

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 22, 25, and 52 which was published at 72 FR 46357, August 17, 2007, is adopted as a final rule without change.

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DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 30 and 52**

[FAC 2005-24; FAR Case 2005-027; Item V; Docket 2006-0020; Sequence 9]

RIN 9000-AK60

Federal Acquisition Regulation; FAR Case 2005-027, FAR Part 30-CAS Administration

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 implement revisions to the regulations related to the administration of the Cost Accounting Standards (CAS).

DATES: Effective Date: March 31, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at (202) 501-0650 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-24, FAR case 2005-027.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 71 FR 58338, October 3, 2006 to make administrative corrections to FAR Part 30, "CAS Administration," subsequent

to the issuance of the final rule (FAR case 1999-025) at 70 FR 11743, March 9, 2005. Among other changes, the Council's March 9, 2005 final rule streamlined the process for submitting, negotiating, and resolving cost impacts resulting from a change in cost accounting practice or noncompliance with stated practices. The Councils received public comments in response to the proposed rule. The Councils' responses to the public comments received in response to the proposed rule follow.

The Use of Auditors and Other Technical Advisors

Comment: One commenter recommended elimination of the words "as appropriate" from FAR 30.601(c) since it would be imprudent for the CFAO not to request and consider the expert advice of the contract auditor in performing CAS administration. The commenter also recommended that the phrase be eliminated from FAR 1.602-2(c) for consistency.

Response: Nonconcur. The Councils agree that it is generally prudent for the CFAO to consider the advice of auditors and other specialists in performing contract administration responsibilities. However, the Councils believe the CFAO is in the best position to determine the need for technical assistance on a particular issue, as well as the nature of the technical assistance required. Accordingly, it may not be necessary for the CFAO to obtain audit or technical advice in all cases in order to effectively and responsibly perform his/her duties. In those cases, requiring the CFAO to obtain such advice would infringe on the CFAO's authority and may unnecessarily delay the administration of contracts. Any revision to FAR 1.602-2(c) would be beyond the purview of this case.

Cost Impacts of CAS Noncompliances That Affect Both Cost Estimates and Cost Accumulations

Comment: One commenter recommended that contractors be required to submit separate cost impacts when a single noncompliance affects both cost estimates and cost accumulations (one for the impact on cost estimating and another for the cost impact on cost accumulations). The commenter also recommended that those separate cost impacts be administered separately, rather than considered as a whole. The commenter opined that while "it might be convenient for the contractor to combine the cost impacts, it could make it difficult for the Government to analyze the noncompliance(s) and to

determine whether the cost impacts are material or not."

Response: Nonconcur. The Councils believe that the recommendation would not comply with paragraph (a)(5) of the clause at 48 CFR 9903.201-4(a) and 48 CFR 9903.201-6 which require the Government to recover the increased costs in the aggregate of a noncompliance. These provisions are intended to ensure the Government's full recovery of any increased costs in the aggregate while also prohibiting the recovery of more than the increased costs in the aggregate. The recommendation would require the calculation and recovery of the impact on cost estimates separately and apart from the calculation and recovery of the impact on cost accumulations, when both are the result of a single noncompliance. The Councils believe that the separate consideration of the impacts on cost estimating and on cost accumulations may result in the Government's recovery of an amount which is either more or less than the cost impact in the aggregate of a particular noncompliance.

As it is currently written, FAR 30.605(h) provides a systematic approach to the calculation of the increased or decreased costs in the aggregate of a noncompliance that affects both cost estimates and cost accumulations. Pursuant to FAR 30.605(h)(6), the cost impact of the cost estimating noncompliance (calculated in accordance with FAR 30.605(h)(3)) is combined with the cost impact of the cost accumulation noncompliance (calculated in accordance with FAR 30.605(h)(4)) and the impact on profit and fee (calculated in accordance with FAR 30.605(h)(5)), in order to arrive at the cost impact in the aggregate of a noncompliance that affects both cost estimates and cost accumulations. The Councils believe that this approach to determining the cost impact of a noncompliance affecting both cost estimates and cost accumulations complies with the CAS Board's Rules and Regulations.

Combining Cost Impacts of Multiple Unilateral Cost Accounting Practice Changes

Comment: One commenter recommended that the combination of cost impacts resulting from unilateral cost accounting practice changes be permitted as prescribed in DoD CAS Working Group Paper 76-8, Interim Guidance on the Use of the Offset Principle in Contract Price Adjustments Resulting from Accounting Changes. The commenter "disagrees with the Councils' interpretation of the statute

and believes that current statutory language permits aggregation of the impact of a unilateral change affecting more than one cost accounting practice rather than prohibiting the combining of cost impacts for two or more unilateral changes” and opined that the Councils’ reading of 41 U.S.C. 422(h)(1)(B) is “overly narrow.”

Response: Nonconcur. The Councils have previously considered the commenter’s recommendation in the publication of their final rule amending FAR Part 30, effective April 8, 2005 at 70 FR 11743, March 9, 2005. The Councils’ comments in the discussion of Public Comments, Item 35, follow:

(c) *Combining unilateral changes and/or noncompliances.* When the individual cost-impact of each unilateral change and each noncompliance is increased costs in the aggregate, the Councils agree that the change and noncompliance may be combined for administrative ease in resolving cost-impacts, as indicated at FAR 30.606(a)(3)(iii). Such combinations can only be made by mutual agreement of both parties.

The Councils further believe that combining the cost-impacts of unilateral changes and/or noncompliances must be precluded if any of the individual changes or noncompliances involved results in decreased costs in the aggregate. When there are two or more unilateral changes/ noncompliances, some with increased costs and others with decreased costs, combining the cost-impact of those changes does not comply with the statutory requirement that the Government recover the increased costs in the aggregate for each unilateral change/ noncompliance. There is no statutory provision that permits offsetting the cost-impact of one unilateral change/ noncompliance with the cost-impact of any other unilateral change/ noncompliance.

As stated above, the Councils found that combining multiple cost impacts, where one or more of those cost impacts is decreased costs to the Government, does not comply with the CAS Board’s requirement that the Government recover the increased costs in the aggregate for each unilateral change. The 1988 statute (41 U.S.C. 422(h)(3)) and subsequent revisions to 48 CFR 9903.201–4, both of which added the words “in the aggregate” in describing the amounts to be recovered as a result of a unilateral cost accounting practice change or noncompliance, effectively supersede Working Group Paper 76–8 and preclude the combination of the cost impacts of multiple unilateral cost accounting practice changes.

The Councils agree with the commenter that the Councils have construed the CAS narrowly. The Councils believe that to do otherwise would be a violation of 41 U.S.C 422(f) since that statute provides that only the CAS Board may interpret their rules,

regulations and standards. Accordingly, the Councils have an obligation to construe the CAS as narrowly as possible when promulgating regulations so as to refrain from interpreting the CAS Board’s rules and regulations, and second guessing the CAS Board’s intent.

At its July 5, 2005 meeting, the CAS Board instructed its staff to establish a working group to evaluate whether revisions or interpretations to its rules and regulations are needed regarding the term “increased costs in the aggregate” and to consider how increased costs in the aggregate are to be computed when a contractor makes multiple accounting changes that take effect on the same date. After the CAS Board has considered these issues, the Councils may take additional actions to implement any changes to the CAS Board’s rules and regulations.

Availability of Funds

Comment: One commenter recommended that the provision at FAR 30.603–2(b)(3)(iii) be deleted since the lack of available funds to pay any increased costs may compel CFAOs to deny virtually all requests that cost accounting practice changes be determined desirable.

Response: Nonconcur. The Councils believe the consideration of funding availability at FAR 30.603–2(b)(3)(iii) is necessary to ensure that CFAOs act within their authority in obligating the Government and to avoid potential noncompliance with the requirements of the Anti-Deficiency Act (31 U.S.C. 1341) in determining whether a contractor’s cost accounting practice change is desirable. In instances where a CFAO’s determination that a cost accounting practice change is desirable may obligate the Government to pay increased costs, it is incumbent upon the CFAO to ensure that funds are available on affected contracts to pay those increased costs.

Definition of “Increased Costs”

Comment: One commenter opined that the “Councils have exceeded their authority by including in FAR Part 30 language that in essence defines ‘increased costs’ by indicating what costs can and cannot be combined” and that only the CAS Board has the authority to define the term.

Response: Nonconcur. The Councils believe they have taken actions that are consistent with the CAS Board’s definition of “increased costs” at 48 CFR 9903.306, and have not exceeded their authorities or redefined the term “increased costs” by their narrow application of the Board’s Rules and Regulations, as asserted by the

commenter. In accordance with their narrow reading of the CAS, the Councils believe that the CAS Board’s consistent use of the terms “a change” and “the change” in describing cost accounting practice changes dictates that each such change, including the related cost impact, must be considered separately.

As discussed in the comments above, the CAS Board is taking steps to determine whether or not additional rules and regulations are needed to clarify the meaning of the term “increased costs in the aggregate.” In the interim, the Councils have adopted regulations that reflect their understanding of the CAS Board’s existing rules and regulations.

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 contracts and subcontracts awarded to small businesses are exempt from the Cost Accounting Standards.

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 30 and 52

Government procurement.

Dated: February 19, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 30 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 30 and 52 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).

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

■ 2. Amend section 30.001 by—

- a. Removing from the definition “Cognizant Federal agency official (CFAO)” the word “administer” and adding “administer the” in its place;
- b. Removing from the definition “Desirable change” the word “unilateral” and adding “compliant” in its place; and
- c. Revising paragraph (1) of the definition “Required change” to read as follows:

30.001 Definitions.

* * * * *

Required change means—

(1) A change in cost accounting practice that a contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently becomes applicable to an existing CAS-covered contract or subcontract due to the receipt of another CAS-covered contract or subcontract; or

* * * * *

- 3. Amend section 30.601 by removing from paragraph (b) “52.230-6(b)” and adding “52.230-6(l), (m), and (n)” in its place; and by adding paragraph (c) to read as follows:

30.601 Responsibility.

* * * * *

(c) In performing CAS administration, the CFAO shall request and consider the advice of the auditor as appropriate (see 1.602-2).

- 4. Amend section 30.602 by revising paragraph (d) to read as follows:

30.602 Materiality.

* * * * *

(d) For required, unilateral, and desirable changes, and CAS noncompliances, when the amount involved is material, the CFAO shall follow the applicable provisions in 30.603, 30.604, 30.605, and 30.606.

- 5. Amend section 30.604 by—
- a. Removing from the introductory text of paragraphs (b) and (f) “, with the assistance of the auditor,”;
- b. Revising the introductory text of paragraph (g);
- c. Revising paragraph (h)(4); and
- d. Removing from paragraph (i)(1) “With the assistance of the auditor, estimate” and adding “Estimate” in its place.

The revised text reads as follows:

30.604 Processing changes to disclosed or established cost accounting practices.

* * * * *

(g) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO shall promptly evaluate the DCI proposal and follow the procedures at 30.606 to negotiate

and resolve the cost impact. The DCI proposal—

* * * * *

(h) * * *

(4) For required or desirable changes, negotiate an equitable adjustment as provided in the Changes clause of the contract.

* * * * *

■ 6. Amend section 30.605 by—

- a. Removing from the introductory text of paragraph (c)(2) “, with the assistance of the auditor,”;
- b. Revising the introductory text of paragraph (f);
- c. Removing from paragraph (h)(5) “; and” and adding “;” in its place; and
- d. Redesignating paragraph (h)(6) as (h)(7) and adding a new paragraph (h)(6).

The revised text reads as follows:

30.605 Processing noncompliances.

* * * * *

(f) *Detailed cost-impact proposal.* If the contractor is required to submit a DCI proposal, the CFAO shall promptly evaluate the DCI proposal and follow the procedures at 30.606 to negotiate and resolve the cost impact. The DCI proposal—

* * * * *

(h) * * *

(6) Determine the cost impact of each noncompliance that affects both cost estimating and cost accumulation by combining the cost impacts in paragraphs (h)(3), (h)(4), and (h)(5) of this section; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 7. Amend section 52.230-6 by—
- a. Revising the date of the clause; and
- b. Amending paragraph (a) by—
- i. In the definition “Flexibly-priced contracts and subcontracts” by revising paragraph (1); and
- ii. In the definition “Required change” revising paragraph (1).

The revised text reads as follows:

52.230-6 Administration of Cost Accounting Standards.

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ADMINISTRATION OF COST ACCOUNTING STANDARDS (MAR 2008)

* * * * *

(a) * * *

Flexibly-priced contracts and subcontracts means—

(1) Fixed-price contracts and subcontracts described at FAR 16.203-1(a)(2), 16.204, 16.205, and 16.206;

* * * * *

Required change means—

(1) A change in cost accounting practice that a Contractor is required to make in order to comply with applicable Standards, modifications or interpretations thereto, that subsequently become applicable to existing CAS-covered contracts or subcontracts due to the receipt of another CAS-covered contract or subcontract; or

* * * * *

(End of clause)

[FR Doc. E8-3371 Filed 2-27-08; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 39

[FAC 2005-24; FAR Case 2007-004; Item VI; Docket 2008-0001; Sequence 5]

RIN 9000-AK88

Federal Acquisition Regulation; FAR Case 2007-004, Common Security Configurations

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 require agencies to include common security configurations in new information technology acquisitions, as appropriate. The revision reduces risks associated with security threats and vulnerabilities and will ensure public confidence in the confidentiality, integrity, and availability of Government information. This final rule requires agency contracting officers to consult with the requiring official to ensure the proper standards are incorporated in their requirements.

DATES: *Effective Date:* March 31, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-24, FAR case 2007-004.