

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 1, 2, 7, 16, 32, 42, and 50**

[FAC 2005–56; FAR Case 2008–030; Item II; Docket 2011–0082, Sequence 1]

RIN 9000–AL78

Federal Acquisition Regulation; Proper Use and Management of Cost-Reimbursement Contracts

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 that addresses the use and management of cost-reimbursement contracts.

DATES: *Effective Date:* April 2, 2012

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at 202–219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–56, FAR Case 2008–030.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 14543 on March 16, 2011, to implement section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) enacted on October 14, 2008. This law aligns with the President's goal of reducing high-risk contracting as denoted in the March 4, 2009, Presidential Memorandum on Government Contracting. Section 864 of the law requires amending the FAR to address the use and management of cost-reimbursement contracts in the following three areas:

1. Circumstances when cost-reimbursement contracts are appropriate.
2. Acquisition plan findings to support the selection of a cost-reimbursement contract.
3. Acquisition resources necessary to award and manage a cost-reimbursement contract.

Six respondents submitted comments in response to the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

Comment: One respondent expressed a preference for continued reliance on OMB Circular A–133 Audits of States, Local Governments and Non-Profit Organizations to determine and monitor the adequacy of an educational institution or nonprofit organization's accounting system during the performance of cost-type contracts.

Response: The rule does not prevent reliance on OMB Circular A–133 to determine and monitor the adequacy of an educational institution or nonprofit organization's accounting system during the performance of cost-type contracts.

Comment: A number of respondents asked for clarification of whether the appointment of a contracting officer's representative (COR) is now mandatory for other than firm-fixed-price contracts.

Response: A COR is required on all contracts and orders other than those that are firm-fixed-price, and for firm-fixed-price contracts, as appropriate. The Government applies this requirement to all contract types except firm-fixed-price contracts.

Comment: One respondent referenced FAR 16.103(d)(1) stating "Each contract file shall include documentation to show why the particular contract type was selected. This shall be documented in the acquisition plan, or if a written acquisition plan is not required, in the contract file." The respondent recommended clarifying the circumstances when a formal acquisition plan would not be required.

Response: There are circumstances, such as low dollar thresholds or non-complex contracts, which are set forth in agency procedures, when a formal acquisition plan is not required. However, if a written acquisition plan is not required, the contract type selection must still be documented in the contract file.

Comment: One respondent expressed support for the interim rule and stated an opinion that cost-plus-incentive-fee is the best contract type for the Government and U.S. taxpayer, particularly when in a sole-source environment.

Response: Contracting officers are required to determine the appropriate

contract type that is in the best interests of the Government.

Comment: One respondent recommended that the final rule be written so as to exempt research and development (R&D) contracts from the requirements. The respondent questioned the necessity of the documentation requirements set forth in this rule for R&D contracts. Further, the respondent questioned the necessity of assigning CORs to R&D contracts, since contracting officers generally retain such duties.

Response: Section 864 does not provide for an exception for R&D contracts under this rule. Each contract file shall include documentation to show why the particular contract type was selected, in order to ensure the appropriate contract type is utilized. Specifically for high risk contracts such as R&D contracts it is necessary to discuss the Government's additional risks and the burden to manage the contract type selected. Contracting officers are not precluded under this rule from retaining COR duties.

Comment: One respondent recommended that the Councils reset the effective date of the interim rule to permit training and designation of CORs and revision of internal guidance and templates.

Response: The statute does not provide for a grace period to permit training and designation of CORs and revision of internal guidance and templates.

Comment: One respondent commented that the interim rule interferes with the contracting officer's discretion in selecting the appropriate contract type, and imposes a documentation burden that may not be effective in actually reducing the risk to the Government.

Response: The rule does not interfere with the contracting officer's discretion to select the appropriate contract type. It merely clarifies when cost-reimbursement contracts are appropriate and requires the contracting officer to document the rationale for the decision.

Comment: One respondent questioned the applicability of the rule to other than firm-fixed price contracts, and specifically for supply type contracts. The respondent questioned whether the term "other than firm-fixed price contracts" means only cost-reimbursement, time-and-material, and labor-hour contracts.

Response: The term "other than firm-fixed price contracts" means all contract types other than firm-fixed price contracts, including supply type contracts.

Comment: One respondent recommended the contracting officer be required to make a written determination in order to retain and execute the COR duties. Further the respondent recommended delaying the designation of the COR until the contractor or potential contractor is identified and the terms and conditions of the contract are known.

Response: Contracting officers are not required to make formal written determinations in order to retain their existing duties and responsibilities. However, when the appointment of CORs is necessary, in order to ensure adequate resources are available to monitor and manage other than firm-fixed price contracts, CORs must be nominated as early as practicable. It would not be in the Government's best interest to delay such appointments.

III. Changes in the Final Rule

The following changes were made in the final rule:

(1) FAR 1.602–2(d) was revised to clarify that COR duties may be retained by contracting officers; the language has been revised and moved to the first sentence.

(2) FAR 1.602–2(d)(1), (3), and (6) were modified to make administrative revisions.

(3) At FAR 1.602–2(d)(2), the word “current” has been added and the words “dated November 26, 2007” have been removed. Additionally, the phrase “or for DoD, DoD Regulations as applicable” has been replaced by the phrase “or for DoD, in accordance with the current applicable DoD policy guidance.”

(4) With regard to nomination of a COR, FAR 7.104(e) was modified to delete “and designated and authorized by the contracting officer” because it is redundant to language in the following sentence.

(5) FAR 16.103(d)(1) was revised to make an administrative change. The phrase “in the contract file” was moved from the end of the sentence to the middle of the sentence for clarity. The words “by agency procedures” were also added for clarity.

(6) Because the need to document the contract file with regard to selection of contract type is already adequately addressed in FAR 16.103(d)(1), FAR 16.301–2(b) was revised to remove the next to last sentence, “If a written acquisition plan is not required, the contracting officer shall document the rationale in the contract file.”

(7) FAR 16.301–3(a)(4) has been modified to add at the beginning “Prior to award of the contract or order,” with regard to the requirement for availability of adequate Government resources to

award and manage a contract other than firm-fixed price. FAR 16.301–3(a)(4) is further modified to delete the previous (a)(4)(i) (designation of COR is addressed elsewhere) and make the old (a)(4)(ii) the second sentence of (a)(4). The previous (a)(4)(ii) language has been revised to read, “This includes appropriate Government surveillance during performance in accordance with 1.602–2, to provide reasonable assurance that efficient methods and effective cost controls are used.”

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. 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 section 864 affects only internal Government operations and requires the Government to establish internal guidance on the proper use and management of all contracts especially other than firm-fixed-price contracts (*e.g.*, cost-reimbursement, time-and-material, and labor-hour) and does not impose any additional requirements on small businesses. Therefore, a Final Regulatory Flexibility Analysis has not been performed.

VI. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 1, 2, 7, 16, 32, 42, and 50

Government procurement.

Dated: February 21, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 1, 2, 7, 16, 32, 42, and 50 which was published in the **Federal Register** at 76 FR 14543 on March 16, 2011, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 1, 7, and 16 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. Amend section 1.602–2 by—

■ a. Revising the introductory text of paragraph (d), and paragraphs (d)(1), (d)(2), and (d)(3); and

■ b. Removing from paragraph (d)(6) “Must” and adding “Shall” in its place.

The revised text reads as follows:

1.602–2 Responsibilities.

* * * * *

(d) Unless the contracting officer retains and executes the contracting officer's representative (COR) duties, in accordance with agency procedures, designate and authorize, in writing, a COR on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate. See 7.104(e). A COR—

(1) Shall be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC-COR) guidance, or for DoD, in accordance with the current applicable DoD policy guidance;

(3) Shall be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with agency procedures;

* * * * *

PART 7—ACQUISITION PLANNING

7.104 [Amended]

■ 3. Amend section 7.104 by removing from paragraph (e) “, and designated

and authorized by the contracting officer.”.

PART 16—TYPES OF CONTRACTS

■ 4. Amend section 16.103 by revising the second sentence of paragraph (d)(1) introductory text to read as follows:

16.103 Negotiating contract type.

* * * * *

(d) * * *

(1) * * * This shall be documented in the acquisition plan, or in the contract file if a written acquisition plan is not required by agency procedures.

* * * * *

16.301–2 [Amended]

■ 5. Amend section 16.301–2 by removing the second sentence from paragraph (b).

■ 6. Amend section 16.301–3 by—

■ a. Removing from paragraph (a)(3) “contract;” and adding “contract or order;” in its place; and

■ b. Revising paragraph (a)(4).

The revised text reads as follows:

16.301–3 Limitations.

(a) * * *

(4) Prior to award of the contract or order, adequate Government resources are available to award and manage a contract other than firm-fixed-priced (see 7.104(e)). This includes appropriate Government surveillance during performance in accordance with 1.602–2, to provide reasonable assurance that efficient methods and effective cost controls are used.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 8, 16, 18, and 38

[FAC 2005–56; FAR Case 2007–012; Item III; Docket 2011–0081, Sequence 1]

RIN 9000–AL93

Federal Acquisition Regulation: Requirements for Acquisitions Pursuant to Multiple-Award Contracts

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to enhance competition in the purchase of supplies and services by all executive agencies under multiple-award contracts.

DATES: *Effective Date:* April 2, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at 202–219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–56, FAR Case 2007–012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 14548 on March 16, 2011, to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), enacted on October 14, 2008.

Section 863 mandated the development and publication of regulations in the FAR to enhance competition for the award of orders placed under multiple-award contracts. Section 863 specified enhancements that include—

- Strengthening competition rules for placing orders under the Federal Supply Schedules (FSS) program and other multiple-award contracts to ensure both the provision of fair notice to contract holders and the opportunity for contract holders to respond (similar to the procedures implemented for section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107)); and

- Providing notice in FedBizOpps of certain orders placed under multiple-award contracts, including FSS.

For each individual purchase of supplies or services in excess of the simplified acquisition threshold (SAT) that is made under a multiple-award contract, section 863 requires the provision of fair notice of intent to make a purchase (including a description of the work to be performed and the basis on which the selection will be made) to all contractors offering such supplies or services under the multiple-award contract. In addition, the statute requires that all contractors responding to the notice be afforded a fair opportunity to make an offer and have that offer fairly considered by the purchasing official. A notice may be provided to fewer than all contractors offering such supplies or services under

a multiple-award contract if the notice is provided to as many contractors as practicable. When notice is provided to fewer than all the contractors, a purchase cannot be made unless—

- Offers were received from at least three qualified contractors; or
- A contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.

These requirements may be waived on the basis of a justification, including a written determination identifying the statutory basis for an exception to fair opportunity, that is prepared and approved at the levels specified in the FAR.

In considering the regulatory changes to strengthen the use of competition in task and delivery-order contracts, DoD, GSA, and NASA made changes consistent with the general competition principles addressed in the President’s March 4, 2009, Memorandum on Government Contracting (available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government), while still preserving the efficiencies of these contract vehicles. For this reason, the rule addressed several issues that were not expressly addressed in section 863, such as competition for the establishment and placement of orders under FSS blanket purchase agreements (BPAs).

The FAR changes are applicable to task and delivery orders placed against multiple-award contracts including FSS and BPAs awarded under FSS pursuant to FAR subpart 8.4, and indefinite-delivery/indefinite-quantity contracts awarded pursuant to subpart 16.5. They do not apply to BPAs awarded pursuant to part 13.

Seven respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. Respondents submitted comments covering the following nine categories: (1) Conformance with the Small Business Jobs Act; (2) The \$103 million threshold reference; (3) Posting requirements; (4) Eliminate distinctions between single-award and multiple-award BPAs; (5) Competition requirements for establishing BPAs and allowing flexibility in establishing BPA ordering procedures; (6) BPA requirements and health-care programs; (7) Competition above the SAT is a