

With regard to equal opportunity for individuals with disabilities, DOL estimated that its rule impacts 20,490 Federal contractors with between 50 and 500 employees (approximately 44% of Federal contractors may be impacted).

This FAR rule does not add any new reporting, recordkeeping, or other compliance burdens. The FAR rule makes contracting officers and contractors aware of the DOL requirements.

DoD, GSA, and NASA are not aware of any significant alternatives which would accomplish the stated objectives of implementing the DOL final rules, while minimizing impact on small entities. DoD, GSA, and NASA do not have the flexibility of changing the DOL rules, which have been published for public comment and are in effect as final rules. There is no significant impact on small entities imposed by the FAR rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved for the DOL regulations under OMB Control Numbers 1250-0004, OFCCP Recordkeeping and Reporting Requirements—38 U.S.C. 4212, Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; 1250-0005, OFCCP Recordkeeping and Reporting Requirements—Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 703; and 1293-0005, Federal Contractor Veterans' Employment Report, VETS-100/VETS-100A.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: April 30, 2015.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 1, 22, and 52, which was published in the **Federal Register** at 79 FR 43575 on July 25, 2014, is adopted as a final rule without change.

[FR Doc. 2015-11028 Filed 5-6-15; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005-82; FAR Case 2013-012; Item II; Docket No. 2013-0012; Sequence No. 1]

RIN 9000-AM57

Federal Acquisition Regulation; Review and Justification of Pass-Through Contracts

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. This section provides additional requirements relative to the review and justification of pass-through contracts.

DATES: *Effective:* June 8, 2015.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy J. Hopkins, Procurement Analyst, at 202-969-7226 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-82, FAR Case 2013-012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 79 FR 39361 on July 10, 2014 to implement section 802 of the NDAA for FY 2013 (Pub. L. 112-239) which provided for additional requirements relative to the review and justification of pass-through contracts. Specifically, in those instances where an offeror for a contract, task order, or delivery order informs the agency pursuant to FAR 52.215-22 of its intention to award subcontracts for more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, section 802 requires the contracting officer to (1) consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work; (2) make a written determination that the contracting approach selected is in the

best interest of the Government; and (3) document the basis for such determination. These statutory requirements are being implemented in FAR 15.404-1(h). For consistency, this rule is applicable to all of the agencies subject to the FAR, even though section 802 only applied to the Department of Defense, the Department of State, and the United States Agency for International Development. Contract actions under section 46 of the Small Business Act (15 U.S.C. 657s) are exempt from the requirements under section 802 of the NDAA for FY 2013.

Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes two changes from the proposed rule. The first change revises FAR 15.404-1(h)(2) to make clear that competition requirements still apply if the contracting officer selects alternative approaches. The second change revises FAR 15.404-1(h)(3) to clarify that the requirements of this rule do not apply to small business set-aside contracts.

B. Analysis of Public Comments

The Regulatory Secretariat Division received responses from two respondents to the proposed rule which are discussed below:

1. Application of Rule to FAR Part 36

Comment: One respondent requested that the final rule ensure that this new requirement take into consideration the requirements found in FAR 36.501, which addresses performance of work by prime construction contractors.

Response: The statute does not exempt the contracting officer from making a written determination that the contracting approach selected is in the best interest of the Government under FAR part 36 acquisitions. The contracting officer shall take into consideration industry practices in making this determination.

2. Conflict With FAR 52.219-14

Comment: One respondent stated that FAR clause 52.219-14, Limitations on Subcontracting, could also conflict with the new requirements of this rule.

Response: FAR clause 52.219–14, Limitations on Subcontracting, applies only to contracts that have been set aside for small business concerns or 8(a) concerns. Section 1615 of the NDAA for FY 2014 (Pub. L. 113–66) exempts contract actions subject to Section 46 of the Small Business Act (15 U.S.C. 657s). The text at FAR 15.404–1(h)(3) has been revised to clarify that contract actions awarded pursuant to FAR subparts 19.5, 19.8, 19.13, 19.14, or 19.15 are exempt from the requirements of this rule. Therefore, the requirements of this rule do not conflict with FAR clause 52.219–14.

3. Potential Increase in Bid Protests

Comment: One respondent stated that by requiring contracting officers to consider direct award to a subcontractor that will perform more than 70 percent of the work, those subcontractors could become interested parties for bid protest purposes. This could open the door to a substantial number of bid protests and significantly impact the ability of agencies to make timely awards.

Response: The statute requires that the contracting officer consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work, make a determination that the contracting approach selected is in the best interest of the Government, and document the basis for such determination. By following these requirements and adhering to the established solicitation procedures in the FAR, contracting officers will mitigate the risk of protests. This rule does not change existing competition requirements, nor does it change the status of subcontractors in the bid protest process.

4. Subcontractors Lacking Prime Contractor Experience

Comment: One respondent stated that direct award to subcontractors that do not have sufficient prime experience can severely impact procurements and result in a substantial increase in workload for both the contractor and the Government (*i.e.* additional audits and business system reviews).

Response: The statute requires that contracting officers consider direct award to subcontractors and the purpose of this rule is to amend the FAR to implement that requirement. However, it should be noted that both the statute and the rule only require that the contracting officer consider direct award. Contracting officers shall continue to ensure that purchases shall be made from, and contracts shall be

awarded to, responsible prospective contractors only, in accordance with FAR 9.103.

5. Subcontractors Contracting Directly With the Government

Comment: One respondent opined that prime contractors will try to avoid the impact of this rule by using contract provisions that prohibit subcontractors from entering into a direct contract with the agency. So, if this rule is going to work, a clause preventing primes from including a restrictive provision in a teaming arrangement and/or subcontract needs to be included in the rule.

Response: FAR clause 52.203–6 “Restrictions on Subcontractor Sales to the Government” precludes prime contractors from including such restrictions in their agreements with actual or prospective subcontractors. For acquisitions of commercial items, the prohibition applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial item(s).

6. Subcontractor Pricing and Participation in Negotiations

Comment: One respondent stated that in many cases, the prime contractors do not allow subcontractors to see the final version of the prime’s proposal sent in response to the Government’s RFP or allow subcontractors to participate in negotiations. As such, the subcontractor pricing that the Government sees in the prime contractor’s proposal or during negotiations may not be accurate. This issue can be resolved by revising the proposed clause in the rule to require the prime contractor to obtain the signed approval of the subcontractor’s portion of the final offer submitted to the Government and allowing subcontractors that will perform 70 percent or more work to participate in negotiations.

Response: FAR 15.404–3 already provides requirements for evaluating subcontractor pricing and obtaining certified cost or pricing data as required. Prime contractors are responsible for managing their subcontractors and appropriately evaluating subcontractor cost or pricing data in accordance with FAR subpart 15.4.

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 not a significant regulatory action and, therefore, was not 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

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 augments the current responsibilities of contracting officers relative to the review and justification of pass-through contracts and does not initiate or impose any new administrative or performance requirements on contractors. In addition, contract actions awarded pursuant to FAR subparts 19.5, 19.8, 19.13, 19.14, or 19.15 are exempt from the requirements of this rule.

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 Subject in 48 CFR Part 15

Government procurement.

Dated: April 30, 2015.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

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 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 15.404–1 by adding paragraph (h) to read as follows:

15.404–1 Proposal analysis techniques.

* * * * *

(h) *Review and justification of pass-through contracts.* (1) The requirements of this paragraph (h) are applicable to all agencies. The requirements apply by law to the Department of Defense, the Department of State, and the United States Agency for International Development, per section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013. The requirements apply as a matter of policy to other Federal agencies.

(2) Except as provided in paragraph (h)(3) of this section, when an offeror for a contract or a task or delivery order informs the contracting officer pursuant to 52.215-22 that it intends to award subcontracts for more than 70 percent of the total cost of work to be performed under the contract, task or delivery order, the contracting officer shall—

(i) Consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work. If such alternative approaches are selected, any resulting solicitations shall be issued in accordance with the competition requirements under FAR part 6;

(ii) Make a written determination that the contracting approach selected is in the best interest of the Government; and

(iii) Document the basis for such determination.

(3) Contract actions awarded pursuant to subparts 19.5, 19.8, 19.13, 19.14, or 19.15 are exempt from the requirements of this paragraph (h) (see section 1615 of the National Defense Authorization Act for Fiscal Year 2014 (Pub. L. 113-66)).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAC 2005-82; FAR Case 2014-010; Item III; Docket No. 2014-0010, Sequence No. 1]

RIN 9000-AM79

Federal Acquisition Regulation; Enhancements to Past Performance Evaluation Systems

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to accommodate the recent merger of the Architect-Engineer Contract Administration Support System (ACASS) and the Construction Contractor Appraisal Support System (CCASS) modules within the Contractor Performance Assessment Reporting System (CPARS) database.

DATES: *Effective:* June 8, 2015.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202-501-1448, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-82, FAR Case 2014-010.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 79 FR 54949 on September 15, 2014, to standardize the past performance reporting requirements under the CPARS database in FAR subpart 42.15. One respondent submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Changes

There are no changes made in the final rule as a result of the public comments.

B. Public Comments

1. Continue To Use ACASS

Comment: The respondent requests that ACASS continue to be utilized because the ratings are more descriptive and appropriate to the design professionals than those in CPARS.

Response: ACASS will not continue to be utilized since the ACASS module was merged into CPARS on July 1, 2014. Appendix 3 of the “Guidance for Contractor Performance Assessment Reporting System (CPARS),” dated July 2014, provides specific instructions on describing the different aspects of the quality of the contractor’s work and the contractor’s management of a quality control program in the narrative of a

CPARS evaluation for an Architect-Engineer contract or order. This guidance is accessible electronically at <https://www.cpars.gov/cparsfiles/pdfs/CPARS-Guidance.pdf>.

2. “Overall Rating” Added to CPARS

Comment: The respondent requests an “Overall Rating” be added to the CPARS rating system, similar to the ACASS system.

Response: An overall rating of contractor performance in CPARS is not advantageous, because the weight of the specific evaluation areas (quality, schedule, cost control, management, utilization of small business and regulatory compliance) is different for each contract being evaluated and each solicitation in which the offeror’s past performance is being evaluated.

3. Interim Evaluations

Comment: The respondent suggests that the interim evaluation in CPARS be superseded by the final evaluation.

Response: The final evaluation is the last rating provided to date on a contract. Interim evaluations, combined with the final evaluation (or last evaluation to date), remain available in order to provide the entire picture of contractor performance under the contract for future source selection purposes.

C. Other Changes

For clarity, the final rule adds a reference to the past performance thresholds at paragraphs (b) through (f) of section 42.1502.

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 not a significant regulatory action and, therefore, was not 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

DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the