

concerning the IRFA were received. A Final Regulatory Flexibility Analysis (FRFA) was prepared. The rule is expected to have a positive impact on small business concerns. However, it is not expected to have a significant impact on a substantial number of small entities because it provides Governmentwide procurement authority that enables the contracting officer (CO) to treat a noncommercial service as commercial if specific conditions, most of which pertain to performance-based contracting, are met. The Government is encouraged to use performance-based contracting techniques on all service contracts and allowing this authority—

- Opens up opportunities to small businesses that otherwise would not have been available if they could not meet the commercial items definition in FAR 2.101 and 52.202-1;

- Provides contracting flexibility when using performance-based contracting techniques;

- Helps the Government move closer to achieving the performance-based contracting performance-goals for Fiscal Years 2004 and 2005; and

- Allows the CO to use FAR Part 12, and procure these types of services similar to the commercial marketplace.

Specifically, a query of the Central Contractor Registration (CCR) system indicates there are 198,732 small businesses registered, and many of these contractors were awarded performance-based contracts or task orders for noncommercial services and the Government was required to use FAR Part 13, Simplified Acquisition Procedures, FAR Part 14, Sealed Bidding, or FAR Part 15, Contracting by Negotiations, for these acquisitions because they were not commercial items. This authority allows the CO to use FAR Part 12, which is the Government's preference since this will allow us to procure these types of services similar to the commercial marketplace, and using FAR Part 12 will provide more contracting flexibility and opportunities to the small business community.

The rule will impose no new reporting or recording keeping requirements on large or small entities. It only requires the Government to report on contracts or task orders awarded under this authority. Specifically, implementation of Section 1431 requires agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The Federal Procurement Data System—Next Generation (FPDS—NG) will be revised to enable agencies to report on

the use of such authority both Governmentwide and for each department and agency. By November 2006, the Office of Management and Budget will start reporting to the Committees on Governmental Affairs and Armed Services of the Senate, and the Committees on Government Reform and Armed Services of the House of Representatives on the implementation of this section. The authority of Section 1431 expires on November 24, 2013, ten years after enactment.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 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 2005-004, FAR Case 2004-004), 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.*

List of Subjects in 48 CFR Parts 2, 4, 12, 37, and 52

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,
Director, Contract Policy Division.

Interim Rule Adopted as Final With Changes

■ Accordingly, DOD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 4, 12, 37, and 52, which was published in the **Federal Register** at 69 FR 34226, June 18, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 37, 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 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

■ 2. Amend section 12.102 in paragraph (g)(1)(iv) by removing “Includes” and adding “Uses” in its place; and in paragraph (g)(2) by removing “should” and adding “may” in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005-04; FAR Case 2004-035; Item IV]

RIN 9000-AK17

Federal Acquisition Regulation; Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items

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) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) regarding prohibition on obtaining cost or pricing data to implement Section 818 of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

DATES: *Effective Date:* June 8, 2005.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before August 8, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-04, FAR case 2004-035, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

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

- E-mail: farcase.2004-035@gsa.gov. Include FAC 2005-04, FAR case 2004-035, in the subject line of the message.

- Fax: 202-501-4067.
- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-04, FAR case 2004-035, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>.

www.acqnet.gov/far/ProposedRules/proposed.htm, including any personal 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. Jeremy Olson at (202) 501-3221. Please cite FAC 2005-04, FAR case 2004-035.

SUPPLEMENTARY INFORMATION:

A. Background

Section 818, Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items, of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, amends 10 U.S.C. 2306a. 10 U.S.C. 2306a provides exceptions to the requirement for submission of cost or pricing data, including an exception for commercial items. Section 818 states that the exception for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than \$500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005.

B. Discussion

The Councils are revising the commercial item discussion in paragraph (c)(3) of FAR 15.403-1, Prohibition on Obtaining Cost or Pricing Data, to reflect the requirements of Section 818. This includes inserting a new paragraph (3)(ii). This new paragraph provides the exception to the requirement for cost or pricing data for minor modifications that do not change the item from a commercial item to a noncommercial item. The exception applies to all such minor modifications for acquisitions funded by agencies other than DoD, NASA, and Coast Guard. For acquisitions funded by DoD, NASA, and Coast Guard, the exceptions apply to all such modifications if the total cost of the modifications do not exceed the greater of \$500,000 or 5 percent of the total price of the contract.

This new policy applies only to acquisitions funded by DoD, NASA, or the Coast Guard, since the statute amends 10 U.S.C. 2306a, which only applies to DoD, NASA, and the Coast Guard. The new language does not apply to acquisitions funded by other than DoD, NASA, or the Coast Guard because Section 818 did not amend 41 U.S.C. 254b, which prohibits obtaining cost or pricing data for commercial items. However, the new policy applies

to contracts awarded or task or delivery orders placed on behalf of DoD, NASA, or the Coast Guard by an official of the United States outside of those agencies, because the statutory requirement of section 818 applies to the funds provided by DoD, NASA, or the Coast Guard.

C. Regulatory Planning and Review

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.

D. 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 number of small entities providing commercial items with non-commercial modifications costing more than \$500,000 is expected to be very low.

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 2005-04, FAR case 2004-035), in correspondence.

E. 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.*

F. 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 an urgent and compelling reason exists to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement the changes resulting from the enactment of Section 818 of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 that are effective June 1, 2005. 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: May 27, 2005.

Julia B. Wise,

Director, Contract 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 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. Amend section 15.403-1 by revising the first sentence of paragraph (c)(3)(i), redesignating paragraph (c)(3)(ii) as (c)(3)(iii), and adding 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) *Commercial items.* (i) Any acquisition of an item that meets the commercial item definition in 2.101, or any modification, as defined in paragraph (3)(i) of that definition, that does not change the item from a commercial item to a noncommercial item, is exempt from the requirement for cost or pricing data. * * *

(ii) The following requirements apply to minor modifications defined in paragraph (3)(ii) of the definition of a commercial item at 2.101 that do not change the item from a commercial item to a noncommercial item:

(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, the modifications are exempt from the requirement for submission of cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, the modifications are exempt from the requirement for submission of cost or pricing data provided the total cost of the modifications do not exceed the greater of \$500,000 or 5 percent of the total price of the contract.

(C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost of the modifications exceeds the greater of \$500,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

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