15.403–1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

(c) * * *

(3) * * *

(iii) * * *

(B) For acquisitions funded by DoD, NASA, or the Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining cost or pricing data in 15.403–4 or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or the Coast Guard, such modifications of a commercial item are not exempt from the requirement for submission of cost or pricing data on the basis of the exemption provided for at FAR 15.403–1(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining cost or pricing data in 15.403–4 or 5 percent of the total price of the contract at the time of contract award.

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[FR Doc. 2010–5986 Filed 3–18–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 15 and 53

[FAC 2005–39; FAR Case 2008–040; Item III; Docket 2010–0081, Sequence 1]

RIN 9000–AL48

Federal Acquisition Regulation; FAR Case 2008–040, Use of Standard Form 26 - Award/Contract

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR parts 15 and 53 instructions for use of the Standard Form (SF) 26 to strengthen the prohibition against using block 18 of the form when awarding a negotiated procurement and emphasize that block 18 should only be checked when awarding a sealed bid contract. In addition, the final sentence of the current FAR 53.214 is being amended because the updated SF 26 was issued in April 2008, making the sentence unnecessary.

DATES: *Effective Date*: April 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208–4949. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR Case 2008–040.

SUPPLEMENTARY INFORMATION:

A. Background

This case was initiated to clarify an inconsistency in the use of the SF 26 by contracting officers. The SF 26 requires the contracting officer to complete block 17 for negotiated or sealed bid procurements or block 18 for sealed bid procurements, as applicable. Although block 18 of the form is intended for use only with sealed bid procurements, it is regularly (and improperly) being used with negotiated procurements. This has resulted in negotiated procurements being awarded unilaterally without proper documentation.

FAR 53.214(a) prescribes the SF 26 for use in contracting for supplies and services by sealed bidding (except for construction and architect-engineer services). The SF 26 is used to award sealed bid contracts after obtaining bids using a SF 33, Solicitation, Offer, and Award. FAR 14.408–1(d)(1) specifies that, if an offer made using a SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document using the SF 26.

This case is intended to address those instances where contracting officers have mistakenly checked block 18 to award negotiated, not sealed bid, contracts. This error can create the potential for disputes in those situations where the Government's intent was not to accept the terms of the offer in its entirety, as the current wording of block 18 may imply.

The Councils believe that revisions to instructions for use of the form, at FAR subparts 15.5 and 53.2, along with improved training and emphasis on the proper use of the SF 26, will eliminate the issue. Thus, FAR 15.509 is being revised to add "Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used." FAR 53.214(a) is revised by deleting the no-longer-necessary phrase "Pending issuance of a new edition of the form, the reference in 'block 1' should be amended to read '15 CFR 700'" and adding "Block 18 may only be used for sealed-bid procurements." In addition, a sentence is added at FAR 53.215–1(a) to read "Block 18 may not be used for negotiated procurements." This change does not prohibit the use of the SF 26 for awarding negotiated procurements, it only prohibits the use of block 18 of the SF 26 when awarding negotiated procurements. The Councils have opened a separate FAR case to address the actual changes to the SF 26 form. FAR Case 2009–029 is a proposed rule on which the public will have the opportunity to comment.

Decision to Issue a Final Rule

This case does not change the current uses of the SF 26. It merely clarifies the existing instructions for use of the form. Therefore, because there is no change in policy or procedure, the Councils determined to issue a final rule without public comment.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98–577, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–39, FAR Case 2008–040) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 15 and 53

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 15 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 15 and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 15—CONTRACTING BY NEGOTIATION

15.509 [Amended]

■ 2. Amend section 15.509 by removing from the first sentence "appropriate." and adding "appropriate. Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used." in its place.

PART 53—FORMS

53.214 [Amended]

■ 3. Amend section 53.214 by removing from the second sentence in paragraph (a) the phrase "Pending issuance of a new edition of the form, the reference in "block 1" should be amended to read "15 CFR 700."" and adding "Block 18 may only be used for sealed-bid procurements." in its place.

53.215–1 [Amended]

■ 4. Amend section 53.215–1 by removing from paragraph (a) "15.509." and adding "15.509. Block 18 may not be used for negotiated procurements." in its place.

[FR Doc. 2010–5987 Filed 3–18–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–39; FAR Case 2008–006; Item IV; Docket 2008–0001, Sequence 25]

RIN 9000–AL05

Federal Acquisition Regulation; FAR Case 2008–006, Enhanced Competition for Task- and Delivery-Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final with changes the interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 843, Enhanced Competition for Task and Delivery Order Contracts, of the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (FY08) (Pub. L. 110–181). Section 843 of the FY08 NDAA stipulates several requirements regarding enhancing competition within Federal contracting.

DATES: *Effective Date*: April 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. William Clark, Procurement Analyst, at (202) 219–1813. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2008–006.

SUPPLEMENTARY INFORMATION:

A. Background

Section 843, Enhanced Competition for Task and Delivery Order Contracts, of the FY08 NDAA includes several requirements regarding enhancing competition within the Federal contracting framework. The provisions of section 843 include:

(1) Limitation on single-award task- and delivery-order contracts greater than $100 million;

(2) Enhanced competition for task and delivery orders in excess of $5 million; and

(3) Restriction on protests in connection with issuance or proposed issuance of a task- or delivery-order except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of $10 million.

The interim rule was published in the **Federal Register** at 73 FR 54008 on September 17, 2008. The majority of the amendments to the FAR were made at publication of the interim rule. The Councils believe that, as a result of the interim rule, contracting offices will need more time to: carefully consider single versus multiple awards for task- or delivery-order contracts valued in excess of $100 million; perform debriefings for orders over $5 million; and respond to and defend against additional protests for orders over $10 million. The public comments received resulted in several changes to the interim rule.

Requirements contracts. The Councils amended the language at FAR 16.503(a) to clarify that a requirements contract is awarded to one contractor. This change is made to dispel the implication at FAR 16.503(b)(2) that a requirements contract may be awarded to multiple sources.

IDIQ contracts. The Councils also added language at FAR 16.504(c)(1)(ii)(D)(*3*)(*i*) to read that the requirement for a determination for a single-award IDIQ contract greater than $100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single-award task- or delivery-order contract greater than $100 million is required in addition to the justification and approval (J&A) required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition. The language in the interim rule appears to suggest that a J&A pursuant to FAR subpart 6.3 is required whenever you have a single award greater than $100 million, which is not true when the procurement provides for full and open competition. This change is not considered significant but merely a clarification of the interim rule.

Architect-engineer contracts. Lastly, the Councils added language at FAR 16.504(c)(1)(ii)(D)(*3*)(*ii*) to clarify that the agency-head determination does not apply to architect-engineer task- or delivery-order contracts awarded pursuant to FAR subpart 36.6.

Eight respondents submitted comments on the interim rule. The comments are summarized below, with the corresponding responses.

Comment 1. "Architect-Engineer Services Exception." FAR 16.500(d) states that the statutory multiple-award preference is not applicable to the procurement of architect-engineer (A-E) services when such services are procured in accordance with the procedures of FAR subpart 36.6. The FAR subpart 36.6 procedures will result in a single award to the most highly qualified firm and it seems moot to obtain the head of agency determination when procuring A-E services. The commenter requests revision of FAR 16.504(c)(1)(ii)(D)(*1*) to add procurement of an A-E contract pursuant to FAR subpart 36.3 as a fifth reason for an agency-head determination to award a single-award contract that exceeds $100 million.

Response: The Councils do not agree that a fifth reason should be added to FAR 16.504(c)(1)(ii)(D)(*1*), as the list of conditions is statutory. However, the Councils added language at FAR 16.504(c)(1)(ii)(D)(*3*)(*ii*) to clarify that