

removes the requirement for contractors under cost-reimbursement contracts with the Department of Defense (DoD), Coast Guard, and National Aeronautics and Space Administration (NASA) to notify the agency before the award of any cost-plus-fixed-fee subcontract or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract if the contractor maintains a purchasing system approved by the contracting officer for the contract.

In addition, the rule makes a technical amendment to Alternate II of FAR clause 52.244-2, Subcontracts. The rule deletes the reference to paragraph (c) from paragraph (f)(2) of Alternate II because paragraph (c) applies to fixed price type contracts, whereas Alternate II applies to cost-reimbursement contracts.

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

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 it will have a small positive effect. Also, small businesses do not usually hold prime contracts which are cost-reimbursement contracts, so this section would not apply to them, and any changes would not apply. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. We invite comments from small business concerns and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 44 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 2005-01, FAR case 2003-024), in 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. 3501, *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 to implement Section 842 of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108-136, which went into effect November 24, 2003, and which resulted in revisions to 10 U.S.C. 2306 (e). 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 44 and 52

Government procurement.

Dated: February 24, 2005.

**Rodney P. Lantier,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 44 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 44 and 52 is revised 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 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 2. Revise section 44.201-2 to read as follows:

##### 44.201-2 Advance notification requirements.

Under cost-reimbursement contracts, the contractor is required by statute to notify the contracting officer as follows:

(a) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, unless the contractor maintains an approved purchasing system, 10 U.S.C. 2306 requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract.

(b) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, even if the contractor has an approved purchasing system, 41 U.S.C. 254(b) requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds either the simplified acquisition threshold or 5 percent of the total estimated cost of the contract.

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

■ 3. Amend section 52.244-2—

■ a. In Alternate I, by removing “(Aug 1998)” and adding “(MAR 2005)” in its place, and revising the first sentence of paragraph (f)(2); and

■ b. In Alternate II, by removing “(Aug 1998)” and adding “(MAR 2005)” in its place, and in paragraph (f)(2) by removing “(c), (d),” and adding “(d)” in its place. The revised text reads as follows:

##### 52.244-2 Subcontracts.

\* \* \* \* \*

*Alternate I* \* \* \*

(f)(2) Unless the Contractor maintains an approved purchasing system, the Contractor shall notify the Contracting Officer reasonably in advance of entering into any (i) cost-plus-fixed-fee subcontract, or (ii) fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of this contract. \* \* \*

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#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

##### 48 CFR Part 44

[FAC 2005-01; FAR Case 2002-021; Item VIII]

RIN 9000-AJ75

#### Federal Acquisition Regulation; Use of FAR Clause 52.244-6, Subcontracts for Commercial Items

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require that the FAR clause, Subcontracts for Commercial Items, be inserted in solicitations and contracts other than those for commercial items.

**DATES:** *Effective Date:* March 9, 2005.

**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. Michael Jackson, Procurement Analyst, at (202) 208-4949. Please cite FAC 2005-01, FAR case 2002-021.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends FAR 44.403 by requiring the use of the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

The current clause prescription requires use of the clause in solicitations and contracts for "supplies or services" other than commercial items. It is not clear whether this includes solicitations and contracts for construction. The clause matrix at FAR 52.301 lists the clause at 52.244-6 as required for solicitations and contracts for construction.

The revised clause prescription clarifies that the clause is required in all solicitations and contracts other than those for commercial items, thereby clearly including construction contracts that are not for the acquisition of commercial items.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 61302, October 27, 2003. One positive public comment was received supporting the revisions to the clause prescription. This final rule differs from the proposed rule by not adding the phrase "... and includes commercial construction materials but does not include construction itself" to the definition "Commercial item" under paragraph (a) of FAR clause 52.244-6, Definitions. This additional language is unnecessary to clarify the ambiguity between the matrix and the clause prescription. The change at FAR 44.403 and the clause matrix, that already requires the clause in solicitations and contracts for construction, provide sufficient clarity. Also, the additional language in the proposed rule could have been interpreted to conflict with OFPP Memorandum dated July 3, 2003, Applicability of FAR Part 12 to Construction Acquisitions. This rule is not intended to make any changes to existing OFPP guidance addressing the applicability of FAR Part 12 to construction acquisitions.

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 is a clarification of existing policy. Inclusion of FAR clause 52.244-6 reduces the number of flow down clauses required in subcontracts for commercial items and commercial components.

##### 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. 3501, *et seq.*

##### List of Subjects in 48 CFR Part 44

Government procurement.

Dated: February 24, 2005.

**Rodney P. Lantier,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 44 as set forth below:

##### PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 44 is revised 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. Revise section 44.403 to read as follows:

##### 44.403 Contract clause.

The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 28, 31, 42, and 52

[FAC 2005-01; Item IX]

#### 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 (FAR) in order to make editorial changes.

**DATES:** *Effective Date:* March 9, 2005.

**FOR FURTHER INFORMATION CONTACT** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2001-05, Technical Amendments.

#### List of Subjects in 48 CFR Parts 28, 31, 42, and 52

Government procurement.

Dated: February 24, 2005.

**Rodney P. Lantier,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 28, 31, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 28, 31, 42, and 52 is revised 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 28—BONDS AND INSURANCE

##### 28.203 [Amended]

■ 2. Amend section 28.203-3 in paragraph (d) by removing "19" each time it appears and adding "20" in its place.

##### PART 31—CONTRACT COST PRINCIPALS AND PROCEDURES

##### 31.101 [Amended]

■ 3. Amend section 31.101 by removing from the fifth sentence "Assistant Administrator for Procurement" and adding "Deputy Chief Acquisition Officer" in its place.