

and Budget under 44 U.S.C. chapter 35, *et seq.*

#### List of Subjects in 48 CFR Part 13

Government procurement.

Dated: March 15, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 13 as set forth below:

#### PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 1. The authority citation for 48 CFR part 13 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).

##### 13.500 [Amended]

■ 2. Amend section 13.500 by removing from paragraph (d) “January 1, 2010” and adding “January 1, 2012” in its place.

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#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 15

[FAC 2005–39; FAR Case 2008–012; Item II; Docket 2008–0001, Sequence 23]

RIN 9000–AL12

#### Federal Acquisition Regulation; FAR Case 2008–012, Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications 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 adopted as final, with minor changes, an interim rule which amended the Federal Acquisition Regulation (FAR) to implement section 814 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008. Section 814 required the harmonization of the thresholds for cost or pricing data. Specifically, section 814 required alignment of the threshold for cost or pricing data on non-commercial modifications of

commercial items with the Truth In Negotiation Act (TINA) threshold for cost or pricing data.

**DATES:** *Effective Date:* March 19, 2010.

**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 FAR Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2008–012.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 11826 on March 19, 2009, to implement section 814 of the NDAA for FY 2008. Section 814 implemented two areas of clarification with regards to the submission of cost or pricing data on non-commercial modifications of commercial items.

The comment period closed on May 18, 2009, with one comment received. The respondent opined that the addition of the new FAR text “at the time of contract award” was unclear. The respondent indicated that a contract’s initial price subsequently changes based upon modifications and inquired if the total price “at time of contract award” included subsequent modifications that changed the initial contract price. The respondent also highlighted the example of an indefinite delivery-indefinite quantity (IDIQ) contract where orders are issued and inquired whether “at the time of contract award” related to issuance of the IDIQ contract or individual orders placed under this IDIQ contract. The respondent also offered examples of possible revised language.

The Councils believe that, with minor changes, the language in the interim rule is appropriate. Section 814 of the NDAA for FY 2008 required the insertion of the language “at time of contract award” after the language “total price of contract”, which is already contained in FAR 15.403–1. This language is being added to clarify at what point during the life of the contract that the cost or pricing threshold should be applied under FAR 15.403–1. The Councils believe that the language “at the time of contract award” clearly indicates that subsequent modifications, other than those which meet the triggering thresholds of TINA themselves, that change a contract’s price are not factored into determining when the cost or pricing threshold should be applied under FAR 15.403–1. In the case of IDIQ contracts, it is commonly understood that it is the

estimated total value of orders for the specified period at the time of contract award, as well as the individual value of any subsequent discrete orders, to which the TINA thresholds apply. Consequently, the final rule language reflects only minor editorial changes.

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

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this 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.*, since it is harmonizing FAR 15.403–1 with other parts of the FAR and should actually reduce the administrative burden on contractors by not requiring them to track two separate dollar thresholds for submitting cost or pricing data. It is also increasing this dollar threshold relative to the submittal of cost or pricing data in this situation and thus contractors will experience a reduced administrative burden since they no longer will be required to submit cost or pricing data on this lower threshold amount.

##### 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. chapter 35, *et seq.*

#### List of Subjects in 48 CFR Part 15

Government procurement.

Dated: March 15, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 11826 on March 19, 2009, is adopted as a final rule with the following changes:

#### 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 revising paragraphs (c)(3)(iii)(B) and (c)(3)(iii)(C) 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) \* \* \*

(iii) \* \* \*

(B) For acquisitions funded by DoD, NASA, or the Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining cost or pricing data in 15.403-4 or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or the Coast Guard, such modifications of a commercial item are not exempt from the requirement for submission of cost or pricing data on the basis of the exemption provided for at FAR 15.403-1(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining cost or pricing data in 15.403-4 or 5 percent of the total price of the contract at the time of contract award.

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**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 15 and 53**

[FAC 2005-39; FAR Case 2008-040; Item III; Docket 2010-0081, Sequence 1]

RIN 9000-AL48

**Federal Acquisition Regulation; FAR  
Case 2008-040, Use of Standard Form  
26 - Award/Contract**

**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 revise FAR parts 15 and 53 instructions for use of the Standard Form (SF) 26 to strengthen the prohibition against using block 18 of the

form when awarding a negotiated procurement and emphasize that block 18 should only be checked when awarding a sealed bid contract. In addition, the final sentence of the current FAR 53.214 is being amended because the updated SF 26 was issued in April 2008, making the sentence unnecessary.

**DATES:** *Effective Date:* April 19, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208-4949. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-39, FAR Case 2008-040.

**SUPPLEMENTARY INFORMATION:****A. Background**

This case was initiated to clarify an inconsistency in the use of the SF 26 by contracting officers. The SF 26 requires the contracting officer to complete block 17 for negotiated or sealed bid procurements or block 18 for sealed bid procurements, as applicable. Although block 18 of the form is intended for use only with sealed bid procurements, it is regularly (and improperly) being used with negotiated procurements. This has resulted in negotiated procurements being awarded unilaterally without proper documentation.

FAR 53.214(a) prescribes the SF 26 for use in contracting for supplies and services by sealed bidding (except for construction and architect-engineer services). The SF 26 is used to award sealed bid contracts after obtaining bids using a SF 33, Solicitation, Offer, and Award. FAR 14.408-1(d)(1) specifies that, if an offer made using a SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document using the SF 26.

This case is intended to address those instances where contracting officers have mistakenly checked block 18 to award negotiated, not sealed bid, contracts. This error can create the potential for disputes in those situations where the Government's intent was not to accept the terms of the offer in its entirety, as the current wording of block 18 may imply.

The Councils believe that revisions to instructions for use of the form, at FAR subparts 15.5 and 53.2, along with improved training and emphasis on the proper use of the SF 26, will eliminate the issue. Thus, FAR 15.509 is being revised to add "Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used." FAR 53.214(a) is revised by deleting the no-longer-necessary phrase "Pending

issuance of a new edition of the form, the reference in 'block 1' should be amended to read '15 CFR 700'" and adding "Block 18 may only be used for sealed-bid procurements." In addition, a sentence is added at FAR 53.215-1(a) to read "Block 18 may not be used for negotiated procurements." This change does not prohibit the use of the SF 26 for awarding negotiated procurements, it only prohibits the use of block 18 of the SF 26 when awarding negotiated procurements. The Councils have opened a separate FAR case to address the actual changes to the SF 26 form. FAR Case 2009-029 is a proposed rule on which the public will have the opportunity to comment.

**Decision to Issue a Final Rule**

This case does not change the current uses of the SF 26. It merely clarifies the existing instructions for use of the form. Therefore, because there is no change in policy or procedure, the Councils determined to issue a final rule without public comment.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6 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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98-577, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-39, FAR Case 2008-040) in all 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. chapter 35, *et seq.*

**List of Subjects in 48 CFR Parts 15 and 53**

Government procurement.