



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(RESEARCH, DEVELOPMENT AND ACQUISITION)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

MAY 4 2007

MEMORANDUM FOR DISTRIBUTION

Subj: EXCESSIVE PASS-THROUGH CHARGES

Ref: (a) Section 852 of the John Warner National Defense
Authorization Act for Fiscal Year 2007
(Public Law 109-364)

Encl: (1) Federal Register Volume 72, No. 80 April 26, 2007

Enclosure (1) implements, as an interim rule, the requirement of reference (a) with regard to excessive pass-through charges on Department of Defense contracts. The effective date is April 26, 2007. The interim rule provides a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted in their proposals. When subcontract costs will exceed 70 percent of the total cost of work to be performed, the contractor shall provide information on indirect costs and profit and value added with regard to the subcontract work. The contractor must also describe the value added by the subcontractor as related to the work to be performed at all tiers. As a result of the information provided by the contractor, the Contracting Officer shall determine if excessive pass-through charges exist. The interim rule also discusses recovery of excessive pass-through charges.

Please give this information the widest dissemination to all acquisition professionals and ensure that the clauses are incorporated into solicitations and contracts, as appropriate. Questions may be addressed to my point of contact, Mr. Ronald G. Ostrom, who can be reached at (703) 693-4012, or by fax (703) 614-4713, or by email (ronald.ostrom@navy.mil).


M. F. Jaggard
Chief of Staff/Policy
for DASN(ALM)

Distribution:
(See next page)

Subj: IMPLEMENTATION OF INTERIM RULE ON EXCESSIVE
PASS-THROUGH CHARGES

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Acquisition System, and the disciplines in the Defense Acquisition Guidebook.

(d) Source selection processes shall be—

(1) Reviewed and approved by cognizant organizations responsible for oversight;

(2) Documented by the head of the contracting activity or at the agency level; and

(3) Periodically reviewed by outside officials independent of that office or agency.

(e) Legal review of documentation of major acquisition system source selection shall be conducted prior to contract award, including the supporting documentation of the source selection evaluation board, source selection advisory council, and source selection authority.

(f) Procurement management reviews shall determine whether clearance threshold authorities are clear and that independent review is provided for acquisitions exceeding the simplified acquisition threshold.

[FR Doc. E7-7911 Filed 4-25-07; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206 and 225

RIN 0750-AF62

Defense Federal Acquisition Regulation Supplement; Deletion of Obsolete Acquisition Procedures (DFARS Case 2006-D046)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove text relating to obsolete requirements for maintenance of paper-based solicitation mailing lists and for furnishing of documents to certain entities.

EFFECTIVE DATE: April 26, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0328; facsimile (703) 602-0350. Please cite DFARS Case 2006-D046.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends DFARS text as follows:

○ 206.303-1—Removes text designating the Director of Defense Procurement and Acquisition Policy as the agency point of contact for the submission of certain justification and approval documents to the U.S. Trade Representative. This text is no longer applicable, as the underlying Federal Acquisition Regulation (FAR) requirement for submission of these documents to the U.S. Trade Representative was removed by the interim rule that was published at 69 FR 77870 on December 28, 2004, and finalized at 71 FR 219 on January 3, 2006.

○ 225.870-2 and 225.872-3—Removes text addressing requirements for inclusion of Canadian firms and qualifying country sources on solicitation mailing lists, and for sending solicitations to the Canadian Commercial Corporation as well as Canadian firms appearing on the lists. This text is no longer applicable, as solicitation mailing lists have been replaced by electronic tools such as the Central Contractor Registration database and the Federal Business Opportunities Web site. The FAR was amended to remove references to solicitation mailing lists in the final rule published at 68 FR 43855 on July 24, 2003.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2006-D046.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any 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 206 and 225

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 206 and 225 are amended as follows:

■ 1. The authority citation for 48 CFR parts 206 and 225 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 206—COMPETITION REQUIREMENTS

206.303 and 206.303-1 [Removed]

■ 2. Sections 206.303 and 206.303-1 are removed.

PART 225—FOREIGN ACQUISITION

225.870-2 [Amended]

■ 3. Section 225.870-2 is amended as follows:

■ a. By removing paragraphs (a) through (c); and

■ b. By redesignating paragraphs (d) and (e) as paragraphs (a) and (b) respectively.

225.872-3 [Amended]

■ 4. Section 225.872-3 is amended as follows:

■ a. By removing paragraph (a); and

■ b. By redesignating paragraphs (b) through (g) as paragraphs (a) through (f) respectively.

[FR Doc. E7-7907 Filed 4-25-07; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 231, and 252

RIN 0750-AF67

Defense Federal Acquisition Regulation Supplement; Excessive Pass-Through Charges (DFARS Case 2006-D057)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 852 of the National Defense Authorization Act for Fiscal Year 2007. Section 852

ENCLOSURE(/)

requires DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor.

DATES: *Effective date:* April 26, 2007.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before June 25, 2007, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2006–D057, using any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: dfars@osd.mil. Include DFARS Case 2006–D057 in the subject line of the message.

- Fax: (703) 602–0350.

- Mail: Defense Acquisition Regulations System, Attn: Mr. John McPherson, OUSD(AT&L)DPAP(CPF), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

- Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. John McPherson, (703) 602–0296.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Section 852 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364). Section 852 requires DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. To enable DoD to ensure that pass-through charges are not excessive, this interim rule contains a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted and, when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit and value added with regard to the subcontract work.

This rule was not subject to Office of Management and Budget review under

Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to 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 DoD does not expect a significant number of entities to propose excessive pass-through charges under DoD contracts or subcontracts, and the information required from offerors and contractors regarding pass-through charges is minimal. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2006–D057.

C. Paperwork Reduction Act

This interim rule contains a new information collection requirement. The Office of Management and Budget (OMB) has approved the information collection requirement for use through October 31, 2007, under OMB Control Number 0704–0443, in accordance with the emergency processing procedures of 5 CFR 1320.13. DoD invites comments on the following aspects of the interim rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The following is a summary of the information collection requirement.

Title: Defense Federal Acquisition Regulation Supplement (DFARS); Excessive Pass-Through Charges.

Type of Request: New collection.

Number of Respondents: 12,650.

Responses per Respondent: Approximately 1.

Annual Responses: 12,800.

Average Burden per Response: .51 hour.

Annual Burden Hours: 6,550.

Needs and Uses: DoD needs this information to ensure that pass-through charges under DoD contracts and

subcontracts are not excessive, in accordance with Section 852 of Public Law 109–364. DoD contracting officers will use the information to assess the value added by a contractor or subcontractor in relation to proposed, billed, or claimed indirect costs or profit on work performed by a subcontractor.

Affected Public: Businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Written comments and recommendations on the proposed information collection should be sent to Ms. Hillary Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Mr. John McPherson, OUSD(AT&L)DPAP(CPF), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. John McPherson, OUSD(AT&L)DPAP(CPF), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 852 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364). Section 852 requires DoD to prescribe regulations, not later than May 1, 2007, to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 215, 231, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 215, 231, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 231, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Section 215.408 is amended by adding paragraph (3) to read as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) Use the provision at 252.215–7003, Excessive Pass-Through Charges—Identification of Subcontract Effort, and the clause at 252.215–7004, Excessive Pass-Through Charges, in all solicitations and contracts (including task or delivery orders) except for—

(i) Firm-fixed-price contracts awarded on the basis of adequate price competition;

(ii) Fixed-price contracts with economic price adjustment, awarded on the basis of adequate price competition;

(iii) Firm-fixed-price contracts for the acquisition of a commercial item; or

(iv) Fixed-price contracts with economic price adjustment, for the acquisition of a commercial item.

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Sections 231.201–2 and 231.203 are added to read as follows:

231.201–2 Determining allowability.

(a) In addition to the requirements at FAR 31.201–2(a), a cost is allowable only when it complies with the clause at 252.215–7004, Excessive Pass-Through Charges.

231.203 Indirect costs.

(d) Excessive pass-through charges, as defined in the clause at 252.215–7004, are unallowable.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Sections 252.215–7003 and 252.215–7004 are added to read as follows:

252.215–7003 Excessive pass-through charges—Identification of subcontract effort.

As prescribed in 215.408(3), use the following provision:

EXCESSIVE PASS-THROUGH CHARGES—IDENTIFICATION OF SUBCONTRACT EFFORT (APR 2007)

(a) *Definition.* Excessive pass-through charge, as used in this provision, is defined in the clause of this solicitation entitled “Excessive Pass-Through Charges” (DFARS 252.215–7004).

(b) *General.* The offeror’s proposal shall exclude excessive pass-through charges.

(c) *Performance of work by the Contractor or a subcontractor.* (1) The offeror shall identify in its proposal the percent of effort it intends to perform, and the percent expected to be performed by each subcontractor, under the contract, task order, or delivery order.

(2) If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal—

(i) The amount of the offeror’s indirect costs and profit applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the value added by the offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal—

(i) The amount of the subcontractor’s indirect costs and profit applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the value added by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(End of provision)

252.215–7004 Excessive pass-through charges.

As prescribed in 215.408(3), use the following clause:

EXCESSIVE PASS-THROUGH CHARGES (APR 2007)

(a) *Definitions.* As used in this clause—
Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit on work performed by a subcontractor (other than charges for the costs of managing subcontracts and applicable indirect costs and profit based on such costs).

No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added substantive value to the contract or subcontract in accomplishing the work performed under the contract.

(b) *General.* The Government will not pay excessive pass-through charges. The

Contracting Officer shall determine if excessive pass-through charges exist.

(c) *Performance of work by the Contractor or a subcontractor.* (1) If the Contractor changes the amount of subcontract effort identified in its proposal such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the Contractor shall provide the Contracting Officer with a description of the value added by the Contractor as related to the subcontract effort.

(2) If any subcontractor identified in the proposal changes the amount of lower-tier subcontractor effort such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract, the Contractor shall provide the Contracting Officer with a description of the value added by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(3) If any subcontractor not identified in the proposal subcontracts to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the Contractor shall provide the Contracting Officer with a description of the value added by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges.* If the Contracting Officer determines that excessive pass-through charges exist—

(1) For fixed-price contracts, the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price; and

(2) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in Subpart 31.2 of the Federal Acquisition Regulation (FAR) and Subpart 231.2 of the Defense FAR Supplement.

(e) *Access to records.* (1) The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor’s records (as defined at FAR 52.215–2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor’s records (as defined at FAR 52.215–2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Flowdown.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts under this contract, except for—

(1) Firm-fixed-price subcontracts awarded on the basis of adequate price competition;

(2) Fixed-price subcontracts with economic price adjustment, awarded on the basis of adequate price competition;

(3) Firm-fixed-price subcontracts for the acquisition of a commercial item; or

(4) Fixed-price subcontracts with economic price adjustment, for the acquisition of a commercial item.

(End of clause)

[FR Doc. E7-7905 Filed 4-25-07; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 219 and 252

RIN 0750-AE93

Defense Federal Acquisition Regulation Supplement; Small Business Programs (DFARS Case 2003-D047)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending Defense Federal Acquisition Regulation Supplement (DFARS) text pertaining to small business programs. The rule updates and clarifies policy for contracting with small business and small disadvantaged business concerns and relocates text to the DFARS companion resource, Procedures, Guidance, and Information.

EFFECTIVE DATE: April 26, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Tronic, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2003-D047.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends DFARS Part 219 and corresponding contract clauses. The DFARS changes—

- Update and clarify requirements for contracting with small business and small disadvantaged business concerns; and

- Delete text containing procedures for referring matters to the Small Business Administration; procedures for processing contract awards under the 8(a) Program; and information on the DoD test program for negotiation of comprehensive small business subcontracting plans. Text on these subjects has been relocated to the DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>.

DoD published a proposed rule at 71 FR 9303 on February 23, 2006. Three respondents submitted comments on the

proposed rule. A discussion of the comments is provided below.

1. *Comment:* One respondent stated that the proposed changes to subcontracting plan requirements at DFARS 219.704(2) and 252.219-7003(g) would create an ambiguity. These changes proposed to amend text requiring contractors to notify the administrative contracting officer (ACO) of any substitutions of “firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan,” to instead indicate that the contractor must notify the ACO of any substitutions of small businesses specifically identified in the subcontracting plan. The respondent stated that ACOs and contractors could interpret this change to mean that contractors would be required to provide notification when substituting any firm, even one that is a small business concern, for one that is listed in the subcontracting plan. The respondent recommended that the rule instead require contractors to notify the ACO of any substitutions of “firms that are not small business concerns” for the firms listed in the subcontracting plan.

DoD Response: DoD agrees that the language in the proposed rule could be ambiguous. Therefore, the final rule has been written to clarify the existing policy, *i.e.*, that the contractor must notify the ACO of any substitutions of firms that are not small business firms, for the small business firms specifically identified in the subcontracting plan.

2. *Comment:* One respondent recommended deleting the proposed text at 219.704(3), which contains a reference to the procedures in DFARS 215.304 regarding evaluation of offers that require a subcontracting plan. The respondent recommended that the proposed 219.704(3) be replaced with text stating that offerors with approved commercial or comprehensive subcontracting plans are not required to submit contract-specific goals, and that those offerors will be evaluated based on Standard Form 295 information and Defense Contract Management Agency evaluations of company-wide performance under their small business programs. In addition, the respondent recommended that 219.704 state that contracting officers may accept commercial subcontracting plans for both commercial item and noncommercial item contracts, provided the plan covers the entire production of both commercial and noncommercial items as set forth at FAR 52.219-9(g).

DoD Response: The issues addressed in this comment go beyond the scope of the changes being made under this

DFARS case. DoD recognizes the importance of the issues raised by the respondent and is currently working independently of this case to resolve those issues. Any proposed changes to the DFARS that might result would be published under a separate case for public comment.

3. *Comment:* One respondent stated that deleting DFARS text and putting it in PGI requires contracting officers to research multiple locations to ensure they are complying with all the necessary requirements. The respondent stated that deleting requirements would be streamlining, not moving them to another area which may cause uncertainty and ambiguity.

DoD Response: DoD has moved non-regulatory requirements and guidance that do not significantly impact the public, from DFARS to PGI to facilitate rapid dissemination of any future changes, thus streamlining the process. Where there is related text in PGI, a link to this text is imbedded in DFARS. Through these links, the user is able to view the related PGI text side-by-side with the DFARS text. PGI also contains information on training, deviations, policy memoranda, and other information (*e.g.*, guidebooks) that is not available in the DFARS.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies 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 makes no significant change to DoD policy for contracting with small business and small disadvantaged business concerns.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any 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 219 and 252

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 219 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 219 and 252 continues to read as follows: