

**44.303 Extent of review.**

\* \* \* \* \*

(a) The results of market research accomplished;

\* \* \* \* \*

■ 5. Revise section 44.400 to read as follows:

**44.400 Scope of subpart.**

This subpart prescribes the policies limiting the contract clauses a contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with Section 8002(b)(2) of Public Law 103-355 and Section 826 of Public Law 110-181 (10 U.S.C. 2377(c)).

■ 6. Amend section 44.402 by redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively, and adding a new paragraph (b) to read as follows:

**44.402 Policy requirements.**

\* \* \* \* \*

(b) Under a contract that is over \$5 million for the procurement of items other than commercial items, and under which the contractor is acting as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold, the contractor shall, to the maximum extent practicable, conduct market research to determine—

(1) If commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(i) Meet the agency's requirements;

(ii) Could be modified to meet the agency's requirements; or

(iii) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(2) The extent to which commercial items or nondevelopmental items could be incorporated at the component level.

\* \* \* \* \*

■ 7. Revise section 44.403 to read as follows:

**44.403 Contract clause.**

(a) The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

(b) The contracting officer shall use the clause with its Alternate I when the acquisition value is in excess of \$5 million.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 8. Amend section 52.244-6 by revising the introductory text and adding Alternate I to read as follows:

**52.244-6 Subcontracts for Commercial Items.**

As prescribed in 44.403(a), insert the following clause:

\* \* \* \* \*

*Alternate I (JUN 2010).* As prescribed in 44.403(b), the Contracting Officer shall substitute the following paragraph (d) for paragraph (d) of the base clause, and add the following paragraph (e):

(d) The Contractor shall include the terms of this clause, including this paragraph (d), but not including paragraph (e), in subcontracts awarded under this contract.

(e) To the maximum extent practicable, when the Contractor acts as a purchasing agent for the Government with respect to a purchase that exceeds the simplified acquisition threshold, the Contractor shall conduct market research (10 U.S.C. 2377(c)) to—

(i) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(ii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level.

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**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 12, 13, 14, 15, and 52**

[FAC 2005-42; FAR Case 2009-011; Item VI; Docket 2009-0012, Sequence 1]

RIN 9000-AL20

**Federal Acquisition Regulation; FAR Case 2009-011, American Recovery and Reinvestment Act of 2009 (Recovery Act)—GAO/IG Access**

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 (the Councils) have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to sections 902, 1514, and 1515.

**DATES:** *Effective Date:* July 16, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-42, FAR Case 2009-011.

**SUPPLEMENTARY INFORMATION:****A. Background**

The Councils published an interim rule in the **Federal Register** at 74 FR 14646 on March 31, 2009, to implement the Recovery Act with respect to sections 902, 1514, and 1515. Technical amendments to the interim rule were published in the **Federal Register** at 74 FR 22810 on May 14, 2009. The interim rule added alternate clauses to FAR 52.214-26 "Audit and Records—Sealed Bidding", FAR 52.212-5 "Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items", and FAR 52.215-2 "Audit and Records—Negotiation".

Further, the interim rule amended FAR 12.504(a)(7) for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts which are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Comments were received from 5 respondents. The Councils considered the comments received and concluded that the interim rule, as revised by the technical amendments, should be converted to a final rule with minor changes to the clause prescriptions.

The comments received are addressed as follows:

**1. Scope of records that can be examined.**

*Comment:* A respondent states that the language in FAR 52.212-5(d)(i) and FAR 52.212-5(d)(ii) is unnecessarily broad by not limiting the scope of records that can be examined by the

Inspector General (IG) to only those records related or funded with Recovery Act funds. The respondent made the same comment with regard to the scope of the IG examination of records in FAR 52.214–26(c)(2) Alternate I and 52.215–2(d)(1) Alternate I. Likewise, a respondent expressed concern that the interim rule is not clear whether it applies only to task orders that are funded with Recovery Act funds.

*Response:* Section 902 of the Recovery Act provides that each contract awarded using funds made available by the Recovery Act shall provide the Comptroller General, and his representatives, with the access specified in the statutory provision. Section 1515 provides that each contract awarded using covered funds shall provide the appropriate IG with the access specified in the statutory provision. The Councils have revised the clause prescriptions to clarify that “contract,” as defined in FAR 2.101, may mean bilateral contract modification or an individual task or delivery order. In the case of a bilateral modification that will use funds appropriated or otherwise made available by the Recovery Act, the contracting officer shall specify the applicability of the Recovery Act to that modification. In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or otherwise made available by the Recovery Act, the contracting officer will specify the task or delivery orders to which the Recovery Act applies.

## 2. Advance notice.

*Comment:* A respondent states that they believe an IG must provide reasonable advance notice to contractors and their employees before a review of contractor transactions to include when and where the review and interviews will occur; the topics to be covered; the employees affected; and the total amount of time required to conduct the review.

*Response:* The Councils disagree. The purpose of this rule is to put contractors on notice that they may need to make their records and employees available in the event a review is requested. The FAR is an acquisition regulation and the exact review procedures that the Comptroller General or his authorized representatives use to execute such procedures are not required to be detailed in the FAR.

## 3. Rights of contractor employees.

*Comment:* A respondent is concerned that the rule is silent on the protection of the rights of employees subject to an interview. The respondent recommends

clearly outlining the rights of contractor employees to include prescribing the right to have counsel present during the interviews and clearly spelling out the process that the Government Accountability Office (GAO)/IG will use in both notifying employees of the intent to interview and the process to be followed.

*Response:* The Councils disagree. The FAR does not prescribe GAO processes or grant legal rights to contractors regarding GAO/IG interview processes.

## 4. IG authority to interview subcontractor employees.

*Comment:* A respondent commented that while they generally support the rule, they feel that the rule failed to include an IG authority to interview subcontractor employees.

*Response:* The Councils disagree. The FAR rule follows the statute. The Councils do not find evidence that there was an inadvertent omission in the statute with reference to allowing an IG to interview subcontractor employees.

## 5. Technical amendments.

*Comment:* A respondent believes that there are overlapping changes between this case and the Whistleblower case, FAR 2009–012, with respect to FAR clause 52.212–5, Alternate II. This same comment was made by a second respondent recommending the inclusion of the Whistleblower case in FAR clause 52.212–5, Alternate II.

*Response:* The Councils agree. FAC 2005–032, Technical Amendments, reconciled this issue by adding the Whistleblower reference to Alternate II of FAR 52.212–5.

## 6. Outside scope of this case.

*a. Comment:* A respondent commented that the application of reporting requirements is overly broad and recommends exempting contracts at or below the simplified acquisition threshold, commercial item contracts, and Commercially available off-the-shelf (COTS) contracts from the reporting requirements.

*Response:* Reporting requirements are covered under FAR Case 2009–009.

*b. Comment:* A respondent commented that FAR 12.504(a)(7) incorrectly states that 41 U.S.C. 254(c) and 10 U.S.C. 2313(c) are required “when a subcontractor is not required to provide cost or pricing data”.

*Response:* This comment does not address a change made by this rule. The comment may be taken under consideration for appropriateness as a future case.

*c. Comment:* A respondent notes that if FAR 52.203–15 is intended to be

flowed down to commercial item subcontractors, then it should also be included in the list of clauses under FAR 52.244–6.

*Response:* This comment is not directed at changes made under this rule and does not require a change to FAR Case 2009–011.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6(b) 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. Applicability to Commercial Item contracts

Section 8003 of Pub. L. 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given sections 902 and 1515 of the Recovery Act, which requires Comptroller General and agency inspector general access to contractor and subcontractor records, the FAR Council has determined that the rule should apply to commercial items, as defined at FAR 2.101, both at the prime and subcontract levels.

## C. Applicability to commercially available off-the-shelf (COTS) item contracts

Section 4203 of Pub. L. 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. The Clinger-Cohen Act provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given sections 902 and 1515 of the Recovery Act, which requires Comptroller General and agency IG access to contractor and subcontractor records, the Administrator for Federal Procurement Policy, has determined that the rule

should apply to COTS item contracts, as defined at FAR 2.101.

#### D. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Pub. L. 103-355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FARC) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will not apply to them. Therefore, given sections 902 and 1515 of the Recovery Act, which requires Comptroller General and agency IG access to contractor and subcontractor records, the FARC has determined that this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at FAR 2.101.

#### E. 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 it merely requires contractors to make available existing records of transactions covered by the Recovery Act. Contractors are not obligated to create additional records.

#### F. 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 OMB under 44 U.S.C. chapter 35, *et seq.*

#### List of Subjects in 48 CFR Parts 12, 13, 14, 15, and 52

Government procurement.

Dated: June 2, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 14646 on March 31, 2009, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 12, 13, 14, 15, and 52 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 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 12.301 by revising paragraph (b)(4)(ii) to read as follows:

##### 12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(ii)(A) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), the contracting officer shall use the clause with its Alternate II.

(B)(1) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate II to that modification.

(2) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate II applies.

(C) The contracting officer may not use Alternate I when Alternate II applies.

\* \* \* \* \*

#### PART 14—SEALED BIDDING

■ 3. Amend section 14.201-7 by revising paragraph (a)(2) to read as follows:

##### 14.201-7 Contract clauses.

(a) \* \* \*

(2)(i) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts.

(ii)(A) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate I to that modification.

(B) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or

otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate I applies.

\* \* \* \* \*

#### PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.209 by revising paragraph (b)(2) to read as follows:

##### 15.209 Solicitation provisions and contract clauses.

\* \* \* \* \*

(b) \* \* \*

(2)(i) When using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5)—

(A) The exceptions in paragraphs (b)(1)(i) through (b)(1)(iii) are not applicable; and

(B) Use the clause with its Alternate I.

(ii)(A) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate I to that modification.

(B) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate I applies.

\* \* \* \* \*

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

##### 52.214-26 [Amended]

■ 5. Amend section 52.214-26 in the introductory text by removing “14.201-7(a)” and adding “14.201-7(a)(1)” in its place; and removing from Alternate I introductory text “14.201-7(a)(2)” and adding “14.201-7(a)(2),” in its place. [FR Doc. 2010-14170 Filed 6-15-10; 8:45 am]

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