



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

DEC 23 2009

In reply refer to
DARS Tracking Number: 2009-O0015

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), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION & LOGISTICS MANAGEMENT),
ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation - Limitations on Pass-Through Charges

Effective immediately, for the purpose of implementing requirements pertaining to limitations on pass-through charges, DoD contracting officers shall use FAR 15.408(n)(1); 15.408(n)(2)(i)(B); 15.408(n)(2)(iii); 31.203(i); the provision at 52.215-22; and the clause at 52.215-23 and its Alternate I, in lieu of DFARS 215.408(3) and (4); 231.201-2; 231.203(d); the provision at 252.215-7003; and the clause at 252.215-7004 and its Alternate I.

The DFARS text implements section 852 of the National Defense Authorization Act for Fiscal Year 2007 and has been superseded by a FAR rule that implements section 852 as well as section 866 of the National Defense Authorization Act for Fiscal Year 2009. This class deviation therefore eliminates the identified DFARS text, provisions, and clauses as obsolete, appropriately focusing on the FAR interim rule.

Additionally, this memorandum provides a deviation from FAR 15.408(n)(2)(i)(B)(2) to add an exception for fixed-price incentive contracts awarded on the basis of adequate price competition. The deviations to the FAR and DFARS are attached. This deviation is effective until incorporated into the FAR and DFARS, or otherwise rescinded. My point of contact is Mr. Mark Gomersall, 703-602-0302, or via e-mail at Mark.Gomersall@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachments:
As stated

Deviations to the FAR and DFARS are indicated by **[bold print in brackets]** and ~~strikethrough~~.

1. Deviation to the FAR.

15.408 Solicitation provisions and contract clauses.

* * * * *

(n) Limitations on Pass-Through Charges.

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(2)(i) Except as provided in paragraph (n)(2)(ii), the contracting officer shall insert the clause 52.215-23, Limitations on Pass-Through Charges, in solicitations and contracts including task or delivery orders as follows:

* * * * *

(B) For DoD, insert the clause when—

(1) The total estimated contract or order value exceeds the threshold for obtaining cost or pricing data in 15.403-4; and

(2) The contemplated contract type is expected to be any contract type except—

(i) A firm-fixed-price contract awarded on the basis of adequate price competition;

(ii) A fixed-price contract with economic price adjustment **[or a fixed-price incentive contract]** awarded on the basis of adequate price competition;

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2. Deviation to the DFARS.

215.408 Solicitation provisions and contract clauses.

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~~(3) Use the provision at 252.215-7003, Excessive Pass-Through Charges—
Identification of Subcontract Effort, in solicitations (including task or delivery orders)—~~

~~(i) With a total value that exceeds the threshold for obtaining cost or pricing
data in accordance with FAR 15.403-4, except when the resulting contract is expected to
be—~~

~~(A) A firm fixed-price contract awarded on the basis of adequate price
competition;~~

~~(B) A fixed-price contract with economic price adjustment, awarded on the
basis of adequate price competition;~~

~~(C) A firm fixed-price contract for the acquisition of a commercial item; or~~

~~(D) A fixed-price contract with economic price adjustment, for the
acquisition of a commercial item; or~~

~~(ii) With a total value at or below the threshold for obtaining cost or pricing data
in accordance with FAR 15.403-4, when the contracting officer determines that inclusion
of the provision is appropriate.~~

~~(4)(i) Use the clause at 252.215-7004, Excessive Pass-Through Charges, in
solicitations and contracts (including task or delivery orders)—~~

~~(A) With a total value that exceeds the threshold for obtaining cost or
pricing data in accordance with FAR 15.403-4, except for—~~

~~(1) Firm fixed-price contracts awarded on the basis of adequate price
competition;~~

~~(2) Fixed-price contracts with economic price adjustment, awarded on
the basis of adequate price competition;~~

~~(3) Firm fixed-price contracts for the acquisition of a commercial item;
or~~

~~————— (4) Fixed price contracts with economic price adjustment, for the acquisition of a commercial item; or~~

~~————— (B) With a total value at or below the threshold for obtaining cost or pricing data in accordance with FAR 15.403-4, when the contracting officer determines that inclusion of the clause is appropriate.~~

~~————— (ii) Use the clause with its Alternate I when the contracting officer determines that the prospective contractor has demonstrated that its functions provide added value to the contracting effort and there are no excessive pass-through charges.~~

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~~231.201-2 Determining allowability.~~

~~—— (a) In addition to the requirements at FAR 31.201-2(a), a cost is allowable only when it complies with the clause at 252.215-7004, Excessive Pass-Through Charges.~~

~~231.203 Indirect costs.~~

~~—— (d) Indirect costs related to excessive pass-through charges, as defined in the clause at 252.215-7004, are unallowable.~~

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~~252.215-7003 Excessive Pass-Through Charges—Identification of Subcontract Effort.~~

~~As prescribed in 215.408(3), use the following provision:~~

~~EXCESSIVE PASS-THROUGH CHARGES—~~

~~IDENTIFICATION OF SUBCONTRACT EFFORT (MAY 2008)~~

~~—— (a) Definitions. “Added value,” “excessive pass-through charge,” “subcontract,” and “subcontractor,” as used in this provision, are defined in the clause of this solicitation entitled “Excessive Pass-Through Charges” (DFARS 252.215-7004).~~

~~—— (b) General. The offeror’s proposal shall exclude excessive pass-through charges.~~

~~—— (c) Performance of work by the Contractor or a subcontractor.~~

~~————— (1) The offeror shall identify in its proposal the total cost of the work to be performed by the offeror, and the total cost of the work to be performed by each subcontractor, under the contract, task order, or delivery order.~~

~~————— (2) If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal —~~

~~————— (i) The amount of the offeror’s indirect costs and profit applicable to the work to be performed by the subcontractor(s); and~~

~~————— (ii) A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).~~

~~————— (3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal —~~

~~————— (i) The amount of the subcontractor’s indirect costs and profit applicable to the work to be performed by the lower tier subcontractor(s); and~~

~~————— (ii) A description of the added value provided by the subcontractor as related to the work to be performed by the lower tier subcontractor(s).~~

(End of provision)

~~252.215-7004 Excessive Pass-Through Charges.~~

~~As prescribed in 215.408(4), use the following clause:~~

~~EXCESSIVE PASS-THROUGH CHARGES (MAY 2008)~~

~~————— (a) Definitions. As used in this clause —~~

~~————— “Added value” means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).~~

~~————— “Excessive pass-through charge,” with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit on work~~

~~performed by a subcontractor (other than charges for the costs of managing subcontracts and applicable indirect costs and profit based on such costs).~~

~~—————“No or negligible value” means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).~~

~~—————“Subcontract” means any contract, as defined in section 2.101 of the Federal Acquisition Regulation, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.~~

~~—————“Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for the Contractor or another subcontractor.~~

~~— (b) General. The Government will not pay excessive pass-through charges. The Contracting Officer shall determine if excessive pass-through charges exist.~~

~~— (c) Required reporting of performance of work by the Contractor or a subcontractor. The Contractor shall notify the Contracting Officer in writing if—~~

~~————— (1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or~~

~~————— (2) Any subcontractor changes the amount of lower tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower tier subcontractor(s).~~

~~— (d) Recovery of excessive pass-through charges. If the Contracting Officer determines that excessive pass-through charges exist—~~

~~————— (1) For fixed price contracts, the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price; and~~

~~———— (2) For other than fixed price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in Subpart 31.2 of the Federal Acquisition Regulation (FAR) and Subpart 231.2 of the Defense FAR Supplement.~~

~~———— (e) Access to records.~~

~~———— (1) The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor's records (as defined at FAR 52.215-2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.~~

~~———— (2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor's records (as defined at FAR 52.215-2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.~~

~~———— (f) Flowdown. The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts under this contract, except for —~~

~~———— (1) Firm fixed price subcontracts awarded on the basis of adequate price competition;~~

~~———— (2) Fixed price subcontracts with economic price adjustment, awarded on the basis of adequate price competition;~~

~~———— (3) Firm fixed price subcontracts for the acquisition of a commercial item; or~~

~~———— (4) Fixed price subcontracts with economic price adjustment, for the acquisition of a commercial item.~~

(End of clause)

~~ALTERNATE I (MAY 2008). As prescribed in 215.408(4)(ii), substitute the following paragraph (b) for paragraph (b) of the basic clause:~~

~~———— (b) General. The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.~~

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