

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.

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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