

FAR 46.407 to provide procedures for the conditional acceptance of supplies and services.

The Councils received public comments from two respondents and considered them in finalizing the rule.

This rule was not subject to Office of Management and Budget 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. 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 use of conditional acceptance is not widespread. No additional requirements are imposed on small businesses.

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 46

Government procurement.

Dated: September 14, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR Part 46 as set forth below:

PART 46—QUALITY ASSURANCE

1. The authority citation for 48 CFR Part 46 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. Amend section 46.101 by adding, in alphabetical order, the definition "Conditional acceptance" to read as follows:

46.101 Definitions.

* * * * *

Conditional acceptance, as used in this part, means acceptance of supplies or services that do not conform to contract quality requirements, or are otherwise incomplete, that the contractor is required to correct or otherwise complete by a specified date.

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3. Amend section 46.407 as follows:

a. Remove from paragraph (a) "Contracting officers" and insert "The contracting officer", in its place;

b. Remove from the first sentence of paragraph (b) "Contractors ordinarily shall be given" and from the second sentence "shall" and insert "The contracting officer ordinarily must give the contractor", and "must", respectively;

c. Revise paragraph (c)(1);

d. Remove from the first and second sentences of paragraph (c)(2) "shall" and insert "must," in their places;

e. Remove from paragraph (e) "Contracting officers shall" and insert "The contracting officer must";

f. Revise paragraph (f); and

g. Remove from the first and last sentences of the introductory text of paragraph (g) "shall" and insert "must," in their places;

Revised text read as follows:

46.407 Nonconforming supplies or services.

* * * * *

(c)(1) In situations not covered by paragraph (b) of this section, the contracting officer ordinarily must reject supplies or services when the nonconformance is critical or major or the supplies or services are otherwise incomplete. However, there may be circumstances (e.g., reasons of economy or urgency) when the contracting officer determines acceptance or conditional acceptance of supplies or services is in the best interest of the Government. The contracting officer must make this determination based upon—

(i) Advice of the technical activity that the item is safe to use and will perform its intended purpose;

(ii) Information regarding the nature and extent of the nonconformance or otherwise incomplete supplies or services;

(iii) A request from the contractor for acceptance of the nonconforming or otherwise incomplete supplies or services (if feasible);

(iv) A recommendation for acceptance, conditional acceptance, or rejection, with supporting rationale; and

(v) The contract adjustment considered appropriate, including any adjustment offered by the contractor.

* * * * *

(f) When supplies or services are accepted with critical or major nonconformances as authorized in paragraph (c) of this section, the contracting officer must modify the contract to provide for an equitable price reduction or other consideration. In the case of conditional acceptance, amounts withheld from payments generally should be at least sufficient to

cover the estimated cost and related profit to correct deficiencies and complete unfinished work. The contracting officer must document in the contract file the basis for the amounts withheld. For services, the contracting officer can consider identifying the value of the individual work requirements or tasks (subdivisions) that may be subject to price or fee reduction. This value may be used to determine an equitable adjustment for nonconforming services. However, when supplies or services involving minor nonconformances are accepted, the contract need not be modified unless it appears that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services will exceed the cost to the Government of processing the modification.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 48 and 52

[FAC 97-14; FAR Case 97-031; Item XIV]

RIN 9000-AH84

Federal Acquisition Regulation; Value Engineering Change Proposals/PAT

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 change the sharing periods and rates that contracting officers may establish for individual value engineering change proposals. **EFFECTIVE DATE:** November 23, 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 Ms. Linda Klein, Procurement Analyst, at (202) 501-3775. Please cite FAC 97-14, FAR case 97-031.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the value engineering change proposal (VECP) guidance in FAR Parts 48 and 52 to allow the contracting officer to increase the sharing period from 36 to a range of 36 to 60 months; increase the contractor's share of instant, concurrent and future savings under the incentive/voluntary sharing arrangement from 50 to a range of 50 to 75 percent; and increase the contractor's share of collateral savings from 20 to a range of 20 to 100 percent on a case-by-case basis for each VECP. The contracting officer's unilateral decision on each of these aspects is final. This revision is intended to incentivize contractors to submit more value engineering change proposals, by allowing contracting officers to unilaterally increase both the share percentage and the sharing period, so that contractors with meritorious proposals may be adequately compensated for the effort required to prepare and negotiate individual change proposals.

The Councils published a proposed rule in the **Federal Register** at 63 FR 43236, August 12, 1998. Nine respondents submitted comments on the proposed rule. The Councils considered all comments in the development of the final rule.

The Councils are addressing the changes concerning the Contract Disputes Act under FAR Case 98-017, Review of Award Fee Determinations (Burnside-Ott). The Councils published this case in the **Federal Register** at 64 FR 24472, May 6, 1999 as a proposed rule with a request for comments.

This rule was not subject to Office of Management and Budget 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. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* applies to this final rule. Interested parties may obtain a copy of the FRFA from the FAR Secretariat.

The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) and it is summarized as follows:

The objective of the rule is to change the sharing periods and rates that contracting officers may establish for individual VECPs. By allowing longer sharing periods and allowing increased contractor sharing rates for collateral and concurrent savings, more contractors may find it feasible to submit VECPs. The rule may increase the number of VECP settlements negotiated between the Government and private entities, as the additional flexibility in sharing periods and

contractor sharing rates it provides should incentivize contractors to submit more VECPs. The rule will apply to all entities, large and small, that propose VECPs under Government contracts.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

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 Parts 48 and 52

Government procurement.

Dated: September 14, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR Parts 48 and 52 as set forth below:

1. The authority citation for 48 CFR Parts 48 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 48—VALUE ENGINEERING

2. In section 48.001, revise paragraph (c) of the definition "Acquisition savings" and revise the definition "Sharing period" to read as follows:

48.001 Definitions.

Acquisition savings, * * *

(c) Future contract savings, which are the product of the future unit cost reduction multiplied by the number of future contract units in the sharing base. On an instant contract, future contract savings include savings on increases in quantities after VECP acceptance that are due to contract modifications, exercise of options, additional orders, and funding of subsequent year requirements on a multiyear contract.

* * * * *

Sharing period, as used in this part, means the period beginning with acceptance of the first unit incorporating the VECP and ending at a calendar date or event determined by the contracting officer for each VECP.

* * * * *

3. In section 48.102, revise paragraphs (g) and (h) to read as follows:

48.102 Policies.

* * * * *

(g) The contracting officer determines the sharing periods and sharing rates on

a case-by-case basis using the guidelines in 48.104-1 and 48.104-2, respectively. In establishing a sharing period and sharing rate, the contracting officer must consider the following, as appropriate, and must insert supporting rationale in the contract file:

- (1) Extent of the change.
- (2) Complexity of the change.
- (3) Development risk (e.g., contractor's financial risk).
- (4) Development cost.
- (5) Performance and/or reliability impact.
- (6) Production period remaining at the time of VECP acceptance.
- (7) Number of units affected.
- (h) Contracts for architect-engineer services must require a mandatory value engineering program to reduce total ownership cost in accordance with 48.101(b)(2). However, there must be no sharing of value engineering savings in contracts for architect-engineer services.

* * * * *

48.104-1 through 104-3 [Redesignated as 48.104-2 through 48.104-4]

4. Redesignate sections 48.104-1 through 48.104-3 as 48.104-2 through 48.104-4, respectively;

5. Add new section 48.104-1 to read as follows:

48.104-1 Determining sharing period.

(a) Contracting officers must determine discrete sharing periods for each VECP. If more than one VECP is incorporated into a contract, the sharing period for each VECP need not be identical.

(b) The sharing period begins with acceptance of the first unit incorporating the VECP. Except as provided in paragraph (c) of this section, the end of the sharing period is a specific calendar date that is the later of—

- (1) 36 to 60 consecutive months (set at the discretion of the contracting officer for each VECP) after the first unit affected by the VECP is accepted; or
- (2) The last scheduled delivery date of an item affected by the VECP under the instant contract delivery schedule in effect at the time the VECP is accepted.

(c) For engineering-development contracts and contracts containing low-rate-initial-production or early production units, the end of the sharing period is based not on a calendar date, but on acceptance of a specified quantity of future contract units. This quantity is the number of units affected by the VECP that are scheduled to be delivered over a period of between 36 and 60 consecutive months (set at the discretion of the contracting officer for each VECP) that spans the highest

planned production, based on planning and programming or production documentation at the time the VECP is accepted. The specified quantity begins with the first future contract unit affected by the VECP and continues over consecutive deliveries until the sharing period ends at acceptance of the last of the specified quantity of units.

(d) For contracts (other than those in paragraph (c) of this subsection) for items requiring a prolonged production schedule (e.g., ship construction, major system acquisition), the end of the

sharing period is determined according to paragraph (b) of this subsection. Agencies may prescribe sharing of future contract savings on all future contract units to be delivered under contracts awarded within the sharing period for essentially the same item, even if the scheduled delivery date is outside the sharing period.

6. In the newly designated section 48.104-2—

a. Remove from the first sentence of paragraph (a)(1) “normally”;

b. Revise the table in paragraph (a)(1);

c. Remove from the second sentence in paragraph (a)(2) “subparagraph (1) above” and insert “paragraph (a)(1) of this section”, in its place;

d. Remove from the first sentence of paragraph (a)(3) “(but see 48.102(g))”; and

e. Remove paragraph (c).

The revised text reads as follows:

48.104-2 Sharing acquisition savings.

(a) * * *

(1) * * *

GOVERNMENT/CONTRACTOR SHARES OF NET ACQUISITION SAVINGS

[Figures in percent]

Contract type	Sharing arrangement			
	Incentive (voluntary)		Program requirement (mandatory)	
	Instant contract rate	Concurrent and future contract rate	Instant contract rate	Concurrent and future contract rate
Fixed-price (includes fixed-price-award-fee; excludes other fixed-price incentive contracts)	¹ 50/50	¹ 50/50	75/25	75/25
Incentive (fixed-price or cost) (other than award fee)	(2)	¹ 50/50	(2)	75/25
Cost-reimbursement (includes cost-plus-award-fee; excludes other cost-type incentive contracts)	³ 75/25	³ 75/25	85/15	85/15

¹ The contracting officer may increase the contractor's sharing rate to as high as 75 percent for each VECP. (See 48.102(g) (1) through (7).)

² Same sharing arrangement as the contract's profit or fee adjustment formula.

³ The contracting officer may increase the contractor's sharing rate to as high as 50 percent for each VECP. (See 48.102(g) (1) through (7).)

* * * * *

7. Revise designated section 48.104-3 to read as follows:

§ 48.104-3 Sharing collateral savings.

(a) The Government shares collateral savings with the contractor, unless the head of the contracting activity has determined that the cost of calculating and tracking collateral savings will exceed the benefits to be derived (see 48.201(e)).

(b) The contractor's share of collateral savings may range from 20 to 100 percent of the estimated savings to be realized during a typical year of use but must not exceed the greater of—

(1) The contract's firm-fixed-price, target price, target cost, or estimated cost, at the time the VECP is accepted; or

(2) \$100,000.

(c) The contracting officer must determine the sharing rate for each VECP.

(d) In determining collateral savings, the contracting officer must consider any degradation of performance, service life, or capability.

8. In section 48.201, add paragraphs (g) and (h) to read as follows:

§ 48.201 Clauses for supply or service contracts.

* * * * *

(g) *Engineering-development solicitations and contracts.* For engineering-development solicitations and contracts, and solicitations and contracts containing low-rate-initial-production or early production units, the contracting officer must modify the clause at 52.248-1, Value Engineering, by—

(1) Revising paragraph (i)(3)(i) of the clause by substituting “a number equal to the quantity required to be delivered over a period of between 36 and 60 consecutive months (set at the discretion of the Contracting Officer for each VECP) that spans the highest planned production, based on planning and programming or production documentation at the time the VECP is accepted;” for “the number of future contract units scheduled for delivery during the sharing period;” and

(2) Revising the first sentence under paragraph (3) of the definition of “acquisition savings” by substituting “a number equal to the quantity to be delivered over a period of between 36 and 60 consecutive months (set at the discretion of the Contracting Officer for each VECP) that spans the highest planned production, based on planning and programming or production documentation at the time the VECP is

accepted.” for “the number of future contract units in the sharing base.”

(h) *Extended production period solicitations and contracts.* In solicitations and contracts for items requiring an extended period for production (e.g., ship construction, major system acquisition), if agency procedures prescribe sharing of future contract savings on all units to be delivered under contracts awarded during the sharing period (see 48.104-1(c)), the contracting officer must modify the clause at 52.248-1, Value Engineering, by revising paragraph (i)(3)(i) of the clause and the first sentence under paragraph (3) of the definition of “acquisition savings” by substituting “under contracts awarded during the sharing period” for “during the sharing period.”

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. In section 52.248-1, revise the introductory text, the date of the clause, in paragraph (b) paragraph (3) of the definition “Acquisition savings”, and the definition “Sharing period”, revise the table in (f); amend paragraph (i)(5) introductory text by removing “48.104-3” and adding “48.104-4”, and revise

the first sentence in paragraph (j). The revised text reads as follows:

52.248-1 Value Engineering.

As prescribed in 48.201, insert the following clause:

Value Engineering (Nov 1999)

* * * * *

(b) Definitions.

Acquisition savings, * * *

(3) Future contract savings, which are the product of the future unit cost reduction multiplied by the number of future contract units in the sharing base. On an instant contract, future contract savings include savings on increases in quantities after VECP acceptance that are due to contract modifications, exercise of options, additional orders, and funding of subsequent year requirements on a multiyear contract.

* * * * *

Sharing period, as used in this clause, means the period beginning with acceptance of the first unit incorporating the VECP and ending at a calendar date or event determined by the contracting officer for each VECP.

* * * * *

(f) * * *

CONTRACTOR'S SHARE OF NET ACQUISITION SAVINGS

[Figures in Percent]

Contract type	Sharing arrangement			
	Incentive (voluntary)		Program requirement (mandatory)	
	Instant contract rate	Con-current and future contract rate	Instant contract rate	Con-current and future contract rate
Fixed-price (includes fixed-price-award-fee; excludes other fixed-price incentive contracts)	1 50	1 50	25	25
Incentive (fixed-price or cost) (other than award fee)	(2)	1 50	(2)	25
Cost-reimbursement (includes cost-plus-award-fee; excludes other cost-type incentive contracts)	3 25	3 25	15	15

¹ The Contracting Officer may increase the Contractor's sharing rate to as high as 75 percent for each VECP.

² Same sharing arrangement as the contract's profit or fee adjustment formula.

³ The Contracting Officer may increase the Contractor's sharing rate to as high as 50 percent for each VECP.

* * * * *

(j) *Collateral savings*. If a VECP is accepted, the instant contract amount must be increased, as specified in paragraph (h)(5) of this clause, by a rate from 20 to 100 percent, as determined by the Contracting Officer, of any projected collateral savings determined to be realized in a typical year of use after subtracting any Government costs not previously offset. * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 97-14; FAR Case 98-003; Item XV]

RIN 9000-AI23

Federal Acquisition Regulation; Cost Accounting Standards Post-Award Notification

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 reduce the subcontractor information that the FAR requires a contractor to provide to its cognizant contract administration office (CAO) when requesting the CAO to perform administration for Cost Accounting Standards (CAS) matters.

EFFECTIVE DATE: November 23, 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 Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 97-14, FAR case 98-003.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule in the **Federal Register** on January 25, 1999 (64 FR 3786). The proposed rule revised the clause at FAR 52.230-6(e)(2) to reduce the subcontractor information that a contractor is required to provide to its cognizant contract administration office (CAO) when requesting the CAO to perform administration for CAS matters.

Two respondents submitted public comments to the proposed rule. The Councils considered all comments and

converted the proposed rule to a final rule without change.

This rule was not subject to Office of Management and Budget 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. 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 all CAS requirements in accordance with 48 CFR 9903.201-1(b)(3).

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule contains information collection requirements. Accordingly, the FAR Secretariat will forward a request for a revised paperwork burden under OMB Control Number 9000-0129 reflecting a slight decrease to the hours to the Office of Management and Budget under 44