

compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the rule implements section 868 of the Duncan Hunter National Defense Authorization Act (Pub. L. 110-417), which was signed on October 14, 2008, and requires amending the FAR not later than 180 days after the date of enactment of the Act. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 15

Government procurement.

Dated: October 5, 2009.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 15 continues to read as follows:

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

■ 2. Amend section 15.403-1 by redesignating paragraphs (c)(3)(ii) and (c)(3)(iii) as (c)(3)(iii) and (c)(3)(iv), respectively, and adding a new paragraph (c)(3)(ii) to read as follows:

15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

(c) * * *

(3) * * *

(ii) In accordance with section 868 of Pub. L. 110-417:

(A) When purchasing services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, they may be considered commercial items (thus meeting the purpose of 41 U.S.C 254b and 10 U.S.C. 2306a for truth in negotiations) only if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services.

(B) In order to make this determination, the contracting officer may request the offeror to submit prices paid for the same or similar commercial items under comparable terms and

conditions by both Government and commercial customers; and

(C) If the contracting officer determines that the information described in paragraph (c)(3)(ii)(B) of this section is not sufficient to determine the reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs and overhead rates may be requested.

* * * * *

■ 3. Amend section 15.403-3 by adding paragraph (c)(3) to read as follows:

15.403-3 Requiring information other than cost or pricing data.

* * * * *

(c) * * *

(3) For services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, see 15.403-1(c)(3)(ii).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 15, 31, and 52

[FAC 2005-37; FAR Case 2008-031; Item V; Docket 2009-0034, Sequence 1]

RIN 9000-AL27

Federal Acquisition Regulation; FAR Case 2008-031, Limitations on Pass-Through Charges

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) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 which applies to Executive Agencies other than DoD. The DoD is subject to section 852 of the John Warner NDAA for FY 2007 which is also being implemented in this interim rule. Section 866 requires the Councils

to amend the FAR and section 852 requires the Secretary of Defense to prescribe regulations to minimize excessive pass-through charges by contractors from subcontractors, or of tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (i.e., pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value. Since both statutory provisions address excessive pass-through charges and the multiple tiering of subcontracting, the Councils decided to combine both provisions in this FAR rule.

DATES: *Effective Date:* October 14, 2009.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before December 14, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-37, FAR case 2008-031, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-031" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2008-031. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2008-031" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-37, FAR case 2008-031, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-37, FAR case 2008-031.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule is published to implement section 866 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) as well as section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364). Section 866 requires the Councils to amend the FAR to minimize excessive pass-through charges by contractors from subcontractors, or of tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (*i.e.*, pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value.

To enable agencies to ensure that pass-through charges are not excessive, this interim rule includes a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work. Seventy percent was selected as the threshold for this information requirement, because it represents a substantial amount of subcontracting.

The rule is intended to protect the interests of the Government when there appears to be an agreement with a contractor to perform the contract scope of work, including managing subcontractors, then after award, the contractor subcontracts substantially all the effort without providing the required value-added subcontract management functions that were expected. There is no intent in this rule to disrupt the subcontracting process or other arrangements for firms that furnish supplies and services.

To ensure that the Government can make a determination as to whether or not pass-through charges are excessive, the rule incorporates a reporting threshold that affords the contracting officer the ability to understand what functions the contractor will perform (*e.g.*, consistent with the contractor's disclosed practice) and thus will provide added value, whether it be before award, or if the contractor subsequently decides to subcontract substantially all of the effort. The rule provides a recovery mechanism for those situations in which a contractor subcontracts all, or substantially all, of the performance of the contract, and

does not perform the subcontract management functions, or other value-added functions, that were charged to the Government through indirect costs and related profit/fee.

The intent of the reporting threshold is for the contracting officer to make a determination that pass-through charges at the time of award are not excessive, when at least 70 percent of the work will be subcontracted, based on contractor demonstrated functions. It also incorporates a requirement for the contractor to notify the contracting officer, in writing, if the contractor decides after award to subcontract more than 70 percent of the total cost of the work to be performed, and to verify in that document that the contractor will add value consistent with the definition in the contract clause. If the contractor does not perform the demonstrated functions or does not add value, the rule makes the excessive pass-through charges unallowable and provides for recoupment of the excessive pass-through charges consistent with the legislation. A further intent of the reporting threshold is to avoid requiring the contracting officer to re-address this determination during contract performance. To that end, this interim rule includes an Alternate I to the clause at FAR 52.215–23 to address those instances in which the contracting officer has made a determination prior to contract award.

The rule is to be applied consistent with existing Cost Accounting Standard (CAS) and FAR rules related to subcontract management, indirect cost allocation, and profit analysis. While the definitions in the provisions are similar, the applicability differs.

For civilian agencies the rule applies to any cost-reimbursement type contract, task or delivery order in an amount greater than the simplified acquisition threshold (as defined by section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)).

For DoD, this rule applies to an amount greater than the threshold to obtain cost or pricing data in FAR 15.403–3 and cost-reimbursement type contracts as well as fixed-price contracts in accordance with section 852 of the FY 2007 NDAA.

This is a significant regulatory action and, therefore, was 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

This 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 Councils do not expect a significant number of entities to propose excessive pass-through charges under contracts or subcontracts, and the information required from offerors and contractors regarding pass-through charges is minimal. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR parts 15, 31, and 52 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 2005–37, FAR case 2008–031), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the interim rule contains information collection requirements. Accordingly, the Regulatory Secretariat has forwarded an emergency request for approval of a new information collection requirement concerning “Limitations on Pass-Through Charges” to the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35, *et seq.* The OMB has preapproved this information collection under OMB Control Number 9000–0173.

Annual Reporting Burden:

To enable contracting officers to verify that pass-through charges are not excessive, this FAR revision will include a requirement for an offeror submitting a proposal for a contract, task order, or delivery order to provide the following information with its proposals:

(1) The cost of work the offeror intends to perform and the cost of work expected to be performed by each subcontractor.

(2) If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed—

(i) The amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the value added by the offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract—

(i) The amount of the subcontractor's indirect costs and profit/fee applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the added value provided by the subcontractor as related

to the work to be performed by the lower-tier subcontractor(s).

In addition, if the amount of the effort to be subcontracted by the contractor or a subcontractor changes from the amount identified in the proposal such that it exceeds 70 percent of the total cost of work to be performed, the contractor must provide the revised cost of effort and verification that the contractor (or subcontractor) will provide added value.

The annual reporting burden is estimated as follows:

- Respondents: 25,380.
- Responses per respondent: 1.
- Total annual responses: 25,760.
- Preparation hours per response: .5.
- Total response burden hours: 13,260.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than December 14, 2009 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-0173 in all correspondence.

E. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because section 866 of the FY 2009 NDAA, which was

enacted October 14, 2008, requires that the FAR be revised to implement this provision no later than one year after the date of enactment. If this change is not implemented agencies will not be able to comply with section 866 of the FY 2009 NDAA. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 15, 31, and 52

Government procurement.

Dated: October 5, 2009.

Al Matera,
Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 15, 31, and 52 as set forth below:

1. The authority citation for 48 CFR parts 15, 31, and 52 continues to read as follows:

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

PART 15—CONTRACTING BY NEGOTIATION

2. Amend section 15.408 by adding paragraph (n) to read as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

(n) *Limitations on Pass-Through Charges.* (1) The contracting officer shall insert the provision at 52.215-22, Limitations on Pass-Through Charges—Identification of Subcontract Effort, in solicitations containing the clause at 52.215-23.

(2)(i) Except as provided in paragraph (n)(2)(ii) of this section, the contracting officer shall insert the clause 52.215-23, Limitations on Pass-Through Charges, in solicitations and contracts including task or delivery orders as follows:

(A) For civilian agencies, insert the clause when—

(1) The total estimated contract or order value exceeds the simplified acquisition threshold as defined in section 2.101 and

(2) The contemplated contract type is expected to be a cost-reimbursement type contract as defined in Subpart 16.3; or

(B) For DoD, insert the clause when—

(1) The total estimated contract or order value exceeds the threshold for obtaining cost or pricing data in 15.403-4; and

(2) The contemplated contract type is expected to be any contract type except—

(i) A firm-fixed-price contract awarded on the basis of adequate price competition;

(ii) A fixed-price contract with economic price adjustment awarded on the basis of adequate price competition;

(iii) A firm-fixed-price contract for the acquisition of a commercial item; or

(iv) A fixed-price contract with economic price adjustment, for the acquisition of a commercial item.

(ii) The clause may be used when the total estimated contract or order value is below the thresholds identified in 15.408(n)(2)(i) and for any contract type, when the contracting officer determines that inclusion of the clause is appropriate.

(iii) Use the clause 52.215-23 with its Alternate I when the contracting officer determines that the prospective contractor has demonstrated that its functions provide added value to the contracting effort and there are no excessive pass-through charges.

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PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Amend section 31.203 by adding paragraph (i) to read as follows:

31.203 Indirect costs.

* * * * *

(i) Indirect costs that meet the definition of “excessive pass-through charge” in 52.215-23, are unallowable.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add sections 52.215-22 and 52.215-23 to read as follows:

52.215-22 Limitations on Pass-Through Charges—Identification of Subcontract Effort.

As prescribed in 15.408(n)(1), use the following provision:

LIMITATIONS ON PASS-THROUGH CHARGES—IDENTIFICATION OF SUBCONTRACT EFFORT (OCT 2009)

(a) *Definitions.* Added value, excessive pass-through charge, subcontract, and subcontractor, as used in this provision, are defined in the clause of this solicitation entitled “Limitations on Pass-Through Charges” (FAR 52.215-23).

(b) *General.* The offeror’s proposal shall exclude excessive pass-through charges.

(c) *Performance of work by the Contractor or a subcontractor.* (1) The offeror shall identify in its proposal the total cost of the work to be performed by the offeror, and the total cost of the work to be performed by each subcontractor, under the contract, task order, or delivery order.

(2) If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal—

(i) The amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal—

(i) The amount of the subcontractor's indirect costs and profit/fee applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the added value provided by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(End of provision)

52.215–23 Limitations on Pass-Through Charges.

As prescribed in 15.408(n)(2), use the following clause:

LIMITATIONS ON PASS-THROUGH CHARGES (OCT 2009)

(a) *Definitions.* As used in this clause—

Added value means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).

Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).

No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

Subcontract means any contract, as defined in FAR 2.101, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor, as defined in FAR 44.101, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer shall determine if excessive pass-through charges exist.

(c) *Reporting.* Required reporting of performance of work by the Contractor or a subcontractor. The Contractor shall notify the Contracting Officer in writing if—

(1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or

(2) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges.* If the Contracting Officer determines that excessive pass-through charges exist;

(1) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in FAR subpart 31.2; and

(2) For applicable DoD fixed-price contracts, as identified in 15.408(n)(2)(i)(B), the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price.

(e) *Access to records.* (1) The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Flowdown.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all cost-reimbursement subcontracts under this contract that exceed the simplified acquisition threshold, except if the contract is with DoD, then insert in all

cost-reimbursement subcontracts and fixed-price subcontracts, except those identified in 15.408(n)(2)(i)(B)(2), that exceed the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4.

(End of clause)

Alternate I (OCT 2009). As prescribed in 15.408(n)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–37; FAR Case 2008–008; Item VI; Docket 2009–0036, Sequence 1]

RIN 9000–AL42

Federal Acquisition Regulation; FAR Case 2008–008, Award Fee Language Revision

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) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007, section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled *Appropriate Use of Incentive Contracts*.

DATES: *Effective Date:* October 14, 2009.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before December 14, 2009 to be considered in the formulation of a final rule.