

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 16 and 39**

[FAR Case 2003-008]

RIN 9000-AJ74

**Federal Acquisition Regulation; Share-
in-Savings Contracting**

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 implement Section 210 of the E-Government Act of 2002. Section 210 authorizes Governmentwide use of Share-in-Savings (SIS) contracts for information technology (IT). SIS contracts offer an innovative approach for encouraging industry to share creative technology solutions with the Government. Through a properly structured SIS contract, agencies may lower costs and improve service delivery without large "up front" investments by having the contractor provide the technology investment and allowing the contractor to share with the government in the savings achieved.

DATES: Interested parties should submit comments in writing on or before August 31, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2003-008 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR Case number to submit comments.

- E-mail: farcase.2003-008@gsa.gov. Include FAR case 2003-008 in the subject line of the message.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (MVA), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: All submissions received must include the agency name and case number for this rulemaking. All

comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

Please submit comments only and cite FAR case 2003-008 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. For clarification of content, contact Craig Goral, Program Analyst, at 202-501-3856, or by e-mail at craig.goral@gsa.gov. Please cite FAR case 2003-008.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 210 of the E-Government Act amends the Armed Services Procurement Act and the Federal Property and Administrative Services Act to address the use of SIS contracts for IT. Share-in-Savings is an innovative, performance-based concept that is intended to help an agency leverage its limited resources to improve or accelerate mission-related or administrative processes to meet strategic goals and objectives and lower costs for the taxpayer. Under an SIS contract, the contractor finances the work and then shares with the agency in the savings generated from contract performance. In general, agencies would agree to pay the contractor for services performed only if savings are realized and, in such cases, only a portion of the total savings realized.

Section 210, which sunsets at the end of 2005, authorizes an agency that awards an SIS contract for IT to retain its share of the savings, with certain exceptions. As a general rule, agencies would be required to ensure that funds are available and sufficient to make payments with respect to the first fiscal year of the contract and cover termination or cancellation costs. However, section 210 authorizes award of up to ten contracts (i.e., 5 among DOD, NASA, and the Coast Guard, and 5 among other agencies) during fiscal years 2004, and 2005 when funds are not made specifically available for the full costs of cancellation or termination of the contract—provided that the amount of unfunded contingent liability associated with cancellation and termination does not exceed the lesser of (1) 25 percent of the estimated costs of a cancellation or termination; or (2) \$5 million. In signing the E-Government Act into law, the President stated that the executive branch shall "limit authorized waivers for funding of

potential termination costs to appropriate circumstances, so as to minimize the financial risk to the government" and ensure SIS contracts are operated according to sound fiscal policy. Finally, SIS contracts entered into under section 210 are generally to be limited to a performance period not greater than 5 years, but may, under certain circumstances, and with appropriate approvals, be awarded for a period of up to 10 years.

On October 1, 2003, the Councils issued an advance notice of proposed rulemaking to solicit input for amendments to the FAR that would motivate contractors and successfully capture the benefits of SIS contracting. The ANPR included draft amendments reflecting the Councils' preliminary thinking. The Councils have used the draft amendments in the ANPR as a baseline for this rulemaking. Based on responses to the ANPR, however, the draft amendments have been revised to—

- Emphasize the need for an open and collaborative environment, both among interested stakeholders within government (e.g., program, budget, finance, and legal offices) and between Government and industry to facilitate due diligence and mitigate risk;
- Provide additional guidance to help agencies develop business cases to justify the use of SIS, including definitions of "benefit pool," "current baseline," and "projected baseline," and elements for successful analysis;
- Specify options for seeking competition;
- Describe considerations that may establish best value in the context of SIS contracting; and
- Assist contracting officers in determining what clauses need to be included in SIS contracts.

One commenter urged that the final FAR implementation make clear that some of the basic elements of SIS contracting are not dependent on the express authority provided by section 210 and therefore do not expire when section 210 sunsets. The Councils continue to evaluate whether certain guidance, presently proposed for FAR Subpart 39.3, should be addressed in other FAR parts.

The Councils welcome further public comment for consideration in finalizing this proposed rule and potentially for distributing to agencies for their use in preparing related guidance. The public is still encouraged to comment on the same nine areas identified in the ANPR (see the **Federal Register** at 68 FR 56614, October 1, 2003), with special emphasis on the following expanded area:

Cancellation and termination: How, if at all, should the determination of cancellation liability differ from the determination of termination liability, when the termination is for other than default? How, if at all, should the determination of cancellation and termination costs differ from that used in connection with multi-year contracts (see FAR 17.106–1(c))?

This is a significant regulatory action and, therefore, is 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 Councils do not expect this proposed rule 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 use of Share-in-Savings contracting will be targeted only to a limited number of information technology projects, and the impact on small businesses is not anticipated to be significant. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. 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.* (FAR case 2003–008), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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 and 39

Government procurement.

Dated: June 25, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 16 and 39 as set forth below:

1. The authority citation for 48 CFR parts 16 and 39 is revised to read as follows:

PART 16—TYPES OF CONTRACTS

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

16.401 General

2. Amend section 16.401 by adding paragraph (e) to read as follows:

* * * * *

(e) For related incentive concepts, refer to Subpart 39.3, Share-in-Savings Contracting, and 23.204, Energy-savings performance contracts.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

3. Add subpart 39.3, consisting of sections 39.300 through 39.309, to read as follows:

Subpart 39.3—Share-in-Savings Contracting

Sec.

- 39.300 Scope of subpart.
- 39.301 Definitions.
- 39.302 Authority.
- 39.303 Applicability.
- 39.306 General.
- 39.307 Limitations on Share-in-Savings contract period of performance.
- 39.308 Procedures.
- 39.308–1 Formation of an Integrated Project Team (IPT).
- 39.308–2 Development of the Business Case.
- 39.308–3 Use of performance-based contracts.
- 39.308–4 Solicitation of Proposals.
- 39.309 Cancellation or termination.
- 39.309–1 Paying for cancellation or termination.
- 39.309–2 Funding of cancellation or termination.
- 39.310 FAR clauses.
- 39.311 Acquisition-unique clauses.

Subpart 39.3—Share-in-Savings Contracting

39.300 Scope of subpart.

This subpart implements Section 210 of the E-Government Act of 2002 (Public Law 107–347) by prescribing policies and procedures for Share-in-Savings contracts for information technology.

39.301 Definitions.

As used in this subpart—
Benefit Pool—Savings realized based on the net difference between the current baseline costs and the projected (new) baseline costs derived from the implementation of the new project or program.

Cancellation means the cancellation (within a contractually specified time) of the total requirements of all remaining program years. Cancellation results when the contracting officer—

- (1) Notifies the contractor of nonavailability of funds for contract performance for any subsequent program year; or
- (2) Fails to notify the contractor that funds are available for performance of

the succeeding program year requirement.

Current baseline means the estimated total cost to the Government to implement an information technology project through other than a Share-in-Savings contract. It includes all costs of ownership, including procurement, management, operation, maintenance, and administration.

Projected baseline means the estimated total cost to the Government to implement an information technology project through a Share-in-Savings contract.

Savings means—

- (1) Monetary savings to an agency; or
- (2) Savings in time or other quantifiable benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government).

Share-in-Savings contract means a contract under which—

(1) A contractor provides solutions for improving the agency's mission-related or administrative processes or for accelerating the achievement of agency missions; and

(2) The Government pays the contractor an amount equal to a portion of the quantifiable savings derived by the agency from—

(i) Any improvements in mission-related or administrative processes that result from implementation of the solution; or

(ii) Acceleration of achievement of agency missions.

39.302 Authority.

The E-Government Act of 2002 (Public Law 107–347) authorizes the head of an agency to enter into a Share-in-Savings contract for information technology. The authority under this Act expires on September 30, 2005.

39.303 Applicability.

This subpart applies only to information technology projects that are appropriate for Share-in-Savings contracting techniques.

39.304 General.

(a) In general, use of Share-in-Savings contracts should be considered—

(1) For projects involving significant innovation or process transformation;

(2) When there is senior level management support within the agency; and

(3) When there is acknowledgment that the contractor(s) will bear an unusual risk and an open and collaborative environment during the entire acquisition cycle is required to help mitigate that risk.

(b) Use of the share-in savings contract technique does not exempt agencies from the requirements for acquisition planning (see Subpart 7.1), and an information technology acquisition strategy (see 39.101(b)).

(c) Share-in-Savings contracts that are considered to be major IT acquisitions in accordance with OMB Circular A-11, section 53.2, are subject to the requirements of OMB Circular A-11, Part 7, "Planning, Budgeting, Acquisitions and Management of Capital Assets."

39.305 Limitations on Share-in-Savings contract period of performance.

(a) Except as provided in paragraph (b) of this section, a Share-in-Savings contract shall be awarded for a period of not more than five years.

(b) A Share-in-Savings contract may be awarded for a period greater than five years, but not more than 10 years, if other applicable requirements do not otherwise limit the length of the contract and the head of the agency determines in writing prior to award of the contract that—

(1) The level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the Government from obtaining the needed information technology competitively at a fair and reasonable price if the contract is limited in duration to a period of five years or less; and

(2) Use of the information technology to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the Government.

39.306 Procedures.

39.306-1 Formation of an Integrated Project Team (IPT).

Agencies are strongly encouraged to form an IPT comprised of program, acquisition, budget, finance, information technology, and legal representatives.

39.306-2 Development of the Business Case.

(a) Agencies intending to use this subpart shall develop a business case. Agencies are strongly encouraged to complete the "Share-in Savings Business Case Decision Tool" at: <http://www.gsa.gov/shareinsavings>. The information provided from this tool will provide a preliminary assessment to help determine if the proposed project is suitable for the share in savings concept.

(b) The business case should minimally include a preliminary baseline analysis using the applicable elements established in paragraph (c) of this subsection. The baseline must be

quantifiable since it will be the basis upon which a benefit pool is established to govern the share ratio and the amount of payment a contractor is to receive under a contract.

(c) The basic elements of the current and projected baselines are listed in paragraphs (c)(1) and (c)(2) of this subsection and cover estimated costs for the expected period of the Share-in-Savings contract.

(1) The estimated value of all contracts the Government would have awarded for procurement, management, maintenance, administration, and operation of the program; and

(2) The costs associated with the Government personnel assigned to the project.

(d) There must be a net difference between the *current* and *projected* baselines to result in a benefit pool large enough to ensure reasonable savings to the Government and to cover contractor costs and incentives commensurate with risk.

39.306-3 Use of performance-based contracts.

Share-in-Savings contracts shall be performance-based contracts. (See Subpart 37.6.)

39.306-4 Solicitation of Proposals.

(a) Solicitations for Share-in-Savings contracts shall adhere to the competition requirements of Part 6. Contracting officers may use any appropriate competitive procedures authorized by the FAR, including 8.404, "Using schedules," and 15.202, "Advisory multi-step process". Each solicitation shall include provisions and evaluation criteria ensuring that—

(1) The contractor's share of savings reflects the risks involved and market conditions; and

(2) The Government will realize best value from the contract including reasonable savings.

(b) When developing proposal evaluation criteria, agencies may consider the contractor Proposal Evaluation Model located at <http://www.gsa.gov/shareinsavings>.

39.306-5 Award.

Award shall be made on a best value basis upon consideration of technical factors, price related factors such as highest life cycle return on investment to the Government, as well as other factors such as highest overall net present value return to both the Government and the contractor.

39.306-6 Managing retained savings.

(a) Agencies may retain savings in excess of the total amount of savings paid to the contractor under the

contract, but may not retain any portion of such savings that is attributable to a decrease in the number of civilian employees of the Federal Government performing the function.

(b) Except as provided in paragraph (c) of this section, savings shall be credited to the appropriation or fund against which charges were made to carry out the contract and shall be used for information technology.

(c) Amounts retained by the agency under this subpart shall—

(1) Without further appropriation, remain available until expended; and

(2) Be applied first to fund any cancellation or termination liabilities associated with Share-in-Savings procurements that are not fully funded.

39.307 Cancellation or termination.

39.307-1 Paying for cancellation or termination.

(a) The amount payable in the event of cancellation or termination of a Share-in-Savings contract shall be negotiated with the contractor at the time of contract award.

(b) If funds are not made available for the continuation of a Share-in-Savings contract in a subsequent fiscal year, the contract shall be cancelled or terminated. The costs of cancellation or termination may be paid out of—

(1) Appropriations available for the performance of the contract;

(2) Appropriations available for acquisition of the information technology procured under the contract, and not otherwise obligated; or

(3) Funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in 39.307-2.

39.307-2 Funding of cancellation or termination liability.

(a) Except as provided in paragraph (b) of this subsection, the funds obligated for Share-in-Savings contracts must be sufficient to cover any potential cancellation and/or termination costs.

(b)(1) The head of an agency may enter into Share-in-Savings contracts even if funds are not made specifically available for the full costs of cancellation or termination of the contract provided that—

(i) The action is approved as provided in paragraph (b)(1)(iii) of this subsection;

(ii) Funds are available and sufficient to make payments with respect to the first fiscal year of the contract; and

(iii) The following conditions are met regarding the funding of cancellation and termination liability:

(A) The amount of unfunded liability does not exceed the lesser of 25 percent

of the estimated costs of a cancellation or termination, or \$5,000,000.

(B) An unfunded cancellation or termination liability in excess of \$1,000,000 has been approved by the Director of the Office of Management and Budget (OMB).

(C) Notification has been provided to OMB in accordance with paragraph (c) of this subsection.

(2) The aggregate number of Share-in-Savings contracts that may be entered into under this paragraph may not exceed 5 in each of fiscal years 2004 and 2005 for each of the following groups of agencies:

(i) The Department of Defense, NASA, and the Coast Guard.

(ii) All other agencies.

(c) In addition to the requirements specified in paragraph (b) of this subsection, an agency planning to award a Share-in-Savings contract having an unfunded cancellation or termination liability in any amount must notify the Office of Management and Budget at least 30 days prior to solicitation issuance.

39.308 FAR clauses.

For the purposes of determining the clauses to be included in the contract, the contracting officer shall—

(a) Assume the contract type is “firm fixed price”; and

(b) Use the maximum cancellation amount as the contract value.

39.309 Acquisition-unique clauses.

(a)(1) Share-in-Savings contracts shall include a clause containing a quantifiable baseline that is to be the basis upon which a saving share ratio is established to govern the amount of payment a contractor is to receive under a contract.

(2) Before award of a Share-in-Savings contract, the agency senior procurement executive shall determine in writing that the terms of the baseline clause are quantifiable and will likely yield value to the Government.

(b) Contracting officers shall include a cancellation clause tailored to the specifics of the Share-in-Savings contract that describes, at a minimum, the cancellation amounts, the basis for those amounts, and the periods during which the Government may cancel the contract. The clause shall contain the amount that the Contractor and Government have agreed will be the maximum amount of Government liability under the contract in the event of cancellation.

(c) Contracting officers may use a termination for convenience clause

other than one prescribed in 49.502 if the prescribed clauses do not adequately address the specifics of the Share-in-Savings contract. The clause shall contain the amount that the contractor and Government have agreed will be the maximum amount of Government liability under the contract in the event of termination for convenience.

(d) Contracting officers should consider the use of a technology refreshment clause to ensure the information technology provided under the contract incorporates desired technological advancements throughout the entire period of contract performance. In developing such a clause, contracting officers should consider similar terms and conditions available on the commercial market.

(e) Contracting officers may include other appropriate clauses not specifically prescribed in this Federal Acquisition Regulation (48 CFR Chapter 1) to ensure that the goals of the Share-in-Savings contract are attained, provided that such clauses are consistent with applicable statutes and regulations.

[FR Doc. 04–15028 Filed 7–1–04; 8:45 am]

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