

48 CFR Part 12**[FAC 90-43; FAR Case 96-310; Item IV]****RIN 9000-AH01****Federal Acquisition Regulation; Inapplicability of Cost Accounting Standards to Contracts and Subcontracts for Commercial Items**

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 have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to implement Section 4205 of the Clinger-Cohen Act of 1996 (Public Law 104-106) (formerly the Federal Acquisition Reform Act (FARA)). Section 4205 amends Section 26(f) of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 422(f)) by noting the current applicability of Cost Accounting Standards (CAS) to contracts and subcontracts for commercial items. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-43, FAR case 96-310.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule amends FAR Part 12 to implement Section 4205 of the Clinger-Cohen Act of 1996 (Public Law 104-106). Section 4205 amends Section 26(f) of the OFPP Act (41 U.S.C. 422(f)), making the application of CAS to commercial items "nonmandatory". Therefore, the new coverage at FAR 12.214 indicates that CAS generally will not apply to commercial items unless so indicated at 48 CFR 9903.201. A cross-reference to FAR 12.214 is added at 12.503(c) and 12.504(c), to further clarify the effect of Section 4205.

A proposed rule was published in the Federal Register on June 21, 1996 (61 FR 32312). Three sources submitted comments in response to the proposed rule. All comments were considered in the development of the final rule.

B. 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 contracts and subcontracts with small businesses are exempt from Cost Accounting Standards requirements.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 12

Government procurement.

Dated: December 11, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 12 is amended as set forth below:

PART 12—ACQUISITION OF COMMERCIAL ITEMS

1. The authority citation for 48 CFR Part 12 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 12.214 is added to read as follows:

12.214 Cost Accounting Standards.

Cost Accounting Standards (CAS) generally will not apply to commercial items. If CAS does apply pursuant to 48 CFR 9903.201 (FAR Appendix B), the contracting officer shall insert the appropriate provisions and clauses as prescribed in that section.

3. Section 12.503(c)(3) is revised to read as follows:

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

* * * * *

(c) * * *

(3) 41 U.S.C. 422, Cost Accounting Standards (48 CFR chapter 99) (see 12.214).

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4. Section 12.504(c)(3) is revised to read as follows:

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

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(c) * * *

(3) 41 U.S.C. 422, Cost Accounting Standards (48 CFR chapter 99) (see 12.214).

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48 CFR Parts 16 and 52**[FAC 90-43; FAR Case 93-024; Item V]****RIN 9000-AG74****Federal Acquisition Regulation; Allowable Cost and Payment Clause**

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 have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to clarify that reimbursement of subcontract costs under cost-type contracts generally will not be made to a large business contractor until the contractor has made payment to the subcontractor. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: February 18, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-43, FAR case 93-024.

SUPPLEMENTARY INFORMATION:**A. Background**

The Office of Federal Procurement Policy SWAT Team on Civilian Agency Contracting, in its report of December 3, 1992, entitled "Improving Contracting Practices and Management Controls on Cost-Type Federal Contracts", recommended several FAR revisions which were viewed to have Government-wide benefit. One area identified for clarification was the payment provisions in FAR clauses 52.216-7, Allowable Cost and Payment, and 52.232-7, Payments under Time-and-Materials and Labor-Hour

Contracts. The SWAT team concluded that these clauses did not clearly convey the Government's intent that payments to subcontractors by large business prime contractors were not billable to the Government until the contractor had actually paid the subcontractors.

This final rule amends FAR 52.216-7, Allowable Cost and Payment, and FAR 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, to clarify that payments to subcontractors by large business prime contractors are not billable until the contractors have actually paid the subcontractors. The rule exempts, however, contractors who are awarded construction contracts that include the clauses at FAR 52.216-7, Allowable Cost and Payment, and FAR 52.232-7, Prompt Payment for Construction Contracts. Alternate I of FAR 52.216-7 provides for reimbursement of construction prime contractors for subcontract costs prior to the subcontractors actually being paid, as long as the prime contractor has included a provision in its subcontracts that requires that the subcontractor be paid within seven days of the prime contractor's receipt of payment from the Government.

A proposed rule was published in the Federal Register on December 21, 1995 (60 FR 66472). Five sources submitted public comments. All comments were considered in developing the final rule.

B. 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 only applies to large business prime contractors under time-and-materials, labor-hour, and cost-reimbursement type contracts.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 16 and 52

Government procurement.

Dated: December 11, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 16 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 16 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 16—TYPES OF CONTRACTS

2. Section 16.307(a) is amended by redesignating the text as paragraph (a)(1) and adding paragraph (a)(2) to read as follows:

§ 16.307 Contract clauses.

(a)(1) * * *

(2) If the contract is a construction contract and contains the clause at 52.232-27, Prompt Payment for Construction Contracts, the contracting officer shall use the clause at 52.216-7 with its Alternate I.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.216-7 is amended by revising the clause date and paragraph (b)(1)(iii), and by adding Alternate I to read as follows:

52.216-7 Allowable Cost and Payment.

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ALLOWABLE COST AND PAYMENT (FEB 1997)

* * * * *

(b) * * *

(1) * * *

(iii) The amount of progress and other payments that have been paid by cash, check, or other form of payment to the Contractor's subcontractors under similar cost standards.

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(End of clause)

Alternate I (FEB 1997). As prescribed in 16.307(a)(2), substitute the following paragraph (b)(1)(iii) for paragraph (b)(1)(iii) of the basic clause:

(iii) The amount of progress and other payments to the Contractor's subcontractors that either have been paid, or that the Contractor is required to pay pursuant to the clause of this contract entitled "Prompt Payment for Construction Contracts." Payments shall be made by cash, check, or other form of payment to the Contractor's subcontractors under similar cost standards.

4. Section 52.232-7 is amended by revising the clause date and the second sentence of paragraph (b)(2) to read as follows:

§ 52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

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PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (FEB 1997)

* * * * *

(b) * * *

(2) * * * Reimbursable costs in connection with subcontracts shall be limited to the amounts paid to the subcontractor for items and services purchased directly for the contract only when cash, checks, or other form of payment has been made for such purchased items or services; however, this requirement shall not apply to a Contractor that is a small business concern.* * *

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48 CFR Parts 19 and 52

[FAC 90-43; FAR Case 93-308; Item VI]

RIN 9000-AG70

Federal Acquisition Regulation; Mentor Protégé Program

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

ACTION: Interim rule adopted as final with a change.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule continuing an interim rule which amended the FAR. The interim rule published as Item X of FAC 90-37 is finalized with minor clarifying revisions. This final rule permits a mentor firm under the DOD Pilot Mentor-Protégé Program to be granted credit toward subcontracting goals for certain costs incurred in providing developmental assistance to its Protégé firms and to award subcontracts on a noncompetitive basis to its Protégé firms. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: February 18, 1997.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-43, FAR case 93-308.

SUPPLEMENTARY INFORMATION:

A. Background

This rule implements Section 814(c) of Public Law 102-190, which amended