



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

MAR 31 2011

In reply refer to
DARS Tracking Number: 2011-O0006

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION AND LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Utilities Privatization – Class Deviation from FAR Part 31

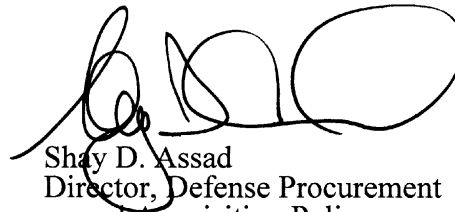
Contracting officers may use this class deviation when awarding qualified contracts in conjunction with the conveyance of a utility system under 10 U.S.C. § 2688, “Utility Systems: Conveyance Authority.” To qualify for the deviation, a contract must meet the conditions detailed in Attachment A and the Cost Accounting Standards (CAS) Board waiver at Attachment B. The applicability of this deviation extends to all qualified contracts awarded as of August 31, 2010.

This deviation replaces and updates the deviation granted under CPF Tracking Number 2007-O00007. The updates include: a statement of which elements of the waiver contractors must meet for each type of situation; a requirement for contractors to meet all the conditions in the waiver; and expansion of the permissible contract types.

The Head of the Contracting Agency shall report to this office (Attention: DPAP/CPF) on a quarterly basis any contracts awarded that use this class deviation. The report, submitted within 30 days of the end of the quarter, shall include, at a minimum, the following information:

1. Contract number
2. Contractor name
3. Date of contract award
4. Amount of contract award
5. Indication of use of CAS waiver as required in Attachment A, Section 1.b.(ii).

This class deviation remains in effect until it is incorporated into the DFARS or is otherwise rescinded. My point of contact for this issue is Mr. Mark Gomersall, 703-602-0302 or mark.gomersall@osd.mil.


Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachments:
As stated

Deviation from FAR Part 31 - Contract Cost Principles and Procedures

Section 1. **General Deviation from FAR Part 31.** This deviation applies to Government contracts awarded in conjunction with the conveyance of a utility system under 10 U.S.C. § 2688 provided all of the conditions listed in this section are met. This deviation permits, but does not require, the Head of the Contracting Activity (HCA) to waive the requirements of FAR Part 31.

The HCA may exclude from the contract some or all of the requirements of FAR Part 31 provided all of the following conditions are met:

- a. The contract is one of the following types:
 - (i) Firm fixed price contracts (FFP);
 - (ii) Fixed price contracts with economic price adjustment (where the price adjustment is based on an index or established prices, not based on actual costs incurred) (FPEPA); or
 - (iii) Fixed price contracts with prospective price redetermination (where the price adjustment is based on actual costs incurred) (FPPPR).
- b. The contract either:
 - (i) Is exempt from the application of the Cost Accounting Standards (CAS); or
 - (ii) Meets all the requirements of the CAS Board waiver of September 2, 2004, related to contracts entered into under the authority of 10 U.S.C. § 2688 (erroneously referred to as section 2686).
- c. The contract requires that the actual costs used for purposes of establishing the initial fixed price and any subsequent price submittals:
 - (i) Meet the limitations specified in Section 2 for any deviation granted from FAR 31.205-20, Interest and other financial costs;
 - (ii) Meet the limitations specified in Section 3 for any deviation granted from FAR 31.205-41, Taxes;
 - (iii) Exclude the types of costs listed at 10 U.S.C. § 2324(e) (as it exists on the date of contract award). Any reasonable method of estimating such costs is sufficient to meet this requirement; and
 - (iv) Exclude the types of costs that are not normally considered as reimbursable by the applicable regulatory body that oversees the utility rate determinations of the business segment performing the contract.

d. The contract provides the Government with access to all records related to the accounting practices used to determine the costs and the supporting data for any estimates of unallowable costs.

Section 2. **FAR 31.205-20 -- Interest and Other Financial Costs.** If a deviation under section 1 includes a deviation from the requirements at FAR 31.205-20, the following conditions, in addition to those under section 1, must also be met. This deviation permits, but does not require, the Contracting Officer to waive the requirements of FAR 31.205-20.

This deviation applies only when all of the following conditions, as well as the conditions of section 1, are met:

a. The contracting officer determines, in writing, that:

- (i) Allowing the costs will significantly reduce the costs of the United States for the utility services provided under the subject contract;
- (ii) The interest costs and directly related financial costs incurred to obtain loans or borrow capital from third-party financial institutions are reasonable based on the particular facts and circumstances involved; and
- (iii) The interest and directly related financial costs are associated with capital expenditures to acquire, renovate, upgrade, and expand utility systems under the subject utility services contract.

b. The contract states that cost of money is an unallowable contract cost under FAR 31.205-10, Cost of money, either during or after the period of the loan for all assets to which the loan relates; and

c. Interest rates used to calculate allowable costs are limited to 600 basis points above the Contract Disputes Act interest rate (41 U.S.C. § 611) in effect at the time the contractor makes the capital expenditure.

d. The deviation does not apply to any imputed interest on the contractor's own funds.

Section 3. **FAR 31.205-41 – Taxes.** If a deviation under section 1 includes a deviation from the requirements of FAR 31.205-41(b)(1), the following conditions, in addition to those under section 1, must also be met. This deviation permits, but does not require, the HCA to waive the requirements of FAR 31.205-41(b)(1).

To the maximum extent practical, contracts should be structured in a manner that will not result in a Contribution in Aid of Construction (CIAC) tax. Nevertheless, the HCA may determine that the CIAC tax is an allowable cost provided all of the following conditions, as well as the conditions of section 1, are met:

a. Based on the particular facts and circumstances involved, the HCA determines that incurrence of the CIAC tax is necessary to achieve the most beneficial business case for the Government and allowing the CIAC tax will result in significant benefits to the Government that outweigh the cost of allowing the tax.

- b. The HCA has adequately documented, in writing:
 - (i) The basis for the DoD determination of fair market value using a generally accepted valuation methodology.
 - (ii) The basis for the determination that the benefits to the Government outweigh the estimated cost of the tax (this requires an estimate of the expected corporate tax rate of the contractor, the marginal tax liability caused by the CIAC, and the anticipated difference in fair market value between the DoD and Internal Revenue Service (IRS) valuations).

- c. The contract limits the allowable cost to the portion of the actual CIAC tax attributable to the difference between:
 - (i) The fair market value determinations of DoD using a generally accepted valuation methodology; and
 - (ii) The fair market value determination of the IRS in assessing the tax.

SEP 2 2004

Ms. Deidre A. Lee
Director, Defense Procurement and
Acquisition Policy
Department of Defense
Washington, DC 20301

Dear Ms. Lee:


This responds to your December 19, 2003 letter, and the additional information you provided on April 5, 2004, to the Cost Accounting Standards (CAS) Board, requesting a CAS waiver for contracts entered into under the authority of 10 U.S.C. 2686, "Utility Systems, Conveyance Authority."

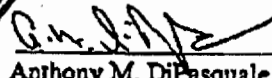
On September 2, 2004, the CAS Board approved the requested waiver subject to the conditions set forth in the attached "Enclosure."


In granting this waiver, the CAS Board recognizes that the utilities industry has a set of established accounting practices that are used by regulatory authorities to set rates for utility customers (e.g., FERC, NARUC, RUS, or AWWA). The Board believes that the enclosed waiver conditions, which include requirements for contractors to consistently follow these established industry accounting practices, and to disclose in writing the accounting practices used for allocation of indirect costs, provides adequate protection for the Government. If any contractor selected for a contract under the above described authority does not agree to the conditions in this waiver, the contractor will be subject to CAS requirements, provided it otherwise satisfies the appropriate CAS applicability criteria.

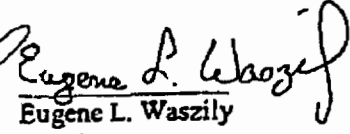
Please inform this Office, within ninety days after the close of each fiscal year, of the extent and use of this waiver.

Sincerely,


James P. Bedingfield
Member


Anthony M. DiPasquale
Member


William F. Reed
Member


Eugene L. Waszily
Member

Enclosure

The Cost Accounting Standards are hereby waived for contracts entered into under the authority of 10 U.S.C. 2686, "Utility Systems, Conveyance Authority" that meet all of the following conditions:

1. The contract is one of the following types:
 - a. Firm fixed price contracts (FFP);
 - b. Fixed price contracts with economic price adjustment (where the price adjustment is based on an index or established prices, not based on actual costs incurred) (FPEPA);
or
 - c. Fixed price contracts with prospective price redetermination (where the price adjustment is based on actual costs incurred) (FPPPR).
2. The business segment performing the contract is not, at the time of contract award, currently performing on any other contract that is subject to the Cost Accounting Standards.
3. The contract is awarded without the submission of cost or pricing data.
4. For contracts that are awarded without adequate price competition (regardless of contract type) and for all FPPPR contracts, the contract must include a clause that:
 - a. Requires the contractor to prepare the proposal for the initial contract or for the price redetermination using accounting practices that (i) comply with pronouncements of the Federal Energy Regulatory Commission (FERC), the National Association of Regulatory Utility Commissioners (NARUC), the Rural Utility Service (RUS), or the American Water Works Association (AWWA) and (ii) are consistent with the contractor's written and established practices for measuring, assigning, and allocating costs;
 - b. Requires the contractor to disclose, in writing, its established accounting practices for allocating indirect costs to contracts for which CAS has been waived, and to consistently use those disclosed practices to prepare proposal(s); and
 - c. Provides for an adjustment to the contract price if it is later found that the price was increased because the contractor used accounting practices that were in noncompliance with FERC, NARUC, RUS, or AWWA, or were inconsistent with the contractor's written and established practices. The amount of the adjustment shall be the difference between the contract price that was negotiated and the price that would have been negotiated had the business unit used compliant accounting practices that were in accordance with FERC, NARUC, RUS, or AWWA, and were consistent with the contractor's written and established practices. The Government shall be entitled to a

credit or cash recovery (at the Government's option) for the amount of the increased price plus interest. The interest shall be computed from the date the payment by the Government until the date of repayment by the contractor. The interest rate shall be the rate specified at 26 U.S.C. 6621(a)(2).

5. For FPPPR contracts, the contract includes the clause at FAR 52.215-2, Audit and Records-Negotiation.

6. For FPPPR contracts, the contract includes the following clause

The actual costs used for purposes of establishing any price predetermination under the contract must exclude all statutory and contractually unallowable costs. The actual costs must also exclude the types of costs that are not normally reimbursed by the applicable regulatory body that oversees the utility rate determinations of the business segment performing the contract. Any reasonable method of estimating such costs, including a statistical sample of contractor costs projected to the total cost universe, is sufficient to meet this requirement. Should any unallowable costs be included in the negotiated price predetermination, the Government shall be entitled to recover the amount of those unallowable costs plus interest from the date of the predetermination until the date of repayment, in accordance with 26 U.S. C. 6621(a)(2).

7. For FFP and FPEPA contracts (where the price adjustment is not based on actual costs incurred), the contract includes a clause that provides the Contracting Officer and his authorized representative access to all relevant contractor records, including but not limited to the accounting practices and cost records in use at the time of the contract award and at the time of the price redetermination.