

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 15, 31 and 52

[FAR Case 2008-031]

RIN 9000-XXXX

Federal Acquisition Regulation; 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 to amend the Federal Acquisition Regulation (FAR) to implement Section 866 of the National Defense Authorization Act (NDAA) for Fiscal Year 2009 as well as Section 852 of the FY 2007 NDAA. This legislation 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.

DATES:

Effective Date: **[Insert date of publication in the FEDERAL REGISTER]**

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formulation of a final rule.

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

Federal eRulemaking Portal:

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.

- Agency Web Site:

<http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2009-031 in all correspondence related to this case. All comments received will be posted without change to www.regulations.gov, including any personal and/or business information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ed Chambers, Procurement Analyst, at 202-501-3221. Please cite 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" (Public Law 110-417) as well as Section 852 of the "John Warner National Defense Authorization Act for Fiscal Year 2007" (Public Law 109-364), which 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.

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 52.215-yy 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.

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 FY2007 NDAA.

This is not a significant regulatory action and, therefore, is 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 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 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, the Councils have not performed an initial regulatory flexibility analysis. The Councils invite comments from small businesses and other interested parties. The Councils also will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately, and should cite FAR Case 2008-031.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Public Law 104-13) applies because the interim rule contains information collection requirements. Accordingly, the FAR Secretariat has forwarded an emergency information collection request for approval of new information collection requirements to the Office of Management and Budget (OMB) under 44 U.S.C. 3501, et seq.

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 proposal:

(1) The percent of effort the offeror intends to perform and the percent 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 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 applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the value added 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 a description of the value added by the contractor or subcontractor, as applicable, as related to the subcontract effort.

We estimate the annual total burden hours as follows:

Respondents: 25,380

Responses per respondent: Approximately 1

Total annual responses: 25,760

Preparation hours per response: Approximately .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 [insert date 30 days after publication in the FEDERAL REGISTER] to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VR), 1800 F Street, NW, Room 4035, 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 the above 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 the burden of the collection of information can be minimized 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, FAR Secretariat (VR), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-XXXX in all correspondence.

List of Subjects in 48 CFR Part(s) 15, 31 and 52

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this provision of the FY 2009 NDAA, Section 866 requires that the FAR be revised to implement this provision no later than one year after the date of enactment. 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 Parts 15, 31, and 52

Government Procurement.

Dated:

Al Matera

Acting Director, Acquisition Policy Division

Therefore, 48 CFR parts 15, 31, and 52 are amended as follows:

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

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.