

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2009–0001, Sequence 8]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005–37; Introduction**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of rules.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–37. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

**DATES:** For effective dates and comment dates, see separate documents, which follow.

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–37 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**LIST OF RULES IN FAC 2005–37**

Item	Subject	FAR case	Analyst
I .....	Registry of Disaster Response Contractors (Interim) .....	2008–035	Loeb.
II .....	Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency” Circumstances.	2007–008	Woodson.
III .....	GAO Access to Contractor Employees .....	2008–026	Loeb.
IV .....	Use of Commercial Services Item Authority (Interim) .....	2008–034	Chambers.
V .....	Limitations on Pass-Through Charges (Interim) .....	2008–031	Chambers.
VI .....	Award Fee Language Revision (Interim) .....	2008–008	Chambers.
VII .....	National Response Framework .....	2009–003	Loeb.
VIII .....	Technical Amendments .....		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–37 amends the FAR as specified below:

**Item I—Registry of Disaster Response Contractors (FAR Case 2008–035) (Interim)**

This interim rule amends the FAR at parts 2, 4, 7, 10, 13, 18, 26, and 52 to implement the Registry of Disaster Response Contractors provision, section 697 of the Department of Homeland Security (DHS) Appropriations Act, 2007 (6 U.S.C. 796).

The Act requires that the Federal Emergency Management Agency (FEMA) establish and maintain this registry. It also requires that the registry include business information consistent with the data that is currently required in the Central Contractor Registration (CCR) with two additional categories added to reflect the area served by the business, and the bonding level of the business concern. The CCR has been updated to include these changes. In addition, the FEMA website has been updated with a link to the CCR search feature which provides access to the disaster response registry. Contracting officers will be required to consult this

registry during market research and acquisition planning.

**Item II—Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency” Circumstances (FAR Case 2007–008)**

This final rule amends the FAR to require that contracts awarded under the authority of FAR 6.302–2, Unusual and compelling urgency, may not exceed the time necessary to meet the unusual and compelling requirements, may not exceed the time for the agency to enter into another contract for the required goods and services through the use of competitive procedures, and may not exceed one year unless the head of the agency entering into the contract determines that exceptional circumstances apply. The determination may be made after contract award when making the determination prior to award would unnecessarily delay the award. The rule applies to any contract in an amount greater than the simplified acquisition threshold. The rule implements the requirements of section 862 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110–417). The rule is intended to strengthen Federal acquisition competition policies.

**Item III—GAO Access to Contractor Employees (FAR Case 2008–026)**

This final rule converts the interim rule published in the **Federal Register** at 74 FR 14649, March 31, 2009, to a final rule without change. The interim rule amended FAR 52.215–2, Audits and Records—Negotiation, and FAR 52.214–26, Audit and Records—Sealed Bidding, to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule does not apply to the acquisition of commercial items; therefore, FAR 12.503 was amended to add the exemption of this rule. This change implemented section 871 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110–417).

**Item IV—Use of Commercial Services Item Authority (FAR Case 2008–034) (Interim)**

This interim rule amends the FAR to implement section 868 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110–417). Section 868 provides that the FAR shall be amended with respect to the procurement of commercial 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. Such services may be considered commercial items

only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for these services.

The rule details the information the contracting officer may consider in order to make this determination. The rule further details, when this determination cannot be made, the information which may be requested to determine price reasonableness.

#### **Item V—Limitations on Pass-Through Charges (FAR Case 2008–031) (Interim)**

This interim rule implements section 866 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110–417) and section 852 of the John Warner NDAA 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.

#### **Item VI—Award Fee Language Revision (FAR Case 2008–008) (Interim)**

This interim rule amends the FAR to implement section 814 of the John Warner NDAA of Fiscal Year 2007 (Pub. L. 109–364) and section 867 of the Duncan Hunter NDAA of Fiscal Year 2009 (Pub. L. 110–417). This rule requires agencies to—

(1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;

(2) Clarify that a base fee amount greater than zero may be included in a cost plus award fee type contract at the discretion of the contracting officer;

(3) Prescribe narrative ratings that will be utilized in award fee evaluations;

(4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;

(5) Conduct a risk and cost benefit analysis and consider the results of the analysis when determining whether to use an award-fee type contract or not;

(6) Include specific content in the award-fee plans; and

(7) Prohibit the rolling over of unearned award fees to subsequent rating periods.

This FAR change will integrate where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

#### **Item VII—National Response Framework (FAR Case 2009–003)**

This final rule amends the FAR part 18 to remove all references to the National Response Plan (NRP) and Incidents of National Significance. In January 2008, FEMA, a component within the DHS, reissued the NRP as the National Response Framework (NRF). With the reissuance, the term “Incidents of National Significance” was eliminated. The changes became effective on March 22, 2008. Both the NRP and the term “Incidents of National Significance” are now obsolete.

This rule is informational and represents minor updates for consistency with FEMA references.

FEMA provides a link at their website for Frequently Asked Questions that explain the rationale for and the changes to the NRF.

This rule does not have a significant impact on Government or any automated systems.

#### **Item VIII—Technical Amendments**

Editorial changes are made at FAR 5.102, 52.213–4, and 52.244–6.

Dated: October 5, 2009.

**Al Matera,**

*Director, Acquisition Policy Division.*

#### **Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-37 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-37 is effective October 14, 2009, except for Item VII, which is effective November 13, 2009.

Dated: October 5, 2009.

**Shay D. Assad,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: October 2, 2009.

**David A. Drabkin,**

*Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.*

Dated: October 6, 2009.

**Leigh Pomponio,**

*Procurement Analyst, National Aeronautics and Space Administration.*

[FR Doc. E9–24551 Filed 10–13–09; 8:45 am]

BILLING CODE 6820–EP–S

## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

#### **48 CFR Parts 2, 4, 7, 10, 13, 18, 26, and 52**

[FAC 2005–37; FAR Case 2008–035; Item I; Docket 2009–0033, Sequence 1]

RIN 9000–AL30

#### **Federal Acquisition Regulation; FAR Case 2008–035, Registry of Disaster Response Contractors**

**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 697, Registry of Disaster Response Contractors (Pub. L. 109–295), the Department of Homeland Security (DHS) Appropriations Act, 2007 (6 U.S.C. 796). The Act requires that the Administrator of the Federal Emergency Management Agency (FEMA), a component of DHS, establish and maintain a registry of contractors, which are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. In addition, the Act requires contracting officers to consult the Registry during market research and acquisition planning.

**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 2008–035, by any of the following methods:

• Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–035” into the field “Keyword”. Select the link that corresponds with FAR Case 2008–035. Follow the instructions provided to submit your comment. Please include your name, company name (if any), and “FAR Case 2008–035” 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 2008–035, 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:** For clarification of content, contact Mr. Edward Loeb, Director, Contract Policy Division at (202) 501–0650. For more information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR Case 2008–035.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Disaster Response Registry includes business information consistent with the data that is currently required in the Central Contractor Registration (CCR) with two additional categories added to reflect the area served by the business, and the bonding level of the business concern. The CCR has been updated to include these changes. In addition, the FEMA website has been updated with a link to the Registry search feature at the CCR website. Contracting officers will be required to consult this Registry during market research and acquisition planning. The Registry covers domestic projects. Foreign contractors may register.

The proposed FAR revisions include the following:

(1) Addition of language in FAR 2.101 to provide a definition of the term “Disaster Response Registry”.

(2) Redesignating FAR section 4.1104 (Solicitation provision and contract

clauses) as section 4.1105, and adding a new FAR section 4.1104 that requires contracting officers to consult the Registry at [www.ccr.gov](http://www.ccr.gov).

(3) Adding a paragraph (v) to FAR section 7.103 that requires agency heads or designees to prescribe procedures which ensure that contracting officers consult the Registry as a part of acquisition planning for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas (defined in FAR part 2).

(4) Including a reference to 6 U.S.C. 796 in FAR 10.000; making a technical correction of an editorial nature to FAR 10.001(a)(2)(v); and adding language to require agencies, in the conduct of their market research, to identify prospective contractors registered in the Registry when researching sources for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief supplies and services.

(5) Adding the requirement in FAR 18.102 for contracting officers to consult the Registry for the availability of contractors for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas.

(6) Redesignating FAR 26.205 as 26.206 and adding a new FAR 26.205, which states that contracting officers shall consult the Registry. This section informs contracting officers how to locate vendors on the Registry.

(7) Making conforming amendments in FAR 13.201 and to the prefatory text in FAR 52.204–7 and in FAR 52.226–3 through 52.226–5.

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 is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Councils do not expect this interim 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 the rule does not impose any additional requirements on small businesses; registration in the Registry is voluntary. Two additional categories for the Registry content were added to the CCR to allow businesses to identify the area served by the business and the bonding level of the business concern.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities

concerning the affected FAR parts 2, 4, 7, 10, 13, 18, 26, 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 2008–035), in all correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

**D. 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 the Department of Homeland Security Appropriations Act, 2007 (6 U.S.C. 796), became effective upon enactment. The enactment date is October 4, 2006. 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 2, 4, 7, 10, 13, 18, 26, and 52**

Government procurement.

Dated: October 5, 2009.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 7, 10, 13, 18, 26, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, 10, 13, 18, 26, 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 2—DEFINITIONS OF WORDS AND TERMS**

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition “Disaster Response Registry” to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

*Disaster Response Registry* means a voluntary registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction,

and other disaster or emergency relief activities established in accordance with 6 U.S.C. 796, Registry of Disaster Response Contractors. The Registry contains information on contractors who are willing to perform disaster or emergency relief activities within the United States and its outlying areas. The Registry is located at [www.ccr.gov](http://www.ccr.gov) and alternately through the FEMA website at <http://www.fema.gov/business/index.shtm>. (See 26.205).

\* \* \* \* \*

**PART 4—ADMINISTRATIVE MATTERS**

**4.1104 [Redesignated as 4.1105]**

■ 3. Redesignate section “4.1104” as section “4.1105”, and add a new section “4.1104” to read as follows:

**4.1104 Disaster Response Registry.**

Contracting officers shall consult the Disaster Response Registry at [www.ccr.gov](http://www.ccr.gov) when contracting for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas. (See 26.205).

**PART 7—ACQUISITION PLANNING**

■ 4. Amend section 7.103 by adding paragraph (v) to read as follows:

**7.103 Agency-head responsibilities.**

\* \* \* \* \*

(v) Ensuring that contracting officers consult the Disaster Response Registry at [www.ccr.gov](http://www.ccr.gov) as a part of acquisition planning for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas. (See 26.205).

**PART 10—MARKET RESEARCH**

■ 5. Amend section 10.000 by revising the second sentence to read as follows:

**10.000 Scope of part.**

\* \* \* This part implements the requirements of 41 U.S.C. 253a(a)(1), 41 U.S.C. 264b, 10 U.S.C. 2377, and 6 U.S.C. 796.

■ 6. Amend section 10.001 by revising paragraph (a)(2)(v) to read as follows:

**10.001 Policy.**

- (a) \* \* \*
- (2) \* \* \*

(v) On an ongoing basis, and to the maximum extent practicable, take advantage of commercially available market research methods in order to identify effectively the capabilities, of small businesses and new entrants into Federal contracting, that are available in the marketplace for meeting the

requirements of the agency in furtherance of—

(A) A contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

(B) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. (See 26.205).

\* \* \* \* \*

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

**13.201 [Amended]**

■ 7. Amend section 13.201 by removing from paragraph (d) “4.1104” and adding “4.1105” in its place.

**PART 18—EMERGENCY ACQUISITIONS**

■ 8. Revise section 18.102 to read as follows:

**18.102 Central contractor registration.**

Contractors are not required to be registered in the Central Contractor Registration (CCR) for contracts awarded to support unusual and compelling needs or emergency acquisitions. (See 4.1102). However, contractors are required to register with CCR in order to gain access to the Disaster Response Registry. Contracting officers shall consult the Disaster Response Registry at [www.ccr.gov](http://www.ccr.gov) to determine the availability of contractors for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas. (See 26.205).

**PART 26—OTHER SOCIOECONOMIC PROGRAMS**

**26.205 [Redesignated as 26.206]**

■ 9. Redesignate section “26.205” as section “26.206” and add a new section “26.205” to read as follows:

**26.205 Disaster Response Registry.**

(a) Contracting officers shall consult the Disaster Response Registry at [www.ccr.gov](http://www.ccr.gov) to determine the availability of contractors for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas.

(b) A list of prospective vendors voluntarily participating in the Disaster Response Registry can be retrieved using the CCR Search tool on the CCR webpage. These vendors may be identified by selecting the criteria for “Disaster Response Contractors”. Contractors are required to register with

CCR in order to gain access to the Disaster Response Registry.

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**52.204–7 [Amended]**

■ 10. Amend section 52.204–7 by removing from the introductory paragraph “4.1104” and adding “4.1105” in its place.

**52.226–3 [Amended]**

■ 11. Amend section 52.226–3 by removing from the introductory paragraph “26.205(a)” and adding “26.206(a)” in its place.

**52.226–4 [Amended]**

■ 12. Amend section 52.226–4 by removing from the introductory paragraph “26.205(b)” and adding “26.206(b)” in its place.

**52.226–5 [Amended]**

■ 13. Amend section 52.226–5 by removing from the introductory paragraph “26.205(c)” and adding “26.206(c)” in its place.

[FR Doc. E9–24554 Filed 10–13–09; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 6**

[FAC 2005–37; FAR Case 2007–008; Item II; Docket 2007–0001, Sequence 14]

RIN 9000–AK90

**Federal Acquisition Regulation; FAR Case 2007–008, Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency” Circumstances**

**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) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement section 862 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) and Office of Federal Procurement Policy (OFPP)

Administrator's memorandum of May 31, 2007. The rule limits the length of contracts awarded noncompetitively under unusual and compelling urgency circumstances to the minimum contract period necessary to meet the requirements, and no longer than one year, unless the head of the agency determines that exceptional circumstances apply.

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

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-37, FAR case 2007-008.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Office of Federal Procurement Policy (OFPP) Administrator's memorandum of May 31, 2007, issued to Chief Acquisition Officers and Senior Procurement Executives, proposed several initiatives, including promoting competition in Federal acquisition, challenging any barriers to such competition, and reinvigorating the role of the competition advocate. Subsequent to issuance of the memorandum, OFPP submitted multiple business cases proposing FAR changes to strengthen Federal acquisition competition policies. These were established as individual FAR cases. This FAR case specifically addresses the OFPP initiative to limit the length of contracts awarded noncompetitively under the authorities for unusual and compelling urgency. DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 73 FR 5784, January 31, 2008. The 60-day comment period for the proposed rule ended March 31, 2008. Two respondents provided comments for a total of eight comments.

In October 2008 the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417, was enacted. Section 862 of this Act amended section 303(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(d) and 10 U.S.C 2304(d)) to require that contracts awarded under the authority of 41 U.S.C 252(c)(2) and 10 U.S.C. 2304(c) (FAR 6.302-2, Unusual and compelling urgency), (1) may not exceed the time necessary to meet the unusual and compelling requirements, may not exceed the time for the agency to enter into another contract for the required goods and services through the use of competitive procedures, and may not exceed one year unless the head of the

agency entering into the contract determines that exceptional circumstances apply; and (2) that the requirements in (1) of this paragraph apply to any contract in amount greater than the simplified acquisition threshold.

The public comments and requirements of the Act were considered by the Councils in the formation of this final rule.

*Comment 1:* One respondent recommended that the Councils should shorten the contract term to not exceed six months in lieu of the stated "no longer than one year."

*Response:* Non-concur. The time period is required by statute.

*Comment 2 and 3:* One respondent stated that the term "head of the contracting activity" requires clarification. The respondent urges the rule refer to the definition for the "head of the contracting activity" by including FAR subpart 2.101 in FAR 6.302-2(d). Another respondent suggested that the rule specifically state whether or not the head of the contracting activity's authority to approve a period of performance longer than one year is delegable.

*Response:* Non-concur. The National Defense Authorization Act requires that the head of the agency make the determination required by FAR 6.302-2(d). "Head of the agency" is defined in FAR subpart 2.101 and does not require defining in FAR 6.302-2(d).

The rule is silent on whether the authority may be delegated. However, FAR 1.108(b) provides that each authority is delegable unless specifically stated otherwise.

*Comment 4:* Both respondents asked whether the approval process will be governed by FAR 6.304, which requires approval by other government officials depending on the monetary value of the proposed contract? The respondents urged that the process be simplified and duplication of paperwork reduced to prevent the filing of multiple justifications and approvals.

*Response:* The approval process in 6.302-2(d)(2) for the exceptional circumstances determination is not governed by FAR 6.304. The approval levels are different. The requirement for determining exceptional circumstances apply is separate from the approval process at FAR 6.304. The rule requires the determination be obtained prior to the award of the contract; or may be obtained after award when making the determination prior to award would unnecessarily delay the acquisition.

*Comment 5:* The authority of FAR 6.302-2(c)(1) currently allows urgent and compelling justifications to be

"made and approved" after contract award. A respondent suggested that the new FAR citation 6.302-2(d) be added to the 6.303 and 6.304 currently referenced in FAR 6.302-2(c)(1) to make it clear that this can still be done.

*Response:* Non-Concur. As stated in the prior response, the approval process is not governed by FAR 6.303 or FAR 6.304. The requirement for making the determination for a performance period greater than one year, by the head of the agency, for noncompetitive contracts in unusual urgency and compelling circumstances, is separate from the approval process at FAR 6.304. The rule provides for the determination for a performance period greater than one year to be obtained after contract award when making the determination prior to award would unreasonably delay the acquisition.

*Comment 6:* One respondent urged that there be discussion added on the public availability of approval records filed by the head of the contracting activity.

*Response:* Non-concur. FAR Case 2008-003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (74 CFR 2731, January 15, 2009), requires the public disclosure of justification and approval documents for noncompetitive contracts which is a statutory requirement by 10 U.S.C. 2304 and 41 U.S.C. 253.

*Comment 7:* One respondent requested consideration of the impacts of subsequent changes to the contract awarded under the new rule (e.g., an amendment, a modification, or a follow-on contract) to the one-year contract award restriction.

*Response:* Non-concur. This rule does not make changes to the existing regulations regarding use of non-competitive awards. The contracting activity must still comply with the justification requirements at FAR subpart 6.3 when awarding an out-of-scope modification to a contract, or a follow-on contract.

*Comment 8:* Consider a standing exception for certain multiple year non-severable services (e.g., a major acquisition that requires a period of performance greater than one year in order to develop or manufacture an end product).

*Response:* Non-concur. The rule provides for any exception to the one-year limit by having the head of the agency make the determination for the longer performance contract period.

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 the rule addresses internal agency procedures and will benefit small entities by encouraging competition after a one year performance period, except when a longer performance period is properly approved. Therefore, a Final Regulatory Flexibility Analysis has not been performed.

### 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 6

Government procurement.

Dated: October 5, 2009.

#### Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 6 as set forth below:

### PART 6—COMPETITION REQUIREMENTS

■ 1. The authority citation for 48 CFR part 6 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 6.302–2 by adding paragraph (d) to read as follows:

#### 6.302–2 Unusual and compelling urgency.

\* \* \* \* \*

(d) *Period of Performance.* The total period of performance of a contract awarded using this authority—

(1) May not exceed the time necessary:

(i) To meet the unusual and compelling requirements of the work to be performed under the contract; and

(ii) For the agency to enter into another contract for the required goods and services through the use of competitive procedures.

(2) May not exceed one year unless the head of the agency entering into the

contract determines that exceptional circumstances apply.

(3) The requirements in paragraphs (1) and (2) of this section shall apply to any contract in an amount greater than the simplified acquisition threshold.

(4) The determination of exceptional circumstances is in addition to the approval of the justification in 6.304.

(5) The determination may be made after contract award when making the determination prior to award would unreasonably delay the acquisition.

[FR Doc. E9–24565 Filed 10–13–09; 8:45 am]

**BILLING CODE 6820–EP–S**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 12 and 52

[FAC 2005–37; FAR Case 2008–026; Item III; Docket 2009–0013, Sequence 1]

RIN 9000–AL25

#### Federal Acquisition Regulation; FAR Case 2008–026, GAO Access to Contractor Employees

**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, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) which allows the Government Accountability Office to interview current contractor employees during the audit of the contractor's records.

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

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Edward Loeb, Director, Contract Policy Division at (202) 501–0650. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–37, FAR case 2008–026.

**SUPPLEMENTARY INFORMATION:**

### A. Background

Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) added language allowing the Comptroller General to interview current employees regarding transactions being examined during an audit of contracting records. The Act revises 41 U.S.C. 254d(c)(1) and 10 U.S.C. 2313(c)(1) by inserting before the period: “and to interview any current employee regarding such transactions”. To implement the Act, FAR clauses 52.215–2, Audit and Records—Negotiation, and 52.214–26, Audit and Records—Sealed Bidding, were amended to add the required statutory language. The statute did not specify that section 871 apply to commercial item contracts and therefore was not applied to FAR clause 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Order—Commercial Items. Section 34 of the Office of Federal Procurement Policy Act (OFPP), 41 U.S.C. 430, exempts commercial item acquisitions from new provisions of law, such as section 871, unless (1) the law provides criminal or civilian penalties, (2) the law expressly refers to 41 U.S.C. 430 and states that it applies to commercial item contracts, or (3) the FAR Council makes a written determination that it would not be in the best interest of the Federal Government to exempt commercial item contracts. Thus, this new provision was added to the list of inapplicable laws at FAR 12.503(a).

DoD, GSA, and NASA published an interim rule with a request for comments in the **Federal Register** at 74 FR 14649 on March 31, 2009. No comments were received. The interim rule is converted to a final rule without change.

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12886, 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 only a small number of small businesses are audited by the Government Accountability Office (GAO). Currently

many GAO audits of small business contractors include contractor employee interviews. This Act is designed to cover those incidents in which the contractor does not voluntarily make the contractor employees available for interviews. Therefore, it is not anticipated that interviewing any current employee regarding such contract transactions will have a significant impact.

### 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 12 and 52

Government procurement.

Dated: October 5, 2009.

Al Matera,

Director, Acquisition Policy Division.

### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 12 and 52, which was published in the **Federal Register** at 74 FR 14649 on March 31, 2009, is adopted as a final rule without change.

[FR Doc. E9-24568 Filed 10-13-09; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 15

[FAC 2005-37; FAR Case 2008-034; Item IV; Docket 2009-0035, Sequence 1]

RIN 9000-AL44

### Federal Acquisition Regulation; FAR Case 2008-034, Use of Commercial Services Item Authority

**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 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 868 provides that purchases of commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace may only be considered commercial items for the purposes of the FAR 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.

**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 2008-034, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-034" into the field "Keyword". Select the link that corresponds with FAR Case 2008-034. Follow the instructions provided to submit your comment. Please include your name, company name (if any), and "FAR Case 2008-034" 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 2008-034, 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 N. Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. Please cite FAC 2005-37, FAR case 2008-034. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

### SUPPLEMENTARY INFORMATION:

#### A. Background

Section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) states that the FAR shall be amended

with respect to the procurement of commercial services, specifically 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. These services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services. The rule details the information the contracting officer may consider in order to make this determination.

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 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 this interim rule primarily impacts actions required on the part of the Government by requiring a new written determination by the contracting officer. Since the current 15.403-3(a)(1) provides for contracting officers to obtain the information necessary to evaluate price reasonableness, this interim rule places no additional requirements on contractors. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR part 15 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 2008-034), in all correspondence.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0013.

#### D. 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 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).

[FR Doc. E9-24570 Filed 10-13-09; 8:45 am]

BILLING CODE 6820-EP-S

**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.

\* \* \* \* \*

**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.

[FR Doc. E9–24586 Filed 10–13–09; 8:45 am]

BILLING CODE 6820–EP–S

## 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.

**ADDRESSES:** Submit comments identified by FAC 2005–37, FAR case 2008–008, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–008” into the field “Keyword”. Select the link that corresponds with FAR Case 2008–008. Follow the instructions provided to submit your comment. Please include your name, company name (if any), and “FAR Case 2008–008” 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 2008–008, 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 N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–37, FAR case 2008–008. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This rule implements the provisions of section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled *Appropriate Use of Incentive Contracts*, which deal with award and incentive fee contract types, by amending and/or integrating where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

FAR part 16 has been amended to provide further guidance relative to: (1) Award fees being linked to acquisition objectives in the areas of cost, schedule, and technical performance, (2) The percentage of award fee available for prescribed narrative ratings, (3) Award fees not being earned if the contractor’s

overall performance is judged to be below satisfactory, (4) The analysis required in determining whether to use an award or incentive fee type contract or not, (5) Award-fee plan content, (6) The prohibition of the use of the award fee rollover concept, (7) The requirements relative to award and incentive fee data collection and performance measures to evaluate such data, and a reference to FAR 7.105 for consideration of this information in acquisition planning, and (8) The publishing of best practices.

The Councils are revising the following FAR provisions:

(1) FAR 16.001 is revised to add definitions for the terms “Rollover of unearned award fee”, “Award-Fee Board,” and “Fee-Determining Official (FDO)”. This change is made to ensure that all parties understand what is meant by these terms, which are used in the new FAR 16.401(e).

(2) FAR 16.404(a) and FAR 16.404(a)(1) have been combined into 16.404. FAR 16.404(a)(2) has been deleted from this section and is now covered in FAR 16.401(e)(3).

(3) FAR 16.401(d) was changed with the existing content of this section being moved to FAR 16.401(e) and new content being added. This new content requires that a determination and finding be made justifying the use of an incentive or award-fee type contract.

(4) FAR 16.401(e) has been added to require that award fees be linked to acquisition objectives in the areas of cost, schedule, and technical performance; that award fees not be earned if the contractor’s overall performance is judged to be below satisfactory; that award-fee determinations be documented in the contract file; that the determination and methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government; and that all award-fee contracts have an award-fee plan that establishes the procedures and award-fee board for evaluating award-fee determinations. This new section also delineates what the required content shall be for all award-fee plans to include the use of adjectival ratings and associated descriptions as well as award-fee pool earned percentages now incorporated into the FAR in Table 16–1. This new paragraph also provides guidance relative to the use of the “rollover” concept. The “rollover” of unearned award fee from one evaluation period to another evaluation period is now prohibited. The Councils believe “rollover” diminishes the effectiveness of the award-fee rating given for a specific evaluation period, since the

unearned award fee could be earned by the contractor in a subsequent evaluation period. Further, the “rollover” concept is used sparingly across the Federal Government and its limited use has been trending downward.

(5) FAR 16.404(b) was deleted and the core content of this section is now included in FAR 16.401(e). The revisions require that a determination and finding be made based upon the criteria in FAR 16.401(e)(1) before utilizing an award-fee type contract.

(6) FAR 16.405–2(a) is now FAR 16.405–2 and it was revised to clarify that base fee can be included in a cost-plus-award-fee (CPAF) type contract at the discretion of the contracting officer.

(7) FAR 16.405–2(b)(1) has been deleted in its entirety. The language relative to when an award-fee contract is suitable for use is in FAR 16.401(e)(1).

(8) FAR 16.405–2(b)(2) has been deleted in its entirety. The language relative to award-fee criteria motivating contractor performance has been revised and moved to FAR 16.401(e)(3)(ii).

(9) FAR 16.405–2(b)(3) has been deleted in its entirety. The language relative to award-fee evaluation intervals has been revised and moved to 16.401(e)(3)(vi).

(10) FAR 16.405–2(c) has been deleted and the intent of this section is now included in FAR 16.401(e)(5). The revision requires that no award-fee contract shall be awarded unless the limitations cited in this section are met. The limitations include compliance with FAR 16.301–3, FAR 16.401(e)(3), and a determination and finding that justifies the use of this contract type in accordance with the suitability items in FAR 16.401(e)(1).

(11) The references utilized in FAR 16.305 and FAR 16.402–1 were updated to accurately point to the correct FAR sections based upon the changes herein.

(12) FAR 16.401(f) was added to require the collection of incentive- and award-fee data within the Federal Government.

(13) FAR 16.401(g) was added to provide the Federal workforce with best practice type information relative to incentive- and award-fee contracting.

These changes will affect contracts newly awarded. Any changes to existing contracts would be handled in accordance with FAR 1.108(d).

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 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 guidance largely covers a broad range of aspects of award-fee contracting, whose upshot will be a more consistent use and administration of award fees Governmentwide which will provide a small benefit to all entities both large and small. In addition, the changes promulgated in this interim rule do not directly affect the current business processes of Federal contractors. In the matter of the rule's prohibition on the rollover of unearned award fee, the Councils believe this will have a negligible impact on small businesses for the following reasons. First, award-fee contracts are largely the province of large businesses with large dollar contracts. Second, the ability to rollover unearned award fee may have caused evaluators in the past to be more conservative in their ratings because of their awareness that contractors may have a second opportunity to earn unearned award fees.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR part 16 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 2008–008), 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.*

## D. 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 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110–417), enacted on October 14, 2008, requires that the FAR be revised to implement this provision

by October 14, 2009. 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 16

Government procurement.

Dated: October 5, 2009.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 16 as set forth below:

### PART 16—TYPES OF CONTRACTS

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

■ 2. Add section 16.001 to read as follows:

#### 16.001 Definitions.

As used in this part—

*Award-Fee Board* means the team of individuals identified in the award-fee plan who have been designated to assist the Fee-Determining Official in making award-fee determinations.

*Fee-Determining Official (FDO)* means the designated Agency official(s) who reviews the recommendations of the Award-Fee Board in determining the amount of award fee to be earned by the contractor for each evaluation period.

*Rollover of unearned award fee* means the process of transferring unearned award fee, which the contractor had an opportunity to earn, from one evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee.

■ 3. Amend section 16.305 by revising the third and fourth sentences to read as follows:

#### 16.305 Cost-plus-award-fee contracts.

\* \* \* See 16.401(e) for a more complete description and discussion of the application of these contracts. See 16.301–3 and 16.401(e)(5) for limitations.

■ 4. Amend section 16.401 by revising paragraph (d); and adding paragraphs (e) through (g) to read as follows:

#### 16.401 General.

\* \* \* \* \*

(d) A determination and finding, signed by the head of the contracting activity, shall be completed for all incentive- and award-fee contracts justifying that the use of this type of

contract is in the best interest of the Government. This determination shall be documented in the contract file and, for award-fee contracts, shall address all of the suitability items in 16.401(e)(1).

(e) Award-fee contracts are a type of incentive contract.

(1) *Application.* An award-fee contract is suitable for use when—

(i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(ii) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(iii) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the Determination and Findings referenced in 16.401(e)(5)(iii).

(2) *Award-fee amount.* The amount of award fee earned shall be commensurate with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. Award fee shall not be earned if the contractor's overall cost, schedule, and technical performance is below satisfactory. The basis for all award-fee determinations shall be documented in the contract file to include, at a minimum, a determination that overall cost, schedule and technical performance is or is not at a satisfactory level. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government.

(3) *Award-fee plan.* All contracts providing for award fees shall be supported by an award-fee plan that establishes the procedures for evaluating award fee and an Award-Fee Board for conducting the award-fee evaluation. Award-fee plans shall—

(i) Be approved by the FDO unless otherwise authorized by agency procedures;

(ii) Identify the award-fee evaluation criteria and how they are linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance. Criteria should motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;

(iii) Describe how the contractor's performance will be measured against the award-fee evaluation criteria;

(iv) Utilize the adjectival rating and associated description as well as the award-fee pool earned percentages shown below in Table 16-1. Contracting

officers may supplement the adjectival rating description. The method used to determine the adjectival rating must be documented in the award-fee plan;

TABLE 16-1

Award-Fee Adjectival Rating	Award-Fee Pool Available To Be Earned	Description
Excellent .....	91%—100% .....	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Very Good .....	76%—90% .....	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Good .....	51%—75% .....	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Satisfactory .....	No Greater Than 50% .....	Contractor has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Unsatisfactory .....	0% .....	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.

(v) Prohibit earning any award fee when a contractor's overall cost, schedule, and technical performance is below satisfactory;

(vi) Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g. six months, nine months, twelve months, or at specific milestones); and

(vii) Define the total award-fee pool amount and how this amount is allocated across each evaluation period.

(4) *Rollover of unearned award fee.* The use of rollover of unearned award fee is prohibited.

(5) *Limitations.* No award-fee contract shall be awarded unless—

(i) All of the limitations in 16.301-3, that are applicable to cost-reimbursement contracts only, are complied with;

(ii) An award-fee plan is completed in accordance with the requirements in 16.401(e)(3); and

(iii) A determination and finding is completed in accordance with 16.401(d) addressing all of the suitability items in 16.401(e)(1).

(f) *Incentive- and Award-Fee Data Collection and Analysis.* Each agency shall collect relevant data on award fee and incentive fees paid to contractors and include performance measures to evaluate such data on a regular basis to determine effectiveness of award and incentive fees as a tool for improving contractor performance and achieving

desired program outcomes. This information should be considered as part of the acquisition planning process (see 7.105) in determining the appropriate type of contract to be utilized for future acquisitions.

(g) *Incentive- and Award-Fee Best Practices.* Each agency head shall provide mechanisms for sharing proven incentive strategies for the acquisition of different types of products and services among contracting and program management officials.

**16.402-1 [Amended]**

■ 4. Amend section 16.402-1 by removing from paragraph (b) “16.405-2” and adding “16.401(e)” in its place.

■ 5. Revise section 16.404 to read as follows:

**16.404 Fixed-price contracts with award fees.**

Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts shall establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. Award fee earned (if any) will be paid in addition to that fixed price. See 16.401(e) for the requirements relative to utilizing this contract type.

■ 6. Revise section 16.405-2 to read as follows:

**16.405-2 Cost-plus-award-fee contracts.**

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the contracting officer, and (2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance. See 16.401(e) for the requirements relative to utilizing this contract type.

[FR Doc. E9-24579 Filed 10-13-09; 8:45 am]  
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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 18**

[FAC 2005-37; FAR Case 2009-003; Item VII; Docket 2009-0037; Sequence 1]

RIN 9000-AL37

**Federal Acquisition Regulation; FAR Case 2009-003, National Response Framework**

**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) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to reflect reissuance of the Federal Emergency Management Agency's (FEMA) National Response Plan (NRP). On January 22, 2008, FEMA reissued the NRP as the National Response Framework (NRF). In addition, the term "Incident of National Significance" was eliminated. These changes became effective on March 22, 2008.

**DATES:** *Effective Date:* November 13, 2009

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Ed Loeb, Director, Contract Policy Division at (202) 501-0650. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-37, FAR case 2009-003.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On January 22, 2008, FEMA, a component of the Department of Homeland Security, reissued the National Response Plan (NRP) as the National Response Framework (NRF). With the reissuance, the term "Incidents of National Significance" was eliminated. These changes became effective on March 22, 2008. Both the NRP and the term "Incidents of National Significance" are now obsolete.

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 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 Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities and other interested parties concerning the affected FAR part 18 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 2009-003), 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 Part 18**

Government procurement.

Dated: October 5, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 18 as set forth below:

**PART 18—EMERGENCY ACQUISITIONS**

■ 1. The authority citation for 48 CFR part 18 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 18.001 by revising paragraph (c) to read as follows:

**18.001 Definition.**

\* \* \* \* \*

(c) When the President issues an emergency declaration, or a major disaster declaration.

■ 3. Amend section 18.203 by revising the section heading to read as follows:

**18.203 Emergency declaration or major disaster declaration.**

\* \* \* \* \*

■ 4. Amend section 18.204 by revising paragraph (a) to read as follows:

**18.204 Resources.**

(a) *National Response Framework.* The National Response Framework (NRF) is a guide to how the Nation conducts all-hazards response. This key document establishes a comprehensive, national, all-hazards approach to domestic incident response. The Framework identifies the key response principles, roles and structures that organize national response. It describes how communities, States, the Federal Government, the private-sector, and nongovernmental partners apply these principles for a coordinated, effective national response. It also describes special circumstances where the Federal Government exercises a larger role, including incidents where Federal interests are involved and catastrophic incidents where a State would require significant support. The NRF is available at <http://www.fema.gov/emergency/nrf/>.

\* \* \* \* \*

[FR Doc. E9-24580 Filed 10-13-09; 8:45 am]

**BILLING CODE 6820-EP-S**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 5 and 52**

[FAC 2005-37; Item VIII; Docket 2009-0009; Sequence 5]

**Federal Acquisition Regulation; Technical Amendments**

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

**ACTION:** Final rule.

**SUMMARY:** This document makes amendments to the Federal Acquisition Regulation in order to make editorial changes.

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

**FOR FURTHER INFORMATION CONTACT:** The Regulatory Secretariat, 1800 F Street, NW., Room 4041, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-37, Technical Amendments.

**SUPPLEMENTARY INFORMATION:** This document makes amendments to the Federal Acquisition Regulation in order to make editorial changes.

**List of Subjects in 48 CFR Parts 5 and 52**

Government procurement.

Dated: October 5, 2009.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 5 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 5—PUBLICIZING CONTRACT ACTIONS**

**5.102 [Amended]**

■ 2. Amend section 5.102 by removing from paragraph (a)(5)(ii) "GPE;" and adding "GPE; or" in its place.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 3. Amend section 52.213-4 by revising the date of the clause; and removing from paragraph (a)(1)(v) "(Feb 2006)" and adding "(June 2008)" in its place.

■ The revised text reads as follows:

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

\* \* \* \* \*

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (OCT 2009)

\* \* \* \* \*

**52.244-6 [Amended]**

■ 4. Amend section 52.244-6 by removing from the clause heading “(August 11, 2009)” and adding “(Aug 2009)” in its place.

[FR Doc. E9-24584 Filed 10-13-09; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2009-0002, Sequence 8]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-37; Small Entity Compliance Guide**

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the

Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-37 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005-37 which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Hada Flowers, FAR Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

**LIST OF RULES IN FAC 2005-37**

Item	Subject	FAR case	Analyst
I .....	Registry of Disaster Response Contractors (Interim) .....	2008-035	Loeb.
II .....	Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency” Circumstances.	2007-008	Woodson.
III .....	GAO Access to Contractor Employees .....	2008-026	Loeb.
IV .....	Use of Commercial Services Item Authority (Interim) .....	2008-034	Chambers.
V .....	Limitations on Pass-Through Charges (Interim) .....	2008-031	Chambers.
VI .....	Award Fee Language Revision (Interim) .....	2008-008	Chambers.
VII .....	National Response Framework .....	2009-003	Loeb.
VIII .....	Technical Amendments .....		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-37 amends the FAR as specified below:

**Item I—Registry of Disaster Response Contractors (FAR Case 2008-035) (Interim)**

This interim rule amends the FAR at parts 2, 4, 7, 10, 13, 18, 26, and 52 to implement the Registry of Disaster Response Contractors provision, section 697 of the Department of Homeland Security (DHS) Appropriations Act, 2007 (6 U.S.C. 796).

The Act requires that the Federal Emergency Management Agency (FEMA) establish and maintain this registry. It also requires that the registry include business information consistent with the data that is currently required in the Central Contractor Registration (CCR) with two additional categories added to reflect the area served by the business, and the bonding level of the business concern. The CCR has been

updated to include these changes. In addition, the FEMA website has been updated with a link to the CCR search feature which provides access to the disaster response registry. Contracting officers will be required to consult this registry during market research and acquisition planning.

**Item II—Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency” Circumstances (FAR Case 2007-008)**

This final rule amends the FAR to require that contracts awarded under the authority of FAR 6.302-2, Unusual and compelling urgency, may not exceed the time necessary to meet the unusual and compelling requirements, may not exceed the time for the agency to enter into another contract for the required goods and services through the use of competitive procedures, and may not exceed one year unless the head of the agency entering into the contract determines that exceptional circumstances apply. The determination may be made after contract award when making the determination prior to award would unnecessarily delay the award. The rule applies to any contract

in an amount greater than the simplified acquisition threshold. The rule implements the requirements of section 862 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417). The rule is intended to strengthen Federal acquisition competition policies.

**Item III—GAO Access to Contractor Employees (FAR Case 2008-026)**

This final rule converts the interim rule published in the **Federal Register** at 74 FR 14649, March 31, 2009, to a final rule without change. The interim rule amended FAR 52.215-2, Audits and Records—Negotiation, and FAR 52.214-26, Audit and Records—Sealed Bidding, to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule does not apply to the acquisition of commercial items; therefore, FAR 12.503 was amended to add the exemption of this rule. This change implemented section 871 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110-417).

**Item IV—Use of Commercial Services Item Authority (FAR Case 2008–034) (Interim)**

This interim rule amends the FAR to implement section 868 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110–417). Section 868 provides that the FAR shall be amended with respect to the procurement of commercial 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. Such services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for these services.

The rule details the information the contracting officer may consider in order to make this determination. The rule further details, when this determination cannot be made, the information which may be requested to determine price reasonableness.

**Item V—Limitations on Pass-Through Charges (FAR Case 2008–031) (Interim)**

This interim rule implements section 866 of the Duncan Hunter NDAA for Fiscal Year 2009 (Pub. L. 110–417) and section 852 of the John Warner NDAA 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.

**Item VI—Award Fee Language Revision (FAR Case 2008–008) (Interim)**

This interim rule amends the FAR to implement section 814 of the John Warner NDAA of Fiscal Year 2007 (Pub. L. 109–364) and section 867 of the Duncan Hunter NDAA of Fiscal Year 2009 (Pub. L. 110–417). This rule requires agencies to—

- (1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;
- (2) Clarify that a base fee amount greater than zero may be included in a cost plus award fee type contract at the discretion of the contracting officer;
- (3) Prescribe narrative ratings that will be utilized in award fee evaluations;
- (4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;
- (5) Conduct a risk and cost benefit analysis and consider the results of the analysis when determining whether to use an award-fee type contract or not;
- (6) Include specific content in the award-fee plans; and

(7) Prohibit the rolling over of unearned award fees to subsequent rating periods.

This FAR change will integrate where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

**Item VII—National Response Framework (FAR Case 2009–003)**

This final rule amends the FAR part 18 to remove all references to the National Response Plan (NRP) and Incidents of National Significance. In January 2008, FEMA, a component within the DHS, reissued the NRP as the National Response Framework (NRF). With the reissuance, the term “Incidents of National Significance” was eliminated. The changes became effective on March 22, 2008. Both the NRP and the term “Incidents of National Significance” are now obsolete.

This rule is informational and represents minor updates for consistency with FEMA references.

FEMA provides a link at their website for Frequently Asked Questions that explain the rationale for and the changes to the NRF.

This rule does not have a significant impact on Government or any automated systems.

**Item VIII—Technical Amendments**

Editorial changes are made at FAR 5.102, 52.213–4, and 52.244–6.

Dated: October 5, 2009

**Al Matera,**

*Director, Acquisition Policy Division.*

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