(c) Giving to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) a copy of—

* * * * *

(d) Notifying the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) of the opportunity to review subcontracting plans in connection with contract modifications.

* * * * *

■ 15. Amend section 19.1305 by revising the second sentence of paragraph (e) to read as follows:

19.1305 HUBZone set-aside procedures.

* * * * *

(e) * * * When the SBA intends to appeal a contracting officer's decision to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to set aside an acquisition for competition restricted to HUBZone small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 working days of receiving the contracting officer's notice of rejection. * * *

■ 16. Amend section 19.1405 by revising the second sentence of paragraph (d) to read as follows:

19.1405 Service-disabled veteran-owned small business set-aside procedures.

* * * * *

(d) * * * When the SBA intends to appeal a contracting officer's decision to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 working days of receiving the contracting officer's notice of rejection. * * *

[FR Doc. 06–5709 Filed 6–27–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005–10; FAR Case 2004–035; Item III; Docket 2006–0020, Sequence 8]

RIN 9000–AK04

Federal Acquisition Regulation; FAR Case 2004–035, Submission of Cost or Pricing Data on Noncommercial Modifications of 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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) regarding prohibition on obtaining cost or pricing data to implement Section 818 of Public Law 108–375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

DATES: *Effective Date:* July 28, 2006.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Jeremy Olson, at (202) 501–3221. Please cite FAC 2005–10, FAR case 2004–035. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

Section 818 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amends 10 U.S.C. 2306a. 10 U.S.C. 2306a provides exceptions to the requirement for submission of cost or pricing data, including an exception for commercial items. Section 818 states that the exception for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005.

An interim rule was published in the **Federal Register** on June 8, 2005 (70 FR 33659) to implement the statute.

In response to the interim rule, comments were received from seven respondents. One commenter opposes the rule in its entirety, while the other commenters recommend various revisions to the final rule regarding thresholds, definition of total cost, definition of noncommercial modifications, and waivers.

Public Comments

1. Rule fails to recognize the time-honored recognition prohibiting obtainment of cost or pricing data for commercial or modified commercial items.

Comment: One commenter asserts that this revision invalidates long standing procurement streamlining policies previously promoted by the acquisition community. This commenter states that ''The exemption allowance from submission of cost or pricing data afforded to providers of commercial items should not be abolished on the basis of an arbitrary dollar threshold.'' This commenter further states that the interim rule will pose an unnecessary burden to a large segment of the contracting community, and that concerns may also surface with respect to the safeguard from inadvertent disclosure of the required cost or pricing data. This commenter urges the abolishment of the rule.

Councils' Response: The interim rule implements a statutory requirement to obtain cost or pricing data for noncommercial modifications when the statutory thresholds are met. The Councils do not have the authority to decline implementation of the statute. As to the concern regarding safeguarding data, the Government has a long-standing set of procedures that has effectively protected contractor proprietary cost and pricing data from unauthorized disclosure. These same procedures will apply when cost or pricing data are obtained under the subject rule.

2. Dollar and percentage thresholds.

a. *Comment:* Two commenters assert that the interim rule should be revised to clearly state that the requirements for submitting certified cost or pricing data apply only if both the TINA threshold and the NDAA thresholds have been met. These commenters state that Section 818 created an exception to the commercial item exception, but did not change the threshold for TINA. Thus, noncommercial modifications are subject to TINA if over the NDAA thresholds, but only if the noncommercial modifications also exceed the TINA thresholds.

Councils' Response: The Councils agree with the commenters and have revised the interim rule accordingly.

Section 818 states that the exception for commercial items does not apply to cost or pricing data on noncommercial modifications that exceed the $500,000 or 5 percent threshold (whichever is greater). This means that, when the thresholds are exceeded, the commercial item exception does not apply. It does not mean that cost or pricing data must automatically be submitted. Rather, when the Section 818 thresholds are exceeded, the TINA requirements for submission of cost or pricing data need to be evaluated to determine if the noncommercial modifications are otherwise exempt from CAS (*e.g.,* is the cost less than $550,000 or are any of the other TINA exceptions present).

b. *Comment:* One commenter recommends raising the threshold in the interim rule from $500,000 to $550,000 to match the FAR requirement for obtaining cost or pricing data at FAR 15.403–4(a)(1). A second commenter also recommends changing the $500,000 to $550,000. This second commenter notes that, while Section 818 uses the $500,000 figure to amend 10 U.S.C. 2306a, subsection (a)(7) of 10 U.S.C. 2306a provides for adjustments every five years to the $500,000 threshold. This second commenter further states that the threshold is currently adjusted to $550,000, and to simplify matters and avoid confusion, other FAR sections also use the $550,000. The second commenter recommends a similar approach be taken for this rule.

Councils' Response: The interim rule required cost or pricing data if the total price exceeds the $550,000 threshold for the reasons stated in comment 2a. The Councils note that the adjustments required by subsection (a)(7) do not affect the $500,000 threshold in Section 818. The requirement to adjust the thresholds every five years is based on Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375), which requires that the FAR Council periodically adjust statutory acquisition-related dollar thresholds in the FAR for inflation based on the change in the Consumer Price Index. However, acquisition-related thresholds in statutes that took effect after October 1, 2000, are escalated proportionately for the number of months between the effective date of the statute, and October 1, 2005. The statute also requires rounding to the nearest $50,000 for thresholds between $100,000 and $1,000,000. Application of the CPI as of June 1, 2005 (the effective date of Section 818) to October 1, 2005 yields a revised threshold of approximately $510,000, which when rounded results in no change to the Section 818 threshold of $500,000.

c. *Comment:* One commenter was concerned about application of the rule to a noncommercial modification that was between $500,000 and 5 percent of the contract. For example, if the proposal price is $100 million, and the noncommercial modification price is $4.5 million, no certified cost or pricing data would be obtained because the modification does not exceed 5 percent of the contract price. Conversely, if the proposal price was $9 million and the noncommercial modification was $600,000, certified cost or pricing data would be obtained because the modification exceeds 5 percent of the contract price and also exceeds $500,000. This commenter asserts that, from a taxpayer's point of view, this defies common sense. The $4,500,000 modification will most likely yield a bigger cost reduction as a result of obtaining cost or pricing data than would a $600,000 modification. This commenter therefore recommends substituting a specific dollar value of $550,000 in place of the dual thresholds (dollar value and percentage) contained in the interim rule.

Councils' Response: The interim rule required cost or pricing data if the total price exceeds $550,000 for the reasons stated in comment 2a. The interim rule implemented a statutory requirement to obtain cost or pricing data for noncommercial modifications when the statutory thresholds are met. The commenter is suggesting that the Councils revise or eliminate the five percent threshold contained in the legislation. The Councils do not have the authority to revise the statutorily mandated thresholds.

3. *''Minor'' modifications.*

Comment: One commenter recommends adding the word ''minor'' in front of the word modifications in the paragraphs under FAR 15.403–1(c)(3)(ii). This commenter states that, although the paragraph at FAR 15.403–1(c)(3)(ii) defines the applicability of the requirements for minor modifications, the addition of the word ''minor'' in each paragraph would make the applicability more explicit and minimize the possibilities for the paragraphs to be misread in isolation to encompass all modifications.

Councils' Response: The Councils agree that clarification would be helpful. However, since paragraph (3)(ii) is applied to ''minor modifications defined in paragraph (c)(3)(ii) of the definition of a commercial item at 2.101 that do not change the item from a commercial item to a noncommercial item,'' simply adding the word ''minor'' could cause more confusion than clarity. The Councils therefore have revised the language in paragraphs at FAR 15.403–1(c)(3)(ii)(A) thru (C) to add the word ''such,'' to minimize the possibility that the paragraphs could be misread in isolation.

4. Expected to ''cost'' more than $500,000.

Comment: One commenter notes that Section 818 establishes a limitation to the cost or pricing exception when the noncommercial modifications are expected to ''cost'' more than $500,000 or 5 percent of the total ''price'' of the contract. This commenter states that this ''cost'' should refer to the expected price of the modification, i.e., the cost to the Government. This commenter is concerned that the language in the interim rule could be construed as ''cost to the contractor'', thereby requiring that the expected cost be measured by FAR Part 31 to determine whether the noncommercial modification is within the dollar/percentage thresholds of the rule.

Councils' Response: The Councils agree that ''cost'', as used in the interim rule and the statute, does not require contractors to produce an estimated cost computed in accordance with the requirements of FAR part 31 for purposes of applying the thresholds. The term ''cost'' refers to the cost to the Government, *i.e.,* the price of the commercial modifications. The Councils do not believe that the interim rule could reasonably be construed to require computation in accordance with the requirements of FAR part 31. In addition, the Councils do not believe that ''cost to the Government'' would add clarity, since it could be misconstrued to the same extent as the term ''cost.'' However, the Councils recognize that the term ''cost'' should be clarified. The Councils have therefore revised the term ''cost'' to ''price'' in paragraphs at FAR 15.401–1(c)(3)(ii)(B) and (C) of the final rule to provide clarity while also accurately reflecting the intent of the statute.

5. *Definition of ''Noncommercial modification''.*

Comment: Two commenters recommended adding a definition of a ''noncommercial modification'' to distinguish such modifications from commercial modifications. These two commenters assert that a modification that merely alters appearance or is ''of a type'' requested for commercial use is not a ''noncommercial modification''. These two commenters further state that modifications such as additional wiring provisions, additional tubing or piping, thicker materials or doublers to strengthen structural components are

not noncommercial modifications even if they are made for the purpose of accommodating the later installation of military-specific equipment such as missile delivery systems, electronic warfare systems, or aerial refueling systems.

Councils' Response: Modification to the commercial item can be of three types. The first is a modification of such magnitude that the item no longer meets the definition of a commercial item at FAR 2.101. Such modifications are clearly not covered by Section 818. Since the item is no longer a commercial item, the established threshold of $550,000 for submittal of cost or pricing data would apply.

The second is a modification of a type customarily available in the commercial marketplace. These would be commercial modifications, and as such would also not be subject to the requirements of Section 818.

The third type is a modification defined in paragraph (c)(3)(ii) of the definition of a commercial item at FAR 2.101, which states:

Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications are those modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.

These minor modifications are the type of modifications the statute was intended to address. The Councils do not see any criteria in the statute or elsewhere that distinguishes minor modifications based on whether such modifications merely alter the appearance or are ''of a type'' requested for commercial use. The Councils see no basis for adding new criteria that would subdivide the FAR definition of minor modifications not available in the commercial marketplace into two new categories. The Councils are concerned that any such subdivision would result in inappropriate application of the statute by exempting certain modifications to which Congress intended the statute to apply.

6. Application of the rule to paragraph (c)(3)(i) of the definition of a commercial item at FAR 2.101.

Comment: Two commenters state that the statute is not intended to apply to the modifications of the type at paragraph (c)(3)(i) of the definition of a commercial item at FAR 2.101, and has recommended adding regulatory language to clarify that this exception remains.

Councils' Response: The interim rule specifically referenced paragraph (c)(3)(ii) of the definition of a commercial item at FAR 2.101. The Councils believe the interim rule clearly does not apply to paragraph (c)(3)(i) of that definition, since there is no reference to that paragraph.

7. ''Total Cost'' vs. ''In the Aggregate''.

Comment: Two commenters note that the statute applies the $500,000 or 5 percent (whichever is greater) threshold ''in the aggregate'', whereas the interim rule refers to ''total cost.'' One commentor states that any final rule should clarify that the ''total cost'' applies on a per-transaction basis, not on a cumulative basis. These two commenters state that, if treated cumulatively, the threshold would have to apply retroactively, which is impracticable and unfair. Also, if treated cumulatively, subsequent modifications of a non-commercial nature might be refused by an entity with an accounting system unable to comply with the requirements for certified cost or pricing data.

Councils' Response: The Councils agree that the thresholds should not require retroactive determinations of the total cost of all noncommercial modifications. The Councils therefore have revised the final rule to specify that the thresholds apply to modifications of a commercial item for a particular contract action. This is consistent with the application of TINA, which is done on an individual contract action basis.

8. Waivers of requirement to submit cost or pricing data.

Comment: Two commenters state that, where the offeror does not have, nor is required to have, an approved Cost Accounting Standards compliant system, the requirement for cost or pricing data should be waived, as provided for at FAR 15.403–1(c)(4).

Councils' Response: FAR 15.403–1(c)(4) permits the head of the contracting activity to waive the requirement for submission of cost or pricing data in exceptional cases.

This is a case-by-case determination, based on the particular facts and circumstances. The Councils do not believe that it is advisable to revise this by providing for a blanket exception. The Councils are concerned that such an exception would fail to take into account the specific facts and circumstances of each case, and could also be perceived as circumventing the Congressional intent of the statute. Furthermore, such an exception cannot be provided for DoD contracts. Exceptional circumstances for DoD contracts are limited by the provisions of Section 817 of the National Defense Authorization Act of 2003. These provisions limit the exceptional circumstances to instances in which the property or services cannot reasonably be obtained without the waiver, the price can be determined fair and reasonable without obtaining the cost or pricing data, and there are demonstrated benefits of granting the waiver.

9. *Does the 5 percent threshold apply to the prime contract or to the subcontract value when a subcontract is at issue?*

Comment. One commenter asked for clarification about how to apply this rule to subcontracts.

Councils' Response: FAR 15.403–4(a)(1) states that *''Unless an exception applies, cost or pricing data are required before accomplishing actions expected to exceed the current threshold . . .''*. The actions include *''. . . (ii) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to submit cost or pricing data . . .''*. This means that a prime contractor, or a higher tier subcontractor, must apply TINA to their lower-tiered subcontractors. If one of those lower-tiered subcontractors qualifies for an exception to TINA (as outlined in FAR 15.403–1(b) & (c)) then TINA does not apply to that subcontract.

Based on this, if the higher tier contractor is required to submit cost or pricing data, the application of the $500,000 or 5 percent of total contract price threshold applies to the lower tier contractor whenever a commercial item being procured is to be modified, regardless of the tier, and is calculated using the amounts related to that subcontract. For subcontracting purposes, the threshold is based on the subcontract amount and not the prime, or higher tier contract amount.

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 (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) 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 number of small entities providing commercial items with noncommercial modifications costing more than $500,000 is expected to be very low. Although comments submitted on the interim rule prompted several technical amendments necessary to correct the rule, this expectation remains unchanged.

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 Part 15

Government procurement.

Dated: June 20, 2006.

Ralph De Stefano,

Director, Contract 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. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Section 15.403–1 is amended by revising paragraphs (c)(3)(ii)(A), (B), and (C) 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) * * *

(3) Commercial items. (i) * * *

(ii) * * *

(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of $500,000 or 5 percent of the total price of the contract.

(C) For acquisitions funded by DoD, NASA, or Coast Guard such modifications of a commercial item are not exempt from the requirement for submission of cost or pricing data on the basis of the exemption provided for at FAR 15.403–1(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of $500,000 or 5 percent of the total price of the contract.

* * * * *

[FR Doc. 06–5710 Filed 6–27–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 22, 47, 52, and 53

[FAC 2005–10; FAR Case 2005–033; Item IV; Docket 2006–0020, Sequence 11]

RIN 9000–AK47

Federal Acquisition Regulation; FAR Case 2005–033, Implementation of Wage Determinations OnLine (WDOL)

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

ACTION: Interim rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Wage Determinations OnLine (WDOL) internet website as the source for Federal contracting agencies to obtain wage determinations issued by the Department of Labor (DOL) for service contracts subject to the McNamara-O'Hara Service Contract Act (SCA) and for construction contracts subject to the Davis-Bacon Act (DBA).

DATES: *Effective Date*: June 28, 2006.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before August 28, 2006 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–10, FAR case 2005–033, by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• Agency Web site: *http://www.acquisition.gov/far/ProposedRules/ proposed.htm*. Click on the FAR case number to submit comments.

• E-mail: *farcase.2005–033@gsa.gov*. Include FAC 2005–10, FAR case 2005–033 in the subject line of the message.

• Fax: 202–501–4067.

• Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–10, FAR case 2005–033, in all correspondence related to this case. All comments received will be posted without change to *http://www.acquisition.gov/far/ProposedRules/comments.htm* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Gloria Sochon, Procurement Analyst, at (202) 219–0311. Please cite FAC 2005–10, FAR case 2005–033. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

In the August 26, 2005 **Federal Register** (70 FR 50888), the DOL issued a final rule to amend Title 29 CFR parts 1 and 4 to allow for full implementation of the Wage Determinations OnLine (WDOL) Internet Website (*http://www.wdol.gov*) as the source for Federal contracting agencies to use when obtaining wage determinations issued by the DOL for service contracts subject to the SCA and for construction contracts subject to the DBA. The Councils are not seeking comments on the DOL rule, which has already been issued in final, but are requesting comments as to whether the FAR policy in this rule implementing the DOL rule is clear. This interim rule amends FAR Part 22 to direct Federal contracting agencies to obtain wage determinations issued by the DOL for contracts subject to the SCA and DBA from the WDOL website.

This interim rule incorporates new geographical jurisdictions for DOL's Wage and Hour Regional Offices and eliminates FAR references to the Government Printing Office (GPO) publication of general wage determinations. The Contracting Officer (CO) will be able to access the WDOL website (*http://www.wdol.gov*) to find the applicable wage determination for a contract action subject to the SCA or DBA. If the WDOL database does not contain the applicable wage determination for a SCA contract action, the CO must use the e98 process to request a wage determination from DOL.