(c) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, or service-disabled veteran-owned programs. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

* * * * *

■ 6. Amend section 19.502–2 by adding a new first sentence and revising the last sentence of paragraph (a); and by revising the first sentence in paragraph (b) to read as follows:

**19.502–2 Total small business set-asides.**

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). * * * The small business reservation does not preclude the award of a contract as described in 19.203.

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). * * *

* * * * *

■ 7. Amend section 19.800 by revising paragraph (e) to read as follows:

**19.800 General.**

* * * * *

(e) Before deciding to set aside an acquisition in accordance with subpart 19.5, the contracting officer may consider offering the acquisition to a small business under the 8(a) Program in accordance with 19.203.

* * * * *

**19.804–2 [Amended]**

■ 8. Amend section 19.804–2 by removing paragraph (a)(12); and redesignating paragraphs (a)(13) through (a)(16) as paragraphs (a)(12) through (a)(15), respectively.

■ 9. Amend section 19.1305 by—

■ a. Revising paragraph (a);

■ b. Removing paragraph (c);

■ c. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively; and

■ d. Removing from the newly redesignated paragraph (c) "(*see* subpart 19.5)" and adding "(*see* 19.203)" in its place.

The revised text reads as follows:

**19.1305 HUBZone set-aside procedures.**

(a) The contracting officer—

(1) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied (*see* 19.203); and

(2) Shall consider HUBZone set-asides before considering HUBZone sole source awards (*see* 19.1306) or small business set-asides (*see* subpart 19.5).

* * * * *

■ 10. Amend section 19.1306 by revising the introductory text of paragraph (a) to read as follows:

**19.1306 HUBZone sole source awards.**

(a) A contracting officer may award contracts to HUBZone small business concerns on a sole source basis (*see* 6.302–5(b)(5)) before considering small business set-asides (*see* 19.203 and subpart 19.5), provided none of the exclusions at 19.1304 apply; and—

* * * * *

■ 11. Amend section 19.1405 by revising paragraph (a); and removing from paragraph (c) "(*see* Subpart 19.5)" and adding "(*see* 19.203)" in its place.

The revised text reads as follows:

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

(a) The contracting officer—

(1) May set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business concerns when the requirements of paragraph (b) of this section can be satisfied (*see* 19.203); and

(2) Shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (*see* 19.1406) or small business set-asides (*see* subpart 19.5).

* * * * *

■ 12. Amend section 19.1406 by revising the introductory text of paragraph (a) to read as follows:

**19.1406 Sole source awards to service-disabled veteran-owned small business concerns.**

(a) A contracting officer may award contracts to service-disabled veteran-owned small business concerns on a sole source basis (*see* 6.302–5(b)(6)), before considering small business set-asides (*see* 19.203 and subpart 19.5) provided none of the exclusions of 19.1404 apply and—

* * * * *

[FR Doc. 2011–5556 Filed 3–15–11; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Part 15

**[FAC 2005–50; FAR Case 2008–034; Item VI; Docket 2009–0035, Sequence 1]**

**RIN 9000–AL44**

## Federal Acquisition Regulation; Use of Commercial Services Item Authority

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 868 provides that the FAR shall be amended with respect to the procurement of commercial services, specifically services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. These services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services. The rule details the information the contracting officer may consider in order to make this determination.

**DATES:** *Effective Date:* March 16, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2008–034.

**SUPPLEMENTARY INFORMATION:**

### I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 52852 on October 14, 2009, to implement section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. The comment period closed on December 14, 2009.

Four respondents submitted comments on the interim rule.

**II. Discussion/Analysis**

The analysis of public comments by the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) follows:

*A. Agree With the Rule*

*Comment:* One respondent agreed with the interim rule. The respondent believes including "services of a type" provides the Government with flexibility to access a wide variety of services with beneficial contracting methods.

*Response:* The Councils acknowledge the respondent's agreement with the interim rule.

*B. "Services of a Type"*

*Comment:* One respondent suggests adding a definition for "services of a type" and/or providing examples of "services of a type."

*Response:* The Councils do not agree that definitions or examples are necessary to implement this case. The FAR definition of a "commercial item" adequately addresses what is and is not a commercial item. The contracting officer's determination that a service is considered a "service of a type" is a determination made based on the circumstances surrounding a particular acquisition and is made on a case-by-case basis.

*C. Sold in the Commercial Marketplace*

*Comment:* One respondent also suggests qualifying the two references to the "commercial marketplace" in FAR 15.403–1(c)(3)(ii)(A) as follows. The first reference would be followed by "by the offeror," while the second reference would be followed by "by others than the offeror."

*Response:* The respondent's suggested language changes go beyond the statute.

*D. Establishing Price Reasonableness*

1. *Determination that the offeror has submitted sufficient information* (*15.403–1(c)(3)(ii)(A)*).

*Comment:* One respondent suggests that requiring a contracting officer determination that the offeror has submitted sufficient information to evaluate the reasonableness of the offered price will increase the contracting officer's workload, may result in lengthy and unnecessary delays, and could reduce competition.

*Response:* The determination is required by statute.

2. *Other relevant information* (*15.403–1(c)(3)(ii)(C)*).

*Comment:* One respondent believes that if a service is "of a type" sold in the commercial market place, but price reasonableness cannot be established, then that service would not benefit from the Truth in Negotiations Act exception for commercial items, and that such an outcome would cause tremendous confusion among contracting officers and potential offerors of commercial items.

*Response:* If price reasonableness cannot be determined based on prices for similar commercial services, the services "of a type" cannot be determined to be commercial items (*see 15.403–1(c)(3)(ii)(A)*). In that case, the contracting officer would need to determine price reasonableness by requesting relevant cost or pricing data from the contractor.

*Comment:* One respondent suggests that the requirement to provide cost information other than cost or pricing data could prove difficult for industry vendors, which may diminish the field of vendors.

*Response:* Current FAR 15.402 policy requires that the contracting officer determine price reasonableness. This cost information can come in many forms (sales data, vendor quotations, historical data, *etc.*) and is usually on hand for a contractor. Consequently, providing this cost information will not present a burden sufficient to discourage industry vendors from seeking Government contracts.

*Comment:* One respondent believes that if the contracting officer can request cost data, this additional work could result in significant delays in contract award, contract delivery schedule problems and higher prices.

*Response:* The Councils acknowledge the respondent's concern; however, the contracting officer is required to request appropriate cost or pricing data sufficient to determine price reasonableness.

*E. Location of Coverage*

*Comment:* One respondent suggested that this FAR change should be in FAR 15.403–3 in lieu of 15.403–1.

*Response:* The Councils believe the language belongs in FAR 15.403–1, since it is more closely aligned with the prohibition on obtaining cost or pricing data than the FAR section requiring information other than cost or pricing data. It is noted that these two sections complement each other and are often used congruently.

**III. Executive Order 12866**

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.

**IV. 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 does not impose any additional requirements on small businesses. This rule impacts the Government by requiring a new written determination by the contracting officer. The rule details the information the contracting officer may consider in order to make this determination. In addition, since the current FAR 15.403–3(a)(1) provides for contracting officers to obtain the relevant information necessary to determine price reasonableness, this final rule places no additional requirements on contractors.

**V. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0013, titled: Cost or Pricing Data Exemption.

**List of Subjects in 48 CFR Part 15**

Government procurement.

Dated: March 4, 2011.

**Millisa Gary,**

*Acting Director, Office of Governmentwide Acquisition Policy.*

**Interim Rule Adopted as Final Without Change**

■ Accordingly, the interim rule amending 48 CFR part 15, which was published in the **Federal Register** at 74 FR 52852 on October 14, 2009, is adopted as a final rule without change.

[FR Doc. 2011–5557 Filed 3–15–11; 8:45 am]

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