

Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supplies or services for Government use.

3. Revise section 8.003 to read as follows:

#### **8.003 Contract clause.**

Insert the clause at 52.208–9, Contractor Use of Mandatory Sources of Supply and Services, in solicitations and contracts that require a contractor to provide supplies or services for Government use that are available from the Committee for Purchase From People Who Are Blind or Severely Disabled. The contracting officer must identify in the contract schedule the supplies or services that must be purchased from a mandatory source and the specific source.

### **PART 44—SUBCONTRACTING POLICIES AND PROCEDURES**

4. Amend section 44.202–2 by removing from the introductory text of paragraph (a) “shall” and adding “must” in its place; and by revising paragraph (a)(4) to read as follows:

#### **44.202–2 Considerations.**

- (a) \* \* \*
- (4) Has the contractor complied with the prime contract requirements regarding—
- (i) Small business subcontracting, including, if applicable, its plan for subcontracting with small, veteran-owned, service-disabled veteran-owned, HUBZone, small disadvantaged and women-owned small business concerns (seepart 19); and
- (ii) Purchase from nonprofit agencies designated by the Committee for Purchase From People Who Are Blind or Severely Disabled (Javits-Wagner-O'Day Act (JWOD) (41 U.S.C. 48))(see part 8)?

\* \* \* \* \*

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

5. In section 52.208–9, revise the section and clause headings, paragraphs (a) and (b), and the second sentence in paragraph (c) to read as follows:

#### **52.208–9 Contractor Use of Mandatory Sources of Supply or Services.**

\* \* \* \* \*

#### **Contractor Use of Mandatory Sources of Supply or Services (Feb 2002)**

(a) Certain supplies or services to be provided under this contract for use by the Government are required by law to be obtained from the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) under the Javits-

Wagner-O'Day Act (JWOD) (41 U.S.C. 48). Additionally, certain of these supplies are available from the Defense Logistics Agency (DLA), the General Services Administration (GSA), or the Department of Veterans Affairs (VA). The Contractor shall obtain mandatory supplies or services to be provided for Government use under this contract from the specific sources indicated in the contract schedule.

(b) The Contractor shall immediately notify the Contracting Officer if a mandatory source is unable to provide the supplies or services by the time required, or if the quality of supplies or services provided by the mandatory source is unsatisfactory. The Contractor shall not purchase the supplies or services from other sources until the Contracting Officer has notified the Contractor that the Committee or a JWOD central nonprofit agency has authorized purchase from other sources.

(c) \* \* \* For mandatory supplies or services that are not available from DLA/GSA/VA, price and delivery information is available from the appropriate central nonprofit agency. \* \* \*

\* \* \* \* \*

(End of clause)

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### **DEPARTMENT OF DEFENSE**

#### **GENERAL SERVICES ADMINISTRATION**

#### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

#### **48 CFR Part 15**

[FAC 2001–02; FAR Case 1999–022; Item V]

RIN 9000–AI68

#### **Federal Acquisition Regulation; Discussion Requirements**

**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 to amend the Federal Acquisition Regulation (FAR) to clarify the scope of discussions in competitive negotiated acquisitions.

**DATES:** *Effective Date:* February 19, 2002.

**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.

Ralph DeStefano, Procurement Analyst, at (202) 501–1758. Please cite FAC 2001–02, FAR case 1999–022.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This final rule amends FAR 15.306(d) to clarify that the contracting officer is not required to discuss every area where the proposal could be improved. The rule explains that discussions of offerors' proposals beyond deficiencies and significant weaknesses are a matter of contracting officer judgment. GAO has already interpreted the previous FAR language consistently with this clarification in MRC Federal, Inc. (B–280969, December 14, 1998), and Du & Associates (B–280283.3, December 22, 1998). The rule encourages the contracting officer to discuss other aspects of an offerors' proposal that have the potential, if changed, to materially increase the value of the proposal to the Government (B–280283.3). However, the rule makes clear that whether these discussions would be worthwhile is within the contracting officer's discretion.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 17582, April 3, 2000. Five respondents submitted comments on the proposed rule. The Councils considered all comments in the development of the final rule.

This is not a significant regulatory action, and therefore, was not subject to 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 rule only clarifies existing policy that the scope and extent of discussions beyond the stated minimums are a matter of contracting officer judgment. We did not receive any comments regarding this determination as a result of publication of the proposed rule in the **Federal Register** at 65 FR 17582, April 3, 2000.

##### **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: December 5, 2001.

**Al Matera,**

*Director, Federal Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR part 15 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. Amend section 15.306 in paragraph (d)(1) by removing “shall” and inserting “must” in its place; by revising paragraph (d)(3); and by redesignating paragraph (d)(4) as (d)(5) and adding a new (d)(4) to read as follows:

##### 15.306 Exchanges with offerors after receipt of proposals.

\* \* \* \* \*

(d) \* \* \*

(3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The contracting officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting officer judgment.

(4) In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the

excesses were removed and the offered price decreased.

\* \* \* \* \*

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#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 15

[FAC 2001-02; FAR Case 2000-017; Item VI]

RIN 9000-AJ25

#### Federal Acquisition Regulation; Definition of Subcontract in FAR Subpart 15.4

**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 exclude section 15.407-2 from application of the expanded definition of “subcontract” at FAR 15.401.

**DATES:** *Effective Date:* February 19, 2002.

**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. Jeremy Olson, at (202) 501-3221. Please cite FAC 2001-02, FAR case 2000-017.

##### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule excludes section 15.407-2 from application of the expanded definition of “subcontract” at FAR 15.401. This definition of “subcontract” is derived from the Truth in Negotiations Act (10 U.S.C. 2306a(h)(2) and 41 U.S.C. 254b(h)(2)). Prior to the rewrite of Part 15, this definition applied only to Subpart 15.8, Price Negotiation, and did not apply to Subpart 15.7, Make-or-Buy Programs, or Subpart 15.9, Profit. The rewrite combined these three subparts into the new Subpart 15.4, Contract Pricing. However, application of the expanded definition creates a conflict with the

definitions of “buy item” and “make item” in section 15.407-2, Make-or-buy programs. As defined in section 15.407-2, “buy item” means an item or work effort to be produced or performed by a subcontractor. “Make item” means an item or work effort to be produced or performed by the prime contractor or its affiliates, subsidiaries, or divisions. In this context, a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor is not considered to be a “subcontract.” This is not a significant regulatory action and, therefore, 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 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 comment is not required.

However, the Councils will consider comments from small entities concerning the affected FAR part 15 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-02, FAR case 2000-017), 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: December 5, 2001.

**Al Matera,**

*Director, Federal Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR part 15 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).

##### 15.401 [Amended]

2. Amend section 15.401 in the definition of “Subcontract” by adding the parenthetical “(except as used in