

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12 and 16**[FAC 2001–13; FAR Case 2000–013;
Item I]

RIN 9000–AJ03

**Federal Acquisition Regulation;
Contract Types for Commercial Item
Acquisitions**

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 clarify the use of award fees and performance or delivery incentives in firm-fixed-price contracts and fixed-price with economic price adjustment contracts. These changes are intended to clarify how award fees and performance or delivery incentives may be used in commercial item acquisitions where statute prohibits use of cost-type contracts and requires use of firm-fixed-price contracts and fixed-price contracts with economic price adjustment to the maximum extent practicable.

DATES: *Effective Date:* April 17, 2003.

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. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAC 2001–13, FAR case 2000–013.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 83292, December 29, 2000, that proposed to amend FAR 12.207 and Subpart 16.2 to clarify the contract-type requirements for commercial item acquisitions derived from Section 8002(d) of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). FASA states that agencies must use firm-fixed-price (FFP) contracts and fixed-price contracts with economic price adjustments (FP/EPA) to the maximum extent practicable for

commercial item acquisitions. FASA also prohibits the use of cost-type contracts.

The proposed rule would have amended Part 12 to address pricing mechanisms for acquiring commercial services available on a time-and-materials or labor-hour basis within FAR Part 12 contract-type restrictions. Additionally, the proposed rule contained revisions to FAR 16.202–1 and 16.203–1 to indicate that award fee and performance or delivery incentives based solely on factors other than cost may be used in conjunction with FFP and FP/EPA contracts without changing the FFP or FP/EPA nature of the contract.

The 60-day comment period for the proposed rule ended February 27, 2001. Ten sources submitted comments on the proposed rule. All comments received were considered in the formulation of this final rule. The comments indicated significant confusion concerning the proposed revisions to Part 12 regarding the intended application of the proposed time-and-materials and labor-hour pricing mechanism coverage. Consequently, the FAR Council decided that only the changes associated with using non-cost based award fee and delivery or schedule incentives in conjunction with FFP and FP/EPA contracts should be finalized.

Although this rule does not address the use of time-and-materials and labor-hour contracts for commercial item acquisitions, the Administrator, Office of Federal Procurement Policy, intends to work with the other FAR Council members to develop appropriate revisions to current FAR coverage to address their use, including safeguards that are needed to effectively protect taxpayer interests when these contractual arrangements are used under Part 12.

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 Regulatory Flexibility Act does not apply to this rule. This 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, the Councils will consider comments from small entities concerning the affected FAR Parts 12 and 16 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 2001–13, FAR case 2000–013), 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 Parts 12 and 16

Government procurement.

Dated: March 12, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12 and 16 as set forth below:

1. The authority citation for 48 CFR parts 12 and 16 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 12—ACQUISITION OF
COMMERCIAL ITEMS**

2. In section 12.207, add the following sentence to the end of the paragraph to read as follows:

12.207 Contract type.

* * * These contract types may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (*see* 16.202–1 and 16.203–1).

PART 16—TYPES OF CONTRACTS

3. In section 16.202–1, add the following sentences to the end of the paragraph to read as follows:

16.202–1 Description.

* * * The contracting officer may use a firm-fixed-price contract in conjunction with an award-fee incentive (*see* 16.404) and performance or delivery incentives (*see* 16.402–2 and 16.402–3) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

4. In section 16.203–1, redesignate the introductory text as paragraph (a), and paragraphs (a) through (c) as (1) through (3), respectively; and add paragraph (b) to read as follows:

16.203–1 Description.

* * * * *

(b) The contracting officer may use a fixed-price contract with economic

price adjustment in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402–2 and 16.402–3) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 32, 47, and 52

[FAC 2001–13; FAR Case 1999–024; Item II]

RIN 9000–A197

Federal Acquisition Regulation; Preference for U.S.-Flag Vessels— Subcontracts for 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 the applicability of statutory requirements for use of U.S.-flag vessels in the transportation of supplies by sea. The FAR presently waives these requirements for subcontracts for the acquisition of commercial items. This rule would require the use of U.S.-flag vessels under certain subcontracts for commercial items.

DATES: *Effective Date:* April 17, 2003.

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 2001–13, FAR case 1999–024.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 12, 32, 47, and associated clauses to limit the types of subcontracts for which the waiver of cargo preference statutes is

applicable. The rule is intended to ensure compliance with cargo preference statutes if ocean cargoes are clearly destined for Government use, while avoiding disruption of commercial delivery systems. This final rule also amends FAR Part 12 by adding 10 U.S.C. 2631 to the list of laws inapplicable to subcontracts for the acquisition of commercial items, except for certain subcontracts, since civilian agencies may buy supplies for use of military departments.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 66920, November 7, 2000. Four respondents submitted public comments during the comment period. These comments were considered in the formulation of the final rule. A summary of the comments and their respective disposition is as follows:

1. One respondent voiced opposition to the rule indicating that (1) neither the statute nor the legislative history grants authority to create an administrative deviation from the explicit requirement to use U.S.-flag vessels in the transportation of supplies bought for the Department of Defense (DoD) either by DoD or a civilian agency; (2) the rule should be considered a major rule under 5 U.S.C. 804; and (3) this rule will have a significant impact on a substantial number of small entities. The Councils did not concur. 41 U.S.C. 430(b), as added by the Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103–355, Section 8003), requires that the FAR list those laws inapplicable to subcontracts for commercial items, and requires that covered laws as defined in 41 U.S.C. 430(c) be included on that list unless the FAR Council makes a written determination that it would not be in the best interest of the Federal Government to exempt commercial subcontracts from the applicability of the provision (see comment 2). In accordance with this statute, FAR 12.504(a)(10) currently lists 46 U.S.C. 1241(b), with the inapplicability effective May 1, 1996. This rule adds 10 U.S.C. 2631 to the FAR list, because civilian agencies may buy supplies for use of military departments. 10 U.S.C. 2631 is currently listed as inapplicable to commercial items at DFARS 212.504(a)(xxii), with the same exceptions now being incorporated in the FAR. This rule clarifies existing policy and limits the number of allowable waivers. The rule strengthens the Government support for the Cargo Preference statutes. The Office of Information and Regulatory Affairs reviewed the proposed rule before publication and did not declare it to be a major rule under 5 U.S.C. 804.

2. One respondent expressed opposition to the rule considering it to be inconsistent with FASA with respect to commercial item procurements. The respondent states that 10 U.S.C. Sec. 2631 is not specifically enumerated to remain unaffected by Title VIII of FASA, it does not provide for criminal or civil penalties, or contain any provisions that would override the provisions in Title VIII of FASA and, therefore, a written determination of the FAR Council is required to not exempt all commercial item subcontracts from the provisions of 10 U.S.C. Sec. 2631. The FAR Council has made a determination in writing as required by the OFPP Act, 41 U.S.C. 430(b).

3. One respondent expressed concern regarding deletion of contracts awarded using the simplified acquisition procedures in Part 13 from the current list of exceptions to the preference for U.S.-flag vessels. This change was accomplished under FAR case 98–604, and is outside the scope of this case.

4. One respondent expressed concern that the rule does not waive Cargo Preference for commercial subcontracts if the prime contractor is redistributing or reselling without adding value. The Council did not concur. FASA specifically prohibits waiver of laws for subcontracts where the prime does not add value; the subcontractor then is held to all laws applicable to a prime contractor. The rule merely clarifies this portion of the law.

5. One respondent expressed concern regarding the difference between the requirements outlined in the statutes covering DoD and non-DoD cargo. The concern is that extension of the rule to civilian agency acquisitions places an insurmountable burden on Government contractors and subcontractors. The Councils did not concur as FAR 47.503(b)(2) already states that 10 U.S.C. 2631 is applicable if supplies being shipped are for use of military departments. This rule does not expand that applicability of 10 U.S.C. 2631 to other non-DoD cargo, but actually limits application of Cargo Preference, by providing waiver of 10 U.S.C. 2631, if it would otherwise be applicable.

6. One respondent contends that if the proposed rule is not withdrawn, it should be modified to require prime contractors to advise their subcontractors when the statutes apply. The Councils did not concur because the FAR currently requires the prime contractor to notify the subcontractors of any flow-down statutes.

7. Two respondents were concerned that the rule could be read to omit one major exception to cargo preference waivers for subcontracts for commercial