

Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-11, FAR case 98-302.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 805 of Public Law 105-261 clarifies that waivers of requirements for submittal of prime contractor cost or pricing data do not automatically waive requirements for subcontractors to submit cost or pricing data. Although this is consistent with the current requirements of FAR 15.403-1(c)(4), the final rule clarifies the requirement to provide rationale supporting any waiver of subcontractors.

Pursuant to the House of Representatives Conference Report (H.R. Conf. Rep. No. 736, 105th Cong., 2nd Sess. 1998) which addresses Section 805, the executive branch is working to clarify situations in which an exceptional circumstance waiver of requirements for submission of certified cost or pricing data may be granted. This will be the subject of an independent FAR case.

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.

##### B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAC 97-11, FAR case 98-302), in 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. 3501, *et seq.*

##### List of Subjects in 48 CFR Part 15

Government procurement.

Dated: February 25, 1999.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Therefore, 48 CFR Part 15 is amended 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. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 15.403-1 is amended by revising paragraph (c)(4) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(4) *Waivers.* The head of the contracting activity (HCA) may, without power of delegation, waive the requirement for submission of cost or pricing data in exceptional cases. The authorization for the waiver and the supporting rationale shall be in writing. The HCA may consider waiving the requirement if the price can be determined to be fair and reasonable without submission of cost or pricing data. For example, if cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated information, a waiver may be granted. If the HCA has waived the requirement for submission of cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to provide cost or pricing data. Consequently, award of any lower-tier subcontract expected to exceed the cost or pricing data threshold requires the submission of cost or pricing data unless—

(i) An exception otherwise applies to the subcontract; or

(ii) The waiver specifically includes the subcontract and the rationale supporting the waiver for that subcontract.

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#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

##### 48 CFR Parts 22 and 52

[FAC 97-11; FAR Case 94-610; Item VI]

RIN 9000-AH62

##### Federal Acquisition Regulation; Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts

**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 amending the Federal Acquisition Regulation (FAR) to implement Executive Order 12933, Nondisplacement of Qualified Workers under Certain Contracts, signed by the President on October 20, 1994 (59 FR 53559, October 24, 1994). The Executive Order requires that workers on certain building service contracts be given the right of first refusal for employment with the successor contractor, if the workers would otherwise lose their jobs as a result of the termination of the contract.

An interim rule for this FAR case was published in the **Federal Register** at 62 FR 44823, August 22, 1997, as Item XII of Federal Acquisition Circular 97-01. This final rule amends the definition of "building service contract" in FAR 22.1202, and provides guidance regarding the quality of work performed on predecessor contracts and disputes resolution in the clause at 52.222-50.

**EFFECTIVE DATE:** May 3, 1999.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAC 97-11, FAR case 94-610.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Executive Order 12933 was signed October 20, 1994, by President Clinton and published in the **Federal Register** on October 24, 1994 (59 FR 53559). To obtain public input and assist in the

development of implementing regulations, the Department of Labor (DoL) invited comment through a notice of proposed rulemaking in the **Federal Register** on July 18, 1995 (60 FR 36756). The final DoL rule was published in the **Federal Register** on May 22, 1997 (62 FR 28175). An interim rule for this FAR case was published in the **Federal Register** at 62 FR 44823, August 22, 1997, as Item XII of Federal Acquisition Circular 97-01. This final rule makes further changes to FAR part 22, and the clause at 52.222-50, that are the result of resolution of public comments received in response to publication of the interim rule in the **Federal Register**.

The definition of "building service contract" at FAR 22.1202 is amended by deleting concessions other than food services or laundry services from the definition. The clause at FAR 52.222-50, Nondisplacement of Qualified Workers, is amended by inserting a cross-reference to performance standards in 29 CFR 9.8, and inserting the concept of presumption of satisfactory performance by employees on predecessor contracts.

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.

## 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 and the Executive order mandate a practice that is already followed in most cases. This rule implements the requirements of the Executive order, as implemented by the DoL in its final rule of May 22, 1997 (62 FR 28175). The DoL certified that its final rule will not have a significant economic impact on a substantial number of small entities. In those cases where the practice was not followed before the Executive order, the impact would be a result of the Executive order and the DoL regulation; it would not be a result of the FAR implementation.

## C. Paperwork Reduction Act

This final rule will not impose any additional paperwork burdens beyond the information collection and recordkeeping requirements required under sections 9.6(c), 9.9(b), and 9.11 of the Department of Labor Regulations, 29 CFR part 9, and approved under DoL

Office of Management and Budget Control 1215-0190.

## List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: February 25, 1999.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Therefore, 48 CFR Parts 22 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 22 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 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

### 22.1200 [Amended]

2. Section 22.1200 is amended by adding "(E.O.)" after "Order".

### 22.1201 [Amended]

3. Section 22.1201 is amended in the first sentence by removing "Federal"; and in the last sentence by removing "Executive Order" and adding "E.O.".

### 22.1202 [Amended]

4. Section 22.1202 is amended—

A. In the third sentence of the definition "Building service contract" by removing "Executive Order" and adding "E.O.";

B. At the end of paragraph (1) of the definition by adding "and" after the semicolon;

C. In paragraph (2) by removing "; or" and adding a period; and by removing paragraph (3);

D. In paragraph (2) introductory text of the definition "Public building" by removing the colon and adding "—".

### 22.1203-1 [Amended]

5. Section 22.1203-1 is amended in the first sentence of paragraph (b)(1) by revising "non-covered" to read "noncovered", and by revising "non-service" to read "nonservice".

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.222-50 is amended by revising the date of the clause; by revising paragraph (c); and by revising the second sentence of paragraph (j). The new text reads as follows:

### 52.222-50 Nondisplacement of Qualified Workers.

\* \* \* \* \*

Nondisplacement of Qualified Workers (May 1999)

\* \* \* \* \*

(c) Notwithstanding the Contractor's obligation under paragraph (b) of this clause, the Contractor—

(1) May employ on the contract any employee who has worked for the Contractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face layoff or discharge;

(2) Is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees; and

(3) Is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who the Contractor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job (see 29 CFR 9.8).

(4) Must presume, unless demonstrated otherwise, that all employees working on the predecessor contract in the last month of performance performed suitable work on the contract. Offers of employment are governed by the following:

(i) The offer shall state the time within which the employee must accept such offer, but in no case shall the period for acceptance be less than 10 days.

(ii) The offer may be made by separate written notice to each employee, or orally at a meeting attended by a group of the predecessor contractor's employees.

(iii) An offer need not be to a position similar to that which the employee previously held, but the employee must be qualified for the position.

(iv) An offer to a position providing lower pay or benefits than the employee held with the predecessor contractor will be considered *bona fide* if the Contractor shows valid business reasons.

(v) To ensure that an offer is effectively communicated, the Contractor should take reasonable efforts to make the offer in a language that each worker understands; for example, by having a coworker or other person fluent in the worker's language at the meeting to translate or otherwise assist an employee who is not fluent in English.

\* \* \* \* \*

(j) \* \* \* Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. \* \* \*

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