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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31 and 52

[FAR Case 2012-025; Docket 2012-0025; Sequence 1]

RIN: 9000-AM39

**Federal Acquisition Regulation; Applicability of the Senior
Executive Compensation Benchmark**

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to continue the implementation of the requirements of section 803 of the National Defense Authorization Act for Fiscal Year 2012. The proposed rule seeks public comments on applying section 803 with respect to that provision's expansion with respect to contracts that had been awarded by DoD, NASA, and the Coast Guard before the date of enactment of section 803 (which was December 31, 2011) of the application of the senior executive compensation benchmark amount. Section 803 expands to a broader group of contractor employees the limitation on reimbursing compensation costs. As section 803 provides, this proposed rule would apply section 803 retroactively to contracts awarded before December 31, 2011,

with respect to the contractor compensation costs incurred after January 1, 2012. In addition, also as part of the implementation in the FAR of section 803, DoD, GSA and NASA are separately issuing an interim rule (FAR Case 2012-017) that addresses the prospective application of section 803 to contracts awarded on or after December 31, 2011.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2012-025 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-025." Select the link "Submit a Comment" that corresponds with "FAR Case 2012-025." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-025" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2012-025, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2012-025.

SUPPLEMENTARY INFORMATION:

I. Background

The National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81) was signed into law and effective on December 31, 2011. Section 803 of the law amended the standards for determining the individuals affected by the senior executive compensation benchmark amount. Specifically, section 803 expanded the applicability (reach) of the existing executive compensation cap, so that in the case of DoD, NASA, and Coast Guard contracts, the compensation cap would apply to all employees of a contractor (instead of just the "five most highly compensated" employees in management positions at each home office and each segment of the contractor). In section 803(c)(2), Congress stated that the expanded reach of the

compensation cap "shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act" (which was December 31, 2011). In addition, Congress in section 803(c)(1) stated that the amendments in section 803 shall be implemented in the FAR. In accordance with section 803(c)(1), DoD, GSA, and NASA are implementing section 803 in the FAR through the issuance of this proposed rule and a separate interim rule.

In this proposed rule, DoD, GSA, and NASA are proposing to amend FAR 31.205-6(p) to require that the compensation costs incurred after January 1, 2012, for all contractor employees on all DoD, NASA, and Coast Guard contracts awarded before December 31, 2011, be subject to the senior executive benchmark compensation amount. The reference to 31.205-6(p) in FAR 52.216-7 was updated in the interim rule to reflect the revision in 31.205-6(p). This proposed rule uses the interim rule as its baseline.

DoD will separately handle the implementation of authority provided by 10 U.S.C. 2324(e)(1)(P), as amended by section 803(a), in which Congress has authorized the Secretary of Defense to establish "one or more narrowly targeted exceptions for scientists and engineers upon a determination that such exceptions are needed to ensure that

the Department of Defense has continued access to needed skills and capabilities."

As noted above, section 803(c)(2) states that the amendments made by section 803 "shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act," which was December 31, 2011. There are challenges with respect to the retroactive application of section 803 (i.e., to the application of section 803 to contracts awarded before the enactment of section 803). The implementation of section 803 is similar to the implementation of section 808 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85, November 18, 1997) which imposed a cap on Government contractor's allowable costs of "senior executive" compensation. Section 808, like section 803, retroactively applied to contracts that already existed on the date of its enactment; both statutes contain text which applied the statute to contracts awarded before, on, or after the date of enactment of the underlying act. In litigation on the application of section 808 to contracts awarded before the date of the enactment of the statute, the courts held that section 808 breached contracts awarded before the statutory date of enactment (General Dynamics Corp. v. U.S., 47 Fed.

Cl. 514 (2000); and ATK Launch Systems, Inc., ASBCA 55395, 2009-1 BCA ¶ 34118 (2009)).

For these reasons, DoD, GSA, and NASA are implementing section 803 with both an interim rule and a proposed rule. The separate interim rule (FAR Case 2012-017) addresses the prospective application of section 803, i.e., to contracts awarded on or after its enactment (December 31, 2011). This proposed rule addresses the retroactive application of section 803 to contracts that had been awarded before its enactment. In other words, under this bifurcated approach, DoD, GSA, and NASA are implementing section 803 through the interim rule for contracts awarded on or after the date of enactment (December 31, 2011) and, at the same time, DoD, GSA, and NASA are addressing in this proposed rule the retroactive application of section 803. DoD, GSA, and NASA seek public comments on both the interim and proposed rules (and, on this proposed rule, especially with respect to the potential complexities associated with applying section 803 to contracts that had been awarded before the date of its enactment).

II. 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 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, and that this rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule 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. However, an initial regulatory flexibility analysis (IRFA) has been prepared consistent with 5 U.S.C. 603, and is summarized as follows:

An analysis of data in the Federal Procurement Data System (FPDS) revealed that most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principle contained in this rule. Furthermore, it is not expected that a substantial number of small entities will have any employees, other than possibly among the "five most highly compensated" management employees at each home office and each segment of the contractor, whose compensation costs exceed the executive compensation benchmark. The current benchmark amount is \$763,029, for costs incurred after January 1, 2011 (77 FR 24226, April 23, 2012). However, at this time an estimate of the number of small entities whose reimbursement for the compensation costs of their contractor employees will be limited by this rule is not available.

The proposed rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal

rules, and there are no known significant alternatives to the rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR case 2012-025) in correspondence.

IV. Paperwork Reduction Act

The proposed 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 Parts 31 and 52

Government procurement.

Dated: June 10, 2013

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 31 and 52 as set forth below:

1. The authority citation for 48 CFR parts 31 and 52 are revised to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20115.

PART 31-CONTRACT COST PRINCIPLES AND PROCEDURES

2. Amend section 31.205-6 by—

a. Removing from paragraph (p)(1)(i)(B), "December 31, 2011" and adding "December 31, 2011, for costs incurred until January 1, 2012" in its place; and

b. Revising paragraphs (p)(2)(i) and (ii).

The revisions read as follows:

31.205-6 Compensation for personal services.

* * * * *

(p) * * *

(2) * * *

(i) Applicability. This paragraph (p)(2) applies to DOD, NASA, and the Coast Guard for contracts awarded before, on or after December 31, 2011.

(ii) Costs incurred after January 1, 2012, for compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C. 1127 are unallowable (10 U.S.C. 2324(e)(1)(P)). This limitation applies whether or not the affected contracts were previously subject to a statutory limitation on such costs.

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