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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**

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 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: [Insert date 30 days after publication in the FEDERAL REGISTER].

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)).

[BILLING CODE 6820-EP]

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