

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 245**

RIN 0750-AG94

Defense Federal Acquisition Regulation Supplement: Responsibility and Liability for Government Property (DFARS Case 2010-D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to extend the Government self-insurance policy to Government property provided under negotiated fixed-price contracts that are awarded on a basis other than submission of certified cost or pricing data.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Meredith Murphy, telephone (703) 602-1302.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule at 76 FR 21852 on April 19, 2011. Twenty comments were received from one respondent in response to the proposed rule. None of the comments took issue with the regulatory flexibility analysis in the proposed rule.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the formation of the final rule. A discussion of the comments is provided below. No changes were made in the rule as a result of those comments.

A. Change Should Be Made at the FAR Level

Comment: The respondent concluded that the proposed revision is being improperly undertaken at the agency level and should instead be undertaken by the FAR Council.

Response: FAR subpart 1.3 authorizes agency regulations that supplement the FAR. These agency regulations may provide additional policies to satisfy the specific needs of the agency. Further, FAR 1.404 authorizes DoD to deviate from the FAR in accordance with the DFARS. DoD has complied with the requirements of FAR subparts 1.3 and 1.4 and DFARS subparts 201.3 and 201.4.

B. The Proposed Rule Is Inconsistent With the FAR

Comment: According to the respondent, the proposed rule violates FAR 16.202-1 and 1.304. The respondent stated that FAR 45.104(a) and FAR 45.201(b) are clearly coupled, while the proposed rule uncouples them.

Response: FAR 16.202-1 states that a firm-fixed-price contract places maximum risk on the contractor and full responsibility for all costs and resulting profit and loss. The FAR already provides that contractors are not liable for loss of Government property under fixed-price contracts awarded on the basis of submission of certified cost or pricing data. The purpose of the DFARS rule is to standardize policy for negotiated fixed-price contracts, whether or not the contract involved the submission of certified cost or pricing data. DoD does not intend to eliminate the need for Alternate I of the clause at FAR 52.245-1. The Government's general practice of self-insuring its risks of loss or damage to Government-furnished property is based on policy, not statute (55 Comp Gen 1321 (1976)), and Government self-insurance of Government property is not universal. There are many examples of contractors retaining responsibility and liability for property loss, e.g., property acquired by contractors by virtue of progress payments is tied to the Government's financing of the contract under the provisions of FAR part 32. It is a well-established and acceptable practice for contractors to retain responsibility and liability for progress payment inventory, because it would make little sense for the Government to both finance the contract and self-insure against property loss.

There is no regulation that affirmatively prohibits the purchase of insurance. The Government Accountability Office (GAO) has held that exceptions to the general rule can be made when (1) the economy sought to be obtained under this policy would be defeated; (2) sound business practice indicates that a savings can be effected; or (3) services or benefits not otherwise available can be obtained by purchasing insurance (see GAO-04-261SP, Principles of Appropriations Law, Volume I, section 10a, "The Self-Insurance Rule"). The DFARS language is not inconsistent with established practice; i.e., to self-insure Government property where it makes sense to do so. To the extent that 245.104 may be inconsistent with FAR 45.104, such inconsistency is authorized by FAR

1.304, in accordance with FAR subpart 1.4 and DFARS subpart 201.4.

With regard to the comment on "coupling" FAR 45.104(a) and FAR 45.201(b), the former reference reads as follows:

(a) Generally, contractors are not held liable for "loss, theft, damage or destruction of Government property" under the following types of contracts:

- (1) Cost-reimbursement contracts.
- (2) Time-and-material contracts.
- (3) Labor-hour contracts.
- (4) Fixed-price contracts awarded on the basis of submission of certified cost or pricing data.

FAR 45.201(b) states that, (w)hen Government property is offered for use in a competitive acquisition, solicitations should specify that the contractor is responsible for all "costs related to making the property available for use, such as payment of all transportation, installation, or rehabilitation costs." The latter paragraph makes no reference to liability for loss or damage to Government property and is, therefore, not coupled or inconsistent with the former reference, FAR 45.104(a). Each FAR subpart describes policy for different aspects of procurement.

C. The Change Would Eliminate the \$700,000 Threshold

Comment: The respondent stated that "(c)learly the wording indicates that the proposed rule would only apply additionally to negotiated fixed-price contracts awarded below the current certified cost/price data submittal threshold of \$700,000." Therefore, according to the respondent, "the intent of FAR 45.104(a)(4) is that contractors awarded fixed-price contracts on the basis * * * of submission of certified cost or pricing data (all awards over \$700,000) will not be held liable for loss, theft, damage, destruction of Government property."

Response: The intent of the proposed rule was to standardize Government-property policy for negotiated fixed-price contracts, whether or not the submission of certified cost or pricing data was required. The rule does not impact the threshold for submission of certified cost or pricing data either positively or negatively.

D. The Proposed Rule Would Revise Applicability

Comment: According to the respondent, the proposed policy change omitted "all of the competitively awarded contracts that may include Government property." The respondent said that "it should not be assumed that these contracts will require 'negotiation'

and therefore fall under the proposed rule. Contracts may in fact be awarded without discussion (negotiations) if so stipulated in the solicitation even if Government property is included in the solicitation and anticipated contract.”

Response: Whether or not discussions are held, a contract awarded using FAR part 15 procedures is still a negotiated contract. Reference is made to (1) The title of FAR part 15, “Contracting by Negotiation,” and (2) the instructions at FAR 15.209, particularly paragraph (a) of that section: “When contracting by negotiation * * * the contracting officer shall insert the provision at 52.215-1, Instructions to Offerors—Competitive Acquisition, in all competitive solicitations where the Government intends to award a contract without discussions.”

Comment: According to the respondent, it “would make more sense if this proposed rule banned provision of Government property under firm-fixed-price contracts, thereby upholding the integrity of the contact type and being more consistent with FAR * * * 45.102(a) & (b).”

Response: The respondent proposed prohibiting the use of Government-furnished property on all firm-fixed-price contracts, which is outside the scope of this rule. The proposed rule did not address the provision of, or need for, Government-furnished property, but rather whether responsibility and liability for loss of, or damage to, Government property should be treated differently depending on whether a negotiated fixed-price contract was awarded with, or without, submission of certified cost or pricing data. Regardless of contract type, contracting officers are still required to consider the risk of loss or damage prior to providing Government-furnished property (see PGI 245.103-70).

E. The Proposed Rule Would Shift Risk to the Government

Comment: The respondent stated that the proposed rule shifted risk away from the contractor and onto the Government by requiring that DoD competitive fixed-price contracts bearing Government property would be required to convey Limited Risk of Loss, thereby shifting this risk to the Government.

Response: The intent of this rule is to standardize the treatment of negotiated fixed-price contracts, whether or not certified cost or pricing data was required. The contract type used can never completely eliminate the Government’s inherent risk of providing property to contractors. Contracting officers are still required to consider

risks prior to providing Government-furnished property.

The Government retains the option of revoking its assumption of risk under FAR 45.105(b)(1). DoD’s policy, consistent with FAR 45.104 (see PGI 245.103-70), is to provide Government property only after determining that (1) It is in the Government’s best interest and (2) providing the property does not substantially increase the Government’s risk.

F. The Change Would Increase the Government’s Administrative Burden

Comment: The respondent stated that the proposed rule would increase administrative burden rather than minimize it, as conceptualized in FAR 16.202-1, Description (of fixed-price contracts). Further, according to the respondent, the proposed rule is outside of, and therefore inconsistent with, the intent of a firm-fixed price contract instrument.

Response: The intent of this rule is to standardize policy treatment for negotiated FAR part 15 fixed-price contracts. This change decreases the administrative burden associated with the current non-standard treatment of negotiated fixed-price contracts.

G. Insurance Is an Unallowable Cost

Comment: The respondent stated that the cost of insurance is an unallowable cost unless otherwise agreed to in the contract, and, by the very nature of a fixed-price contract, this fact would minimize, if not negate, insurance costs passed on to the Government.

Response: Paragraph (d) of the cost principle at FAR 31.205-19, Insurance and indemnification, states that purchased insurance costs are allowable, subject to certain limitations.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address the inclusion of negotiated fixed-price contracts awarded on the basis of adequate competition to the list of contract types in which contractors are not held liable for loss, damage, destruction, or theft of Government property. The Government generally self-insures against contractor loss, damage, destruction, or theft of Government-furnished property acquired or provided under Government contracts (“assumption of risk”). The current exception to this policy (see FAR 45.104) is for negotiated fixed-price contracts awarded based on adequate competition, i.e., without submission of certified cost or pricing data. For negotiated fixed-price competitive contracts, the contractor, in the past, has been held liable for loss (except for reasonable fair wear and tear). This policy was invoked by use of the clause at FAR 52.245-1, Government Property, with its Alternate I. Government Accountability Office (GAO) decisions (see GAO-04-261SP, Principles of Appropriations Law, Volume I, section 10a, “The Self-Insurance Rule”) support the basic premise that the Government should self-insure Government-furnished property. Any impact to small entities is expected to be beneficial in the form of lower insurance costs and higher deductibles.

No public comments were received in response to the publication of the initial regulatory flexibility analysis. No comments were received from the Chief Counsel for Advocacy of the Small Business Administration in response to the rule. There are no reporting, recordkeeping, or other compliance requirements associated with this rule. This rule will align DoD policy on assumption of risk with the GAO policy. There are no known alternatives to this final rule. The rule will not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 245

Government procurement.

Ynette R. Shelkin,*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 245 is amended as follows:

PART 245—GOVERNMENT PROPERTY

■ 1. The authority citation for 48 CFR part 245 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Add section 245.104 to read as follows:

245.104 Responsibility and liability for Government property.

In addition to the contract types listed at FAR 45.104, contractors are not held liable for loss of Government property under negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data.

■ 3. Amend section 245.107 by redesignating paragraphs (a) through (e) as paragraphs (1) through (5) and adding paragraph (6) to read as follows:

245.107 Contract clauses.

* * * * *

(6) For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at FAR 52.245-1, Government Property, without its Alternate I.

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DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 203 and 252**

RIN 0750-AG99

Defense Federal Acquisition Regulation Supplement: Representation Relating to Compensation of Former DoD Officials (DFARS Case 2010-D020)

AGENCIES: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is amending the DFARS to require offerors to represent whether former DoD officials who are employees of the offeror are in compliance with post-employment restrictions.

DATES: *Effective Date:* November 18, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, 703-602-1302.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule at 76 FR 32846 on June 6, 2011, that proposed adding a requirement for offerors submitting proposals to DoD to represent whether former DoD officials employed by the offeror are in compliance with post-employment restrictions. Four respondents submitted public comments on the proposed rule.

A. Post-Employment Statutory Restrictions and Regulatory Implementation

The principal statutory restrictions concerning post-Government employment for DoD officials after leaving Government employment are at 18 U.S.C. 207 and 41 U.S.C. 2104 (formerly 41 U.S.C. 423) and 5 CFR parts 2637 and 2641.

1. FAR 3.104 implements 41 U.S.C. 2104 and 18 U.S.C. 207.

2. DFARS 203.104 implements the Procurement Integrity Act for DoD.

3. DFARS 203.171-3 implements section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008.

B. General Accountability Office (GAO) Study GAO-08-485

The Congress included a provision in the NDAA for FY 2007 (section 851 of Pub. L. 109-364) requiring the GAO to report on recent employment of former DoD officials by major defense contractors. In May 2008, the GAO issued its report, entitled "Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency" (GAO-08-485). The GAO found that contractors significantly under-reported the employment of former DoD officials and concluded that defense contractors may employ a substantial number of former DoD officials on assignments related to their former positions. GAO further concluded that greater transparency is needed by DoD with respect to former senior and acquisition executives to ensure compliance with applicable post-employment restrictions. The GAO recommended that DoD ask potential offerors to certify that the former DoD officials employed by the offeror are in compliance with post-employment restrictions when contracts are being awarded and that contracting officers consider continuing certifications throughout the performance of the contract.

C. DFARS Rule

This DFARS rule implements the recommendation of the GAO by adding a new representation for offerors to complete and provide as part of each proposal, including proposals for commercial items. DoD elected to employ a representation rather than a certification and have the representation submitted by offerors as part of the proposal process. The representation will be required only one time rather than continuously throughout contract performance. The provision will not be included in the annual representations and certifications.

The solicitation provision at DFARS 252.203-7005, entitled "Representation Relating to Compensation of Former DoD Officials," is a representation that all of the offeror's employees who are former DoD officials are in compliance with the post-employment restrictions at 18 U.S.C. 207, 41 U.S.C. 2101-2107, and 5 CFR parts 2637 and 2641, as well as FAR 3.104-2.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments received in response to the proposed rule in the formation of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments follows.

A. Contractor Compliance Responsibility

Comment: Two respondents noted that compliance with ethics rules is the responsibility of the covered officials, not the contractor employing them. According to the respondents, although contractors instruct and train employees to observe all post-government employment restrictions, contractors have no official compliance responsibility regarding employees' post-government employment restrictions.

Response: FAR subpart 3.10, entitled "Contractor Code of Business Ethics and Conduct," requires, among other things, that contractors exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Contractors must also timely disclose to the Government any credible evidence of a violation of criminal law, which would include, for example, a violation of 18 U.S.C. 207 (post-Government employment restrictions). Accordingly, contractors, as employers of covered officials, have an affirmative compliance responsibility regarding employees'