

price adjustment in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402-2 and 16.402-3) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 32, 47, and 52

[FAC 2001-13; FAR Case 1999-024; Item II]

RIN 9000-A197

Federal Acquisition Regulation; Preference for U.S.-Flag Vessels— Subcontracts for 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) regarding the applicability of statutory requirements for use of U.S.-flag vessels in the transportation of supplies by sea. The FAR presently waives these requirements for subcontracts for the acquisition of commercial items. This rule would require the use of U.S.-flag vessels under certain subcontracts for commercial items.

DATES: *Effective Date:* April 17, 2003.

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. Linda Klein, Procurement Analyst, at (202) 501-3775. Please cite FAC 2001-13, FAR case 1999-024.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 12, 32, 47, and associated clauses to limit the types of subcontracts for which the waiver of cargo preference statutes is

applicable. The rule is intended to ensure compliance with cargo preference statutes if ocean cargoes are clearly destined for Government use, while avoiding disruption of commercial delivery systems. This final rule also amends FAR Part 12 by adding 10 U.S.C. 2631 to the list of laws inapplicable to subcontracts for the acquisition of commercial items, except for certain subcontracts, since civilian agencies may buy supplies for use of military departments.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 66920, November 7, 2000. Four respondents submitted public comments during the comment period. These comments were considered in the formulation of the final rule. A summary of the comments and their respective disposition is as follows:

1. One respondent voiced opposition to the rule indicating that (1) neither the statute nor the legislative history grants authority to create an administrative deviation from the explicit requirement to use U.S.-flag vessels in the transportation of supplies bought for the Department of Defense (DoD) either by DoD or a civilian agency; (2) the rule should be considered a major rule under 5 U.S.C. 804; and (3) this rule will have a significant impact on a substantial number of small entities. The Councils did not concur. 41 U.S.C. 430(b), as added by the Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103-355, Section 8003), requires that the FAR list those laws inapplicable to subcontracts for commercial items, and requires that covered laws as defined in 41 U.S.C. 430(c) be included on that list unless the FAR Council makes a written determination that it would not be in the best interest of the Federal Government to exempt commercial subcontracts from the applicability of the provision (see comment 2). In accordance with this statute, FAR 12.504(a)(10) currently lists 46 U.S.C. 1241(b), with the inapplicability effective May 1, 1996. This rule adds 10 U.S.C. 2631 to the FAR list, because civilian agencies may buy supplies for use of military departments. 10 U.S.C. 2631 is currently listed as inapplicable to commercial items at DFARS 212.504(a)(xxii), with the same exceptions now being incorporated in the FAR. This rule clarifies existing policy and limits the number of allowable waivers. The rule strengthens the Government support for the Cargo Preference statutes. The Office of Information and Regulatory Affairs reviewed the proposed rule before publication and did not declare it to be a major rule under 5 U.S.C. 804.

2. One respondent expressed opposition to the rule considering it to be inconsistent with FASA with respect to commercial item procurements. The respondent states that 10 U.S.C. Sec. 2631 is not specifically enumerated to remain unaffected by Title VIII of FASA, it does not provide for criminal or civil penalties, or contain any provisions that would override the provisions in Title VIII of FASA and, therefore, a written determination of the FAR Council is required to not exempt all commercial item subcontracts from the provisions of 10 U.S.C. Sec 2631. The FAR Council has made a determination in writing as required by the OFPP Act, 41 U.S.C. 430(b).

3. One respondent expressed concern regarding deletion of contracts awarded using the simplified acquisition procedures in Part 13 from the current list of exceptions to the preference for U.S.-flag vessels. This change was accomplished under FAR case 98-604, and is outside the scope of this case.

4. One respondent expressed concern that the rule does not waive Cargo Preference for commercial subcontracts if the prime contractor is redistributing or reselling without adding value. The Council did not concur. FASA specifically prohibits waiver of laws for subcontracts where the prime does not add value; the subcontractor then is held to all laws applicable to a prime contractor. The rule merely clarifies this portion of the law.

5. One respondent expressed concern regarding the difference between the requirements outlined in the statutes covering DoD and non-DoD cargo. The concern is that extension of the rule to civilian agency acquisitions places an insurmountable burden on Government contractors and subcontractors. The Councils did not concur as FAR 47.503(b)(2) already states that 10 U.S.C. 2631 is applicable if supplies being shipped are for use of military departments. This rule does not expand that applicability of 10 U.S.C. 2631 to other non-DoD cargo, but actually limits application of Cargo Preference, by providing waiver of 10 U.S.C. 2631, if it would otherwise be applicable.

6. One respondent contends that if the proposed rule is not withdrawn, it should be modified to require prime contractors to advise their subcontractors when the statutes apply. The Councils did not concur because the FAR currently requires the prime contractor to notify the subcontractors of any flow-down statutes.

7. Two respondents were concerned that the rule could be read to omit one major exception to cargo preference waivers for subcontracts for commercial

items—"non-commercial component parts" and requests clarification. The Councils did not concur because the rule only relates to commercial component parts.

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 most ocean transportation companies are large business concerns. FAR Subpart 47.5 and the clause at FAR 52.247-64 do not generally apply to acquisitions by the Department of Defense.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule will increase the flow down of FAR clause 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, to certain commercial subcontracts. This information collection requirement is currently approved by the Office of Management and Budget under OMB Control Number 9000-0061, Transportation Requirements, which also covers other transportation related information collection requirements. We estimate an increase of 9000 responses per year as a result of this final rule, and a corresponding increase of 900 burden hours per year. We received no comments on the information collection requirements published in the proposed rule.

List of Subjects in 48 CFR Parts 12, 32, 47, and 52

Government procurement.

Dated: March 12, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 32, 47, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 32, 47, 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 section 12.504, amend paragraph (a) by redesignating paragraphs (a)(1) through (a)(11) as (a)(2) through (a)(12), respectively; by adding a new paragraph (a)(1); and by revising the newly designated paragraph (a)(11) to read as follows:

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

(a) * * *

(1) 10 U.S.C. 2631, Transportation of Supplies by Sea (except for the types of subcontracts listed at 47.504(d)).

* * * * *

(11) 46 U.S.C. Appx 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see Subpart 47.5) (except for the types of subcontracts listed at 47.504(d)).

* * * * *

PART 32—CONTRACT FINANCING

32.1103 [Amended]

3. Amend section 32.1103 in the introductory text of paragraph (e) by removing "10 U.S.C. 101(a)(13)" and adding "2.101" in its place.

PART 47—TRANSPORTATION

4. Amend section 47.504 by revising paragraph (d) to read as follows:

47.504 Exceptions.

* * * * *

(d) Subcontracts for the acquisition of commercial items or commercial components (see 12.504(a)(1) and (a)(11)). This exception does not apply to—

(1) Grants-in-aid shipments, such as agricultural and food-aid shipments;

(2) Shipments covered under 46 U.S.C. Appx 1241-1, such as those generated by Export-Import Bank loans or guarantees;

(3) Subcontracts under—

(i) Government contracts or agreements for ocean transportation services; or

(ii) Construction contracts; or

(4) Shipments of commercial items that are—

(i) Items the contractor is reselling or distributing to the Government without adding value (see FAR 12.501(b)). Generally, the contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment; or

(ii) Shipped in direct support of U.S. military—

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

5. Revise section 47.507 to read as follows:

47.507 Contract clauses.

(a)(1) Insert the clause at 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a)(3), 47.503(a), and 47.504.)

(2) If an applicable statute requires, or if it has been determined under agency procedures, that the supplies to be furnished under the contracts must be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.502(a)(1) and 47.503(b)), use the clause with its Alternate I.

(3) Except for contracts or agreements for ocean transportation services or construction contracts, use the clause with its Alternate II if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military—

(i) Contingency operations;

(ii) Exercises; or

(iii) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(b) The contracting officer may insert in solicitations and contracts, under agency procedures, additional appropriate clauses concerning the vessels to be used.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.212-5 by revising the date of the clause and paragraph (e)(4) to read as follows:

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

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Apr. 2003)

* * * * *

(e) * * *

(4) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. Appx 1241 and 10 U.S.C. 2631) (flow down required in accordance with paragraph (d) of FAR clause 52.247-64); and

* * * * *

7. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(1)(xi) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Apr. 2003)

* * * * *

(b)(1) * * *

(xi) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241). (Applies to supplies transported by ocean vessels (except for the types of subcontracts listed at 47.504(d).)

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8. Amend section 52.244-6 by revising the section and clause heading, the date of the clause, and paragraph (c)(1)(v) to read as follows:

§ 52.244-6 Subcontracts for Commercial Items and Commercial Components.

* * * * *

Subcontracts for Commercial Items and Commercial Components (Apr. 2003)

* * * * *

(c)(1) * * *

(v) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631) (flow down required in accordance with paragraph (d) of FAR clause 52.247-64).

* * * * *

9. Amend section 52.247-64 by—
 a. Revising the date of the clause;
 b. Removing “The” from the beginning of the introductory text of paragraph (a) and adding “Except as provided in paragraph (e) of this clause, the” in its place;
 c. Removing the period at the end of paragraph (d) and adding “, except those described in paragraph (e)(4).” in its place;
 d. Removing “and” at the end of paragraph (e)(2);
 e. Removing the period at the end of paragraph (e)(3) and adding “; and” in its place;
 f. Adding paragraph (e)(4);
 g. Revising the date, introductory text, and paragraph (a) of Alternate I; and
 h. Revising Alternate II to read as follows:

52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels.

* * * * *

Preference for Privately Owned U.S.-Flag Commercial Vessels (Apr 2003)

* * * * *

(e) * * *

(4) Subcontracts or purchase orders for the acquisition of commercial items unless—
 (i) This contract is—
 (A) A contract or agreement for ocean transportation services; or
 (B) A construction contract; or

(ii) The supplies being transported are—
 (A) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or
 (B) Shipped in direct support of U.S. military—
 (1) Contingency operations;
 (2) Exercises; or
 (3) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

* * * * *

Alternate I (Apr 2003). As prescribed in 47.507(a)(2), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) Except as provided in paragraphs (b) and (e) of this clause, the Contractor shall use privately owned U.S.-flag commercial vessels, and no others, in the ocean transportation of any supplies to be furnished under this contract.

* * * * *

Alternate II (Apr 2003). As prescribed in 47.507(a)(3), substitute the following paragraph (e) for paragraph (e) of the basic clause:

(e) The requirement in paragraph (a) does not apply to—

- (1) Cargoes carried in vessels of the Panama Canal Commission or as required or authorized by law or treaty;
 - (2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353); and
 - (3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.
- (4) Subcontracts or purchase orders under this contract for the acquisition of commercial items unless the supplies being transported are—

(i) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(ii) Shipments in direct support of U.S. military—

- (A) Contingency operations;
- (B) Exercises; or
- (C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations. (*Note:* This contract requires shipment of commercial items in direct support of U.S. military contingency operations, exercises, or forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 29 and 52

[FAC 2001-13; FAR Case 2000-016; Item III]

RIN 9000-AJ39

Federal Acquisition Regulation; Federal, State, and Local Taxes

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 clarify the prescriptions for use of clauses relating to Federal, State, and local taxes. In addition, the rule deletes the clause at FAR 52.229-5, Taxes—Contracts Performed in U.S. Possessions or Puerto Rico, and updates and moves the definition of “local taxes.”

DATES: Effective Date: April 17, 2003.

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 De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 2001-13, FAR case 2000-016.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to clarify the prescriptions at FAR 29.401 for use of FAR clauses 52.229-3, Federal, State, and Local Taxes; 52.229-4, Federal, State, and Local Taxes (State and Local Adjustments). In addition, the rule deletes the clause at 52.229-5, Taxes—Contracts Performed in U.S. Possessions or Puerto Rico, and moves the definition of “local taxes” from the clause at 52.229-3 and 52.229-4, and updates the definition by adding U.S. territories and the Commonwealth of the Northern Mariana Islands, which are no longer considered possessions of the United States.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 38552, June 4, 2002. Two sources