed 10-19-01; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 32 and 52

[FAC 2001-01; FAR Case 2000-308; Item III]

RIN 9000-AJ17

Federal Acquisition Regulation; Prompt Payment Under Cost-Reimbursement Contracts for Services

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to require agencies to pay an interest penalty whenever they make an interim payment under a cost-reimbursement contract for services more than 30 days after the agency receives a proper invoice from the contractor.

DATES: *Effective Date:* October 22, 2001.

Applicability Date: This amendment is applicable to solicitations issued and contracts awarded on or after October 22, 2001. Any cost reimbursement solicitations issued or contracts awarded for services on or after December 15, 2000, but prior to October 22, 2001 must be amended/modified to incorporate the new Alternate I to 52.232-25. In no event may agencies pay late payment penalty interest for any delay in payment that occurred prior to December 15, 2000.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before December 21, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to: farcase.2000-308@gsa.gov

Please submit comments only and cite FAC 2001-01, FAR case 2000-308, 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. Jeremy Olson at (202) 501-3221. Please cite FAC 2001-01, FAR case 2000-308.

SUPPLEMENTARY INFORMATION:

A. Background

This FAR amendment implements changes in the Office of Management and Budget's (OMB) Prompt Payment Act regulations at 5 CFR part 1315 that implemented Section 1010 of the National Defense Authorization Act for Fiscal Year 2001. Those changes were published by OMB as an interim final rule and became effective on December 15, 2000 (65 FR 78403). Section 1010 requires agencies to pay an interest penalty, in accordance with regulations

issued, whenever an interim payment under a cost-reimbursement contract for services is paid more than 30 days after the agency receives a proper invoice from a contractor. The Act does not permit payment of late payment interest penalty for any period prior to December 15, 2000.

This FAR amendment eliminates the prior policy and contract clause prohibitions on payment of late payment penalty interest for late interim finance payments under cost reimbursement contracts for services. It adds new policy and a contract clause, Alternate I to 52.232-25, to provide for those penalty payments. The policy and clause apply to all covered contracts awarded on or after December 15, 2000. OMB's regulation states that agencies, at their discretion, may apply the revisions made by Section 1010 to interim payment requests received under cost-reimbursement contracts for services awarded prior to December 15, 2000. Accordingly, agencies may apply the FAR changes made by this rule to contracts awarded prior to December 15, 2000, at their discretion provided no late payment interest penalty is paid for any period prior to December 15, 2000.

This is not a significant regulatory action and, therefore, was not subject to 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

The interim 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 number of small entities receiving awards of cost-reimbursement contracts for services is very low compared to the number of fixed-price-type contracts awarded. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 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.* (FAC 2001-01, FAR case 2000-308), 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.*