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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005-65; FAR Case 2012-007; Item II;

Docket 2012-0007, Sequence 1]

RIN 9000-AM26

Federal Acquisition Regulation; Extension of Sunset

Date For Protests of Task and Delivery Orders

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 and the National Defense Authorization Act for Fiscal Year 2012. These statutes extend the sunset date for protests against the award of task or delivery orders from May 27, 2011 to September 30, 2016.

DATES: Effective Date: **[Insert date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Lague, Procurement Analyst, at 202-694-8149 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-65, FAR Case 2012-007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA originally published an interim rule in the Federal Register at 76 FR 39238 on July 5, 2011, entitled "Extension of Sunset Date for Protests of Task and Delivery Orders" (FAC 2005-53, FAR Case 2011-015). The rule implemented section 825 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111-383, enacted January 7, 2011). The rule extended the sunset date for protests of task and delivery orders valued in excess of \$10 million for Title 10 agencies, namely DoD, NASA and the Coast Guard. The rule did not extend the sunset date for Title 41 agencies as there was no comparable change to Title 41 at that time.

Subsequent to the publication of the interim rule under FAR Case 2011-015, section 813 of the NDAA for FY 2012 (Pub. L. 112-81, enacted December 31, 2011) made comparable changes to Title 41 to extend the sunset date for protests against the award of task and delivery orders from May 27, 2011 to September 30, 2016. In order to accomplish the

statutory changes for both Title 10 and Title 41, FAR Case 2011-015 was not issued as a final rule and was instead incorporated into an interim rule under FAR Case 2012-007.

DoD, GSA, and NASA published an interim rule in the Federal Register at 77 FR 44062 on July 26, 2012, entitled "Extension of Sunset Date for Protests of Task and Delivery Orders" (FAC 2005-60, FAR Case 2012-007). The rule implemented section 825 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111-383, enacted January 7, 2011) and section 813 of the NDAA for FY 2012 (Pub. L. 112-81, enacted December 31, 2011). The rule extended the sunset date for protests of task and delivery orders valued in excess of \$10 million from May 27, 2011, to September 30, 2016.

II. Discussion and Analysis

No public comments were received; therefore the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council are finalizing the interim rule without change.

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. The Office of Information and Regulatory Affairs (OIRA) has deemed that 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, and that this rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The changes may 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. The Final Regulatory Flexibility Analysis (FRFA) is summarized as follows.

This rule implements section 825 of the NDAA for FY 2011 and section 813 of the NDAA for FY 2012, which extended the sunset date for protests of task and delivery orders valued in excess of \$10 million from May 27, 2011, to September 30, 2016.

The authority to file protests against the award of task or delivery orders is relatively new, and there is little data available, as such protests may be filed with the agency or Government Accountability Office (GAO). GAO has exclusive jurisdiction of a protest of an order valued in excess of \$10 million. Data on agency-level protests are not compiled outside the agency concerned; therefore estimates are based on the total number of protests filed at the GAO in FYs 2009, 2010, and 2011.

Assuming that one-half of all protests are filed with the GAO and the other half are filed with the agency, then

the average number of protests filed per fiscal year would be 4,466 (see below):

Fiscal Year 2009 protests to GAO	2,000
Fiscal Year 2010 protests to GAO	2,300
Fiscal Year 2011 protests to GAO	2,400
	<hr/>
	6,700
Divided by	3
Average annual GAO protests	2,233
Multiplied by	<u>2</u>
Per Fiscal Year; Estimated	
total number of protests	4,466

Protests may be filed against the award of contracts as well as certain task or delivery orders. There are few prohibitions on the grounds for protests against the award of a contract. However, protests against the award of a task or delivery order are limited to (a) a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or (b) a protest of an order valued in excess of \$10 million. Therefore, it is reasonable to assume that less than 50 percent of the total number of protests filed is against the award of a task or delivery order. A generous estimate is approximately one-fourth, or 1,117. Likewise, only a percentage of the protests against the award of a task or delivery order are made by small businesses. Even if we assume that percentage to be one-half, then the number of protests filed by small businesses against the award of a task or delivery order is estimated to be 559.

# protests of task/delivery orders	
by small businesses	559
% of protests sustained	x <u>.03</u>
# of task/delivery orders protests sustained	17

The number 17 represents the number of small business task or delivery order protests sustained in a fiscal year. This number is representative of protests against awards by all Government agencies.

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 final 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 16

Government procurement.

Dated: January 23, 2013

LAURA AULETTA,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

INTERIM RULE ADOPTED AS FINAL WITHOUT CHANGE

Accordingly, the interim rule amending 48 CFR part 16, which was published in the Federal Register at 77 FR 44062 on July 26, 2012, (which incorporated an interim rule published in the Federal Register at 76 FR 39238 on July 5, 2011), is adopted as final without change.

[BILLING CODE 6820-EP]

[FR Doc. 2013-01747 Filed 01/28/2013 at 8:45 am; Publication Date: 01/29/2013]