AUG 17 2005

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR ROBERT R. JARRETT
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH J. DESTEFANO, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
DIVISION

SUBJECT: FAR Case 2004-035, Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items

Attached are comments received on the subject FAR case published at 70 FR 33659; June 8, 2005. The comment closing date was August 8, 2005.

| Response Number | Date Received | Comment Date | Commenter |
|---|---|---|---|
| 2004-035-1 | 07/06/05 | 07/06/05 | Caterpillar |
| 2004-035-2 | 07/28/05 | 07/28/05 | Wright-Patterson AFB |
| 2004-035-3 | 08/08/05 | 08/08/05 | DCAA |
| 2004-035-4 | 08/10/05 | 08/10/05 | ABA |
| 2004-035-5 | 08/16/05 | 08/05/05 | Boeing |
| 2004-035-6 | 08/16/05 | 08/12/05 | AIA |

Attachments

Attachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

2004-035-1

CATERPILLAR®

**Defense and Federal Products**
**Caterpillar Inc.**

P.O. Box 470
Mossville, Illinois 61552-0470
USA

July 6, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW, Room 4035
ATTN: Laurieann Duarte
Washington DC 20405

RE: FAC 2005-04; FAR Case 2004-035

Dear Ms. Duarte:

We take exception to the above interim rule amending the Federal Acquisition Regulation (FAR) to provide exception to the time honored recognition prohibiting obtainment of cost or pricing data for commercial or modified commercial items.

The revision as proposed for FAR 15.403-1(c)(3)(ii)(c) mandating a requirement for contractor cost or pricing data for DoD, NASA, or Coast Guard acquisitions involving modification value in excess of $500,000 (or 5% of the total price of the contract) invalidates long standing procurement streamlining policies previously promoted by the acquisition community. The exemption allowance from submission of cost or pricing data afforded to providers of commercial items should not be abolished on the basis of an arbitrary dollar threshold.

Many providers of commercial product to the Government are not focused on Governmental sales for their corporations' primary source of revenue. Instead Governmental sales may represent a small adjunct to the firm's private sector client base. The expectation of cost or pricing submission, assuming modification value exceeds the stated threshold, would impose burden on firms in terms of resources, retention systems, and subsequent validation reporting without providing comparable benefit. This contention is especially true when the base product fully meets the FAR definition of commerciality, in the sense of being offered for sale to the general public with pricing being verifiable by catalog or price list. Military required modifications could easily exceed the threshold on the basis of procurement volume alone, yet the base product could remain commercial in function.

The proposed rule will pose unnecessary burden to a large segment of the contracting community, those contractors having lawfully enjoyed previous exemption from the submission requirement resulting from the commerciality, and Government acceptance of the commerciality, of their product offering. Concerns may also surface with respect to safeguard from inadvertent disclosure of the submitted information, and

7-6-05

2004-035-1

firms' confidence with maintaining their perceived competitive advantage. We urge the Secretariat to abolish the proposed rule, and to maintain the private sector partnership logic relative to retaining the commercial item exemption in its entirety without exception.

Sincerely,

Michael L. Lesko
Government Contracts Manager

Caterpillar Inc.
Defense and Federal Products
309/ 578-4488

2004-035-2

GSA

Jerry Olson

07/28/2005 01:13 PM

To: FARCase.2004-035@gsa.gov
cc: James.Hudnell@wpafb.af.mil
Subject: Pricing Division (ASC/PKF) comments

----- Forwarded by Jerry Olson/VPC/CO/GSA/GOV on 07/28/2005 01:12 PM -----

"Hudnell Tom Civ ASC/PKFA" <James.Hudnell@wpafb.af.mil>

07/27/2005 01:11 PM

To "'farcase.2004-035@gsa.gov'" <farcase.2004-035@gsa.gov>

cc "Prickett David R Civ ASC/PKF" <David.Prickett@wpafb.af.mil>, "Reis Robert J Civ ASC/PK" <Robert.Reis@wpafb.af.mil>, "'jerry.olson@gsa.gov'" <jerry.olson@gsa.gov>, "'david.capitano@osd.mil'" <david.capitano@osd.mil>

Subject FAC 2005-04, FAR Case 2004-035

To: FAR Secretariat

Subject: Comments concerning Far Case 2004-035

Attached are the comments regarding the subject FAR case from the Pricing Division (ASC/PKF), Wright-Patterson Air Force Base, Ohio. These comments have been reviewed and approved by the Acting Director of Contracting at ASC, Mr. Robert Reis. If you need further information, please contact the undersigned at DSN 785-7071 or by return E-mail.

Tom Hudnell
Chief, Analysis & Negotiation Branch A

<<COMMENTS CONCERNING FAR CASE 2004-035.doc>> COMMENTS CONCERNING FAR CASE 2004-035.doc

2004-035-2

## *COMMENTS CONCERNING FAC 2005-04, FAR CASE 2004-035, Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items*

These comments address the following sentence in this FAR Case:

> "The change requires that the exception from the requirement to obtain certified cost or pricing data for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5% of the total price of the contract, whichever is greater."

The first comment is directed at the $500,000 threshold stated in the above paragraph. This value should be $550,000 to match the FAR requirement for obtaining certified cost or pricing data (FAR 15.403-4(a)(1))

The second comment is of more concern and addresses the phrase "....more than $500,000 or 5% of the total price of the contract, whichever is greater." The concern involves the window between $500,000 and 5%. If a noncommercial modification is between these two values, no certified cost or pricing data will be obtained based on the wording presently in the FAR Case. The best way to illustrate this concern is through the following examples:

Example #1:
Proposal Price = $100,000,000
Noncommercial Modification Price = $4,500,000
Result = No certified data would be obtained because mod is not above the 5% threshold of $5,000,000 which is greater than $500,000

Example #2:
Proposal Price = $9,000,000
Noncommercial Modification Price = $600,000
Result = Certified data would be obtained because mod is above the $500,000 threshold which is greater than 5% of the price

From a Price/Cost Analyst and taxpayer's point of view this does not make common sense. The logical proposal to obtain certified data on would be the $4,500,000 noncommercial modification. The return on investment is greater because of the much

2004-035-2

larger dollar value which will most likely yield a bigger cost reduction during negotiations verses a $600,000 proposal.

Recommend substituting a specific dollar value in place of the thresholds presently in the language. The dollar value recommended is $550,000 since that is the FAR threshold for obtaining certified cost or pricing data. If the modification is noncommercial it should be subject to the same laws and regulations applied to other sole source proposals priced using FAR Part 15.

2004-035-3

**DEFENSE CONTRACT AUDIT AGENCY**
**DEPARTMENT OF DEFENSE**
**8725 JOHN J. KINGMAN ROAD, SUITE 2135**
**FORT BELVOIR, VA 22060-6219**

IN REPLY REFER TO

PSP 730.8.B.1 August 8, 2005

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION, REGULATORY SECRETARIAT (VIR)

ATTENTION: Ms. Laurieann Duarte

SUBJECT: Comments on FAC 2005-004 (FAR Case 2004-035)

We have reviewed the interim rule published in the Federal Register as Item IV of FAC 2005-004 (FAR Case 2004-035). The interim rule amends FAR 15.403-1, Prohibition on Obtaining Cost or Pricing Data, to reflect the requirements in Section 818 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375).

Based on our review of the interim rule, we suggest the rule be revised to add the word "minor" in front of the word "modifications" in the subparagraphs under 15.403-1(c)(3)(ii). Although the paragraph at 15.403-1(c)(3)(ii) defines the applicability of the requirements to minor modifications, the addition of the word "minor" in each subparagraph would make the applicability more explicit and minimize possibilities for the subparagraphs to be misread in isolation to encompass all modifications. We suggest the interim rule be modified as underlined and bolded below:

**FAR 15.403-1, Prohibition on Obtaining Cost or Pricing Data (10 U.S.C 2306a and 41 U.S.C 254b).**

* * * * *

*(c)* * **

*(3)* * **

*(ii) The following requirements apply to minor modifications defined in paragraph (3)(ii) of the definition of a commercial item at 2.101 that do not change the item from a commercial item to a noncommercial item:*

*(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, ~~the~~ **minor** modifications are exempt from the requirement for submission of cost or pricing data.*

*(B) For acquisitions funded by DoD, NASA, or Coast Guard, ~~the~~ **minor** modifications are exempt from the requirement for submission of cost or pricing data provided the total cost of the **minor** modifications do not exceed the greater of $500,000 or 5 percent of the total price of the contract.*

2004-035-3

August 8, 2005

*(C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost of the* ***minor*** *modifications exceeds the greater of $500,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data."*

We appreciate the opportunity to review and provide comments on the interim rule. Please direct any questions on this matter to Mr. Jeffrey Shaffer, Program Manager, Pricing and Special Projects Division, at (703) 767-3229.

/Signed/
Robert DiMucci
Assistant Director
Policy and Plans

2004-035-4

2004-2005

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August 10, 2005

**VIA E-MAIL AND FIRST CLASS MAIL**

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W., Room 4035
Washington, DC 20405

Attention: Laurieann Duarte

**RE: Interim Rule with Request for Comments, FAC 2005-04, FAR Case 2004-035, 70 Fed. Reg. 33659 (June 8, 2005); Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The June 8, 2005 interim rule amends the Federal Acquisition Regulation ("FAR") to implement section 818 ("Section 818") of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375 (the



Rec'd 8-10-05 (MO)

2004-035-4

"Act"), amending 10 U.S.C. § 2306a. 10 U.S.C. § 2306a(b) contains an exception to the requirement to submit certified cost or pricing data when a commercial item is being acquired. Section 818 limits that exception so that it "does not apply to cost or pricing data on noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater." 10 U.S.C. § 2306a(b)(3). The Section has two comments on the interim rule implementing Section 818.

First, the Section recommends that "$500,000" be changed to "$550,000" where it appears in the interim rule in FAR 15.403-1(c)(3)(ii)(B) and (C). Section 818 does use the $500,000 figure to amend 10 U.S.C. 2306a(b). But 10 U.S.C. § 2306a also contains a subsection (a)(7), which provides for adjustments every five years in the $500,000 threshold. That threshold is currently adjusted to be $550,000, and to simplify matters and avoid confusion, other FAR sections use the adjusted threshold number of $550,000. *See, e.g.*, FAR 15.403-4. The Section recommends that a similar approach be taken here also.

Second, the Section is recommending a change to the FAR language describing the threshold to avoid the possibility that the FAR might be misconstrued and implemented in a way that would prove impracticable.

Section 818 was included in the Act in large part because of Congressional concern that the Air Force did not have access to cost or pricing data on noncommercial modifications in connection with a contract for the KC-767A Tanker Aircraft. *See* Senate Report 108-260, at 355-56. The Senate Committee on Armed Services, citing Department of Defense Inspector General's Report D-2004-064, noted that "less than one-third of the dollar value of the contract negotiated by the Air Force was for the 'green' commercial aircraft." *Id.* at 356.

Section 818 establishes a limitation to the cost or pricing data exception (for DOD, NASA, and the Coast Guard) when the noncommercial modifications are expected to "cost" more than $500,000 or 5 percent of the total "price" of the contract. The Section believes that "expected to cost" in this context means cost to the Government, which is the price charged by the contractor. Because a component of the threshold is the percentage attributable to the noncommercial modifications, and the denominator in determining that percentage is the price of the contract, it is only logical that the numerator in determining that percentage be the price of the noncommercial modifications. The Section believes that such an approach is consistent with the language of Section 818, consistent with the Congressional concern cited above, and makes common sense.

2004-035-4

Nevertheless, the Section is concerned that the current FAR language might be construed by some to refer not to cost to the Government (i.e., price), but cost to the contractor as measured by FAR Part 31. This could require a contractor that typically provided commercial items to develop and implement a capability to determine costs per FAR Part 31 merely to determine if it was within the dollar and percentage thresholds of the exception.

The Section believes this concern can be alleviated by simply adding the words "to the Government" after "total cost" to the wording of FAR 15.403-1(c)(3)(ii)(B) and (C).

The Section recommends that FAR 15.403-1(c)(3)(ii (B) and (C) be revised to read as follows, so as to incorporate both of the above recommendations:

> (B) For acquisitions funded by DoD, NASA, or Coast Guard, the modifications are exempt from the requirement for submission of cost or pricing data provided the total cost to the Government of the modifications does not exceed the greater of $550,000 or 5 percent of the total price of the contract.
>
> (C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost to the Government of the modifications exceeds the greater of $550,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Robert L. Schaefer
Chair, Section of Public Contract Law

cc: Michael A. Hordell
Patricia A. Meagher
Michael W. Mutek

2004-035-4

Carol N. Park-Conroy
Patricia H. Wittie
Hubert J. Bell, Jr.
Mary Ellen Coster Williams
Council Members
Co-Chairs and Vice-Chairs of the Commercial
Products and Services Committee
David Kasanow

The Boeing Company
100 N. Riverside
Chicago, IL 60606-1596

2004-035-5

August 5, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street NW
Room 4035
Washington DC 20405

BOEING

ATTN: Laurieann Duarte

Subject: Federal Acquisition Regulation; Submission of Cost or Pricing Data On Noncommercial Modifications of Commercial Items

Reference: FAR Case 2004-035; Item IV, 70 Federal Register 33659 (Wednesday, June 8, 2005).

Dear Ms. Duarte:

The Boeing Company appreciates the opportunity to offer comments on the subject interim rule.

As you are aware, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) issued the referenced interim rule amending the Federal Acquisition Regulation (FAR) regarding the prohibition on obtaining cost or pricing data. This interim rule implements Section 818, "Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items," of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA).

Section 818 amended 10 U.S.C. 2306a, which provides three exceptions to the requirement for submission of cost or pricing data: adequate price competition, commercial items, and DOD waiver. Section 818 states that the exception for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005.

The Truth in Negotiations Act (TINA) and the implementing regulations are already complicated. Implementing Section 818, with it own challenges, adds further complications. Our primary concern is that the interim rule implementing Section 818 for "noncommercial modifications" is applied appropriately and that its scope

Rec'd 8-16-05

035-5

does not encroach on the scope of the exception for commercial items or commercial modifications. The interim rule introduces confusion, or at least is written in such a way that it risks being interpreted incorrectly. The interim rule introduces new concepts, terms and criteria that differ materially from those established in Section 818 of the Act.

The FAR, unlike the DFARS, lacks an associated Procedures, Guidance, and Information (PGI) resource to foster consistent application of regulatory or statutory requirements. Therefore, we recommend the changes to the interim rule shown on the attachment, for the following reasons:

BOEING

1. Since the limitation does NOT apply to modifications of a commercial nature, additional guidance on what distinguishes a "noncommercial modification" from a commercial modification is essential in the final published rule. For example, modifications which merely alter appearance, or are "of a type" requested for commercial use -- such as for increased strength, durability, reliability, or future installation of other equipment -- are NOT "noncommercial" modifications even if required to meet a military mission, and should not be subject to potential application of certified cost or pricing data regardless of value. For example, modifications -- such as additional wiring provisions, additional tubing or piping, thicker materials or doublers to strengthen structural components -- are not themselves "noncommercial modifications," even if they are made for the purpose of accommodating the later installation of military-specific equipment, such as missile delivery systems, electronic warfare systems, aerial refueling systems, etc. Accordingly, we recommend that the final rule include a new definition of the term "noncommercial modification." This would provide the necessary clarification required in the future and address the latent ambiguities contained in the current interim rule. See Attachment, subparagraph (c)(3)(ii).

2. Subparagraph (c)(3)(ii) of FAR 15.403-1, "Prohibition on Obtaining Cost or Pricing Data (10 U.S.C. 2306a and 41U.S.C. 254b)" includes the concept that a "modification" to a commercial item is exempt as long as it is a modification "that does not change the item from a commercial item to a noncommercial item." It is clear that Congress, under Section 818, did not intend to create new criteria for defining a "commercial item": the underlying commercial item certainly continues to qualify as a "commercial item" despite the "noncommercial modification" (provided the modification is a "minor modification" as defined in paragraph (3)(ii) of the commercial item definition at FAR 2.101, i.e., "the modification does not significantly alter the nongovernmental function or essential physical characteristics of an item or component." Rather, under Section 818, the requirement is that the "noncommercial modification" is subject to TINA if it meets the Section 818 threshold. "Commercial items," including "modifications of a type customarily available in the commercial marketplace" under subparagraph

(c)(3)(i) of the commercial item definition are to remain exempt. As an example, a commercial airplane may include structure, tubing, and wiring typically installed on such airplanes, without losing its "commercial item" status, and should remain exempt from cost or pricing data. The "noncommercial modifications" may include specific military equipment such as weapons, military radios, military radar, refueling booms, etc. This position is consistent with guidance in the Senate report accompanying its draft authorization bill for 2005, Section 813 that evolved into Section 818 which states, "The provision recommended by the committee would not require the contractor to provide any additional information on the commercial part of the contract." Further, the language in Section 818 states in paragraph (C)(ii), "Nothing in subparagraph (A) shall be construed--- to require the submission of cost or pricing data on any aspect of an acquisition of a commercial item other than the cost and pricing of noncommercial modifications of such items". Therefore, we recommend revisions to the interim regulatory language to clarify that this exception remains. See Attachment, subparagraphs (c)(3)(i) and (c)(3)(ii)(C).

3. The statute applies the $500,000 or 5% (whichever is greater) threshold "in the aggregate," whereas the interim rule refers to "total cost." Any final published rule should clarify that the "total cost" applies on a per-transaction basis, not on a cumulative basis. The rule will be unworkable with any other interpretation. If treated cumulatively, the threshold would of necessity have to apply retroactively, which is impracticable and unfair. Also, if treated cumulatively, subsequent modifications of a non-commercial nature might have to be refused by an entity with an accounting system unable to comply with requirements for certified cost or pricing data. See Attachment, subparagraph (c)(3)(ii)(B).

4. Commercial items are exempt from TINA. Section 818 of the FY2005 National Defense Authorization Act (NDAA) created an exception to that exception, rendering noncommercial modifications that exceed the NDAA threshold (the greater of $500,000 or 5% of the contract price) subject to TINA. However, nothing in the FY05 NDAA changed the threshold for the applicability of TINA, which is currently $550,000. To be consistent with the NDAA language and to reconcile the two different amounts, the final regulations should make it clear that noncommercial modifications are subject to TINA if over the NDAA threshold, but that the TINA requirements for certified cost or pricing data apply only if both the TINA threshold and the NDAA thresholds have been met.

5. In those instances where the offeror does not have, nor is required to have, an approved Cost Accounting Standards (CAS) compliant system, the requirement for certified cost and pricing data should be waived, as provided in FAR 15.403-1(c ) (4). Commercial companies that produce commercial items for the commercial marketplace have prices set by market forces (not

035-5

by analysis of costs). Commercial companies do not segregate costs, e.g., supplier costs, unallowable costs, etc. in the same way as FAR Part 31 cost principles. A commercial supplier is not set up to comply with the FAR or with TINA, CAS, government audits, or government requirements for estimating systems. The interim regulation should acknowledge this reality. See Attachment, subparagraph (c)(3)(ii)(C).

We appreciate the opportunity to provide formal comments. If you have any questions on issues covered in this letter, please call Mr. Robert C. Briscoe at (314) 544-2868 or Mark Olague at (253) 773-2173.

BOEING

Sincerely,

Warren L. Reece

Warren L. Reece
Director, Contract Policy & Process

Attachment:
Suggested revisions to FAR 15.403-1, Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C 254b)

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FAR Case 2004-035; Item IV, 70 Federal Register 33659
(Wednesday, June 8, 2005).
Suggested Changes to the interim regulation – FAR Case 2004-035; Item IV

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FAR 15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C.2306a and 41 U.S.C.254b).

235-5

*****

(c ) ***

(3) *Commercial items.*

(i) Any acquisition of an item that meets the commercial item definition in 2.101, and any modification of a type customarily available in the commercial marketplace, as defined in paragraph (3)(i) of that definition, is exempt from the requirement for cost or pricing data stated in paragraph (3)(ii) below. If the contracting officer determines that an item claimed to be commercial is, in fact, not commercial and that no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

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Deleted: that does not change the item from a commercial item to a noncommercial item,

(ii) The following requirements apply to any minor modification of a type not customarily available in the commercial marketplace made to meet Federal Government requirements ("noncommercial modification of a commercial item"), as defined in paragraph (3)(ii) of the definition of a commercial item at 2.101 :

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(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, the minor modifications are exempt from the requirement for submission of cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, the noncommercial modifications are exempt from the requirement for submission of cost or pricing data provided the total cost, on a per transaction basis, of the noncommercial modifications do not exceed the greater of $500,000 or 5 percent of the total price of the contract.

(C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost of the noncommercial modifications exceeds the greater of $500,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data for the noncommercial modifications (provided that if the offeror or contractor performing the noncommercial modification does not have an approved Cost Accounting Standards (CAS) Disclosure Statement or an estimating system compliant with the

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FAR, the requirement for certified cost and pricing data should be considered for a waiver under 15.403-1(c )(4).

2004-035-5

(iii) Any Acquisition for noncommercial supplies or services treated as commercial items at 12.102(f)(1), except sole source contracts greater then $15,000,000, is exempt from the requirements for cost or pricing data (41 U.S.C. 428a).

Deleted: considered for a waiver exception under TINA.

2004-035-6

August 12, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW, Room 4035
ATTN: Ms. Laurieann Duarte
Washington, DC 20405

Subject: Interim Rule Regarding Prohibition on Obtaining Cost or Pricing Data
To Implement Section 818 of Public Law 108-375;
FAC 2005-04; FAR Case 2004-035

Dear Ms. Duarte:

The Aerospace Industries Association (AIA) is pleased to submit comments in response to the interim rule which amends Federal Acquisition Regulation (FAR) Part 15.403-1 regarding a prohibition on obtaining cost or pricing data on noncommercial modifications of commercial items. The rule implements Section 818 of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Section 818, NDAA FY05).

Section 818 amended 10 U.S.C. Section 2306a, the Truth in Negotiations Act (TINA), which provides three exceptions to the requirement for contractor submission of cost or pricing data to the government: adequate price competition; commercial items; and Department of Defense (DOD) waiver. Section 818 states, in particular, that the exception for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Moreover, Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005.

Our principal concern is that the Section 818 implementing interim rule for "noncommercial modifications" must be applied appropriately and that its scope should not encroach on the scope of the exception for commercial items or commercial modifications. As currently drafted, the interim rule is at risk of being interpreted incorrectly. The rule introduces new concepts, terms and criteria that differ materially from those established in Section 818. For reasons more fully elaborated below, we recommend changes be adopted to the interim rule as specifically shown on the Attachment to this letter.

1. Since the limitation does NOT apply to modifications of a commercial nature, additional guidance on what distinguishes a "noncommercial modification" from a

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commercial modification is essential in the final published rule. For example, modifications which merely alter appearance, or are "of a type" requested for commercial use—such as for increased strength, durability, reliability, or future installation of other equipment—are NOT "noncommercial" modifications even if required to meet a military mission, and should not be subject to potential application of certified cost or pricing data regardless of value. For example, modifications—such as additional wiring provisions, additional tubing or piping, thicker materials or doublers to strengthen structural components—are not themselves "noncommercial modifications," even if they are made for the purpose of accommodating the later installation of military-specific equipment, such as missile delivery systems, electronic warfare systems, aerial refueling systems, etc. Accordingly, we recommend that the final rule include a new definition of the term "noncommercial modification." This would provide the necessary clarification required in the future and address the latent ambiguities contained in the current interim rule. See Attachment, subparagraph (c)(3)(ii).

2. Subparagraph (c)(3)(ii) of FAR 15.403-1, "Prohibition on Obtaining Cost or Pricing Data (10 U.S.C. 2306a and 41U.S.C. 254b)," includes the concept that a "modification" to a commercial item is exempt as long as it is a modification "that does not change the item from a commercial item to a noncommercial item." It is clear that Congress, under Section 818, did not intend to create new criteria for defining a "commercial item": the underlying commercial item certainly continues to qualify as a "commercial item" despite the "noncommercial modification" (provided the modification is a "minor modification" as defined in paragraph (3)(ii) of the commercial item definition at FAR 2.101, i.e., "the modification does not significantly alter the nongovernmental function or essential physical characteristics of an item or component.") Rather, under Section 818, the requirement is that the "noncommercial modification" is subject to TINA if it meets the Section 818 threshold. "Commercial items," including "modifications of a type customarily available in the commercial marketplace" under subparagraph (c)(3)(i) of the commercial item definition are to remain exempt. As an example, a commercial airplane may include structure, tubing, and wiring typically installed on such airplanes, without losing its "commercial item" status, and should remain exempt from cost or pricing data. The "noncommercial modifications" may include specific military equipment such as weapons, military radios, military radar, refueling booms, etc. This position is consistent with guidance in the Senate report accompanying its version of the draft authorization bill for 2005 for Section 813 that evolved into Section 818 which states: "The provision recommended by the committee would not require the contractor to provide any additional information on the commercial part of the contract." Further, the language in Section 818 states in paragraph (C)(ii), "Nothing in subparagraph (A) shall be construed—to require the submission of cost or pricing data on any aspect of an acquisition of a commercial item other than the cost and pricing of noncommercial modifications of such items". Therefore, we recommend revisions to the interim regulatory language to clarify that this exception remains. See Attachment, subparagraphs (c)(3)(i) and (c)(3)(ii)(C).

2004-035-6



3. The statute applies the $500,000 or 5% (whichever is greater) threshold "in the aggregate," whereas the interim rule refers to "total cost." Any final published rule should clarify that the "total cost" applies on a per-transaction basis, not on a cumulative basis. The rule will be unworkable with any other interpretation. If treated cumulatively, the threshold would of necessity have to apply retroactively, which is impracticable and unfair. Also, if treated cumulatively, subsequent modifications of a non-commercial nature might have to be refused by an entity with an accounting system unable to comply with requirements for certified cost or pricing data. See Attachment, subparagraph (c)(3)(ii)(B).

4. Commercial items are exempt from TINA. Section 818 of the NDAA FY05 created an exception to that exception, rendering noncommercial modifications that exceed the NDAA threshold (the greater of $500,000 or 5% of the contract price) subject to TINA. However, nothing in the NDAA FY05 changed the threshold for the applicability of TINA, which is currently $550,000. To be consistent with the NDAA language and to reconcile the two different amounts, the final regulations should make it clear that noncommercial modifications are subject to TINA if over the NDAA threshold, but that the TINA requirements for certified cost or pricing data apply only if both the TINA threshold and the NDAA thresholds have been met.

5. In those instances where the offeror does not have, nor is required to have, an approved Cost Accounting Standards (CAS) compliant system, the requirement for certified cost and pricing data should be waived, as provided in FAR 15.403-1(c)(4). Commercial companies that produce commercial items for the commercial marketplace have prices set by market forces, not by analysis of costs. Commercial companies do not segregate costs, e.g., supplier costs, unallowable costs, etc. in the same way as FAR Part 31 cost principles. A commercial supplier is not set up to comply with the FAR or with TINA, CAS, government audits, or government requirements for estimating systems. The interim regulation should acknowledge this reality. See Attachment, subparagraph (c)(3)(ii)(C).

We appreciate the opportunity to provide our comments. If you have any questions concerning our comments or recommendations, please contact me at 703-358-1045 or Elaine.Guth@aia-aerospace.org. Thank you for your consideration.

Sincerely,

Elaine J. Guth

Elaine J. Guth
Assistant Vice President
Procurement and Finance

Attachment

ATTACHMENT 2004-035-6

FAR Case 2004-035; Item IV, 70 Federal Register 33659
Suggested Changes to the Interim Regulation

FAR 15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C.2306a and 41 U.S.C.254b).

*****

(c ) ***

(3) *Commercial items.*

(i) Any acquisition of an item that meets the commercial item definition in 2.101, and any modification of a type customarily available in the commercial marketplace, as defined in paragraph (3)(i) of that definition, is exempt from the requirement for cost or pricing data stated in paragraph (3)(ii) below. If the contracting officer determines that an item claimed to be commercial is, in fact, not commercial and that no other exception or waiver applies, the contracting officer must require submission of cost or pricing data.

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(ii) The following requirements apply to any minor modification of a type **not** customarily available in the commercial marketplace made to meet Federal Government requirements ("noncommercial modification of a commercial item"), as defined in paragraph (3)(ii) of the definition of a commercial item at 2.101 :

(A) For acquisitions funded by any agency other than DoD, NASA, or Coast Guard, the minor modifications are exempt from the requirement for submission of cost or pricing data.

(B) For acquisitions funded by DoD, NASA, or Coast Guard, the noncommercial modifications are exempt from the requirement for submission of cost or pricing data provided the total cost, on a per transaction basis, of the noncommercial modifications do not exceed the greater of $500,000 or 5 percent of the total price of the contract.

(C) For acquisitions funded by DoD, NASA, or Coast Guard where the total cost of the noncommercial modifications exceeds the greater of $500,000 or 5 percent of the total price of the contract and no other exception or waiver applies, the contracting officer must require submission of cost or pricing data for the noncommercial modifications (provided that if the offeror or contractor performing the noncommercial modification does not have an approved Cost Accounting Standards (CAS) Disclosure Statement or an estimating system compliant with the FAR, the requirement for certified cost and pricing data should be considered for a waiver under 15.403-1(c )(4).

(iii) Any Acquisition for noncommercial supplies or services treated as commercial items at 12.102(f)(1), except sole source contracts greater then $15,000,000, is exempt from the requirements for cost or pricing data (41 U.S.C. 428a).

concerning the IRFA were received. A Final Regulatory Flexibility Analysis (FRFA) was prepared. The rule is expected to have a positive impact on small business concerns. However, it is not expected to have a significant impact on a substantial number of small entities because it provides Governmentwide procurement authority that enables the contracting officer (CO) to treat a noncommercial service as commercial if specific conditions, most of which pertain to performance–based contracting, are met. The Government is encouraged to use performance–based contracting techniques on all service contracts and allowing this authority—

- Opens up opportunities to small businesses that otherwise would not have been available if they could not meet the commercial items definition in FAR 2.101 and 52.202–1;
- Provides contracting flexibility when using performance–based contracting techniques;
- Helps the Government move closer to achieving the performance–based contracting performance–goals for Fiscal Years 2004 and 2005; and
- Allows the CO to use FAR Part 12, and procure these types of services similar to the commercial marketplace.

Specifically, a query of the Central Contractor Registration (CCR) system indicates there are 198,732 small businesses registered, and many of these contractors were awarded performance–based contracts or task orders for noncommercial services and the Government was required to use FAR Part 13, Simplified Acquisition Procedures, FAR Part 14, Sealed Bidding, or FAR Part 15, Contracting by Negotiations, for these acquisitions because they were not commercial items. This authority allows the CO to use FAR Part 12, which is the Government's preference since this will allow us to procure these types of services similar to the commercial marketplace, and using FAR Part 12 will provide more contracting flexibility and opportunities to the small business community.

The rule will impose no new reporting or recording keeping requirements on large or small entities. It only requires the Government to report on contracts or task orders awarded under this authority. Specifically, implementation of Section 1431 requires agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The Federal Procurement Data System–Next Generation (FPDS–NG) will be revised to enable agencies to report on the use of such authority both Governmentwide and for each department and agency. By November 2006, the Office of Management and Budget will start reporting to the Committees on Governmental Affairs and Armed Services of the Senate, and the Committees on Government Reform and Armed Services of the House of Representatives on the implementation of this section. The authority of Section 1431 expires on November 24, 2013, ten years after enactment.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 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 2005–004, FAR Case 2004–004), 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 2, 4, 12, 37, and 52

Government procurement.

Dated: May 27, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

### Interim Rule Adopted as Final With Changes

■ Accordingly, DOD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 4, 12, 37, and 52, which was published in the **Federal Register** at 69 FR 34226, June 18, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 37, and 52, is revised 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 12—ACQUISITION OF COMMERCIAL ITEMS

### 12.102 [Amended]

■ 2. Amend section 12.102 in paragraph (g)(1)(iv) by removing "Includes" and adding "Uses" in its place; and in paragraph (g)(2) by removing "should" and adding "may" in its place.

[FR Doc. 05–11189 Filed 6–7–05; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Part 15

**[FAC 2005–04; FAR Case 2004–035; Item IV]**

**RIN 9000–AK17**

## Federal Acquisition Regulation; Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) regarding prohibition on obtaining cost or pricing data to implement Section 818 of Public Law 108–375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

**DATES:** *Effective Date:* June 8, 2005.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before August 8, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–04, FAR case 2004–035, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm.* Click on the FAR case number to submit comments.
- E–mail: *farcase.2004–035@gsa.gov.* Include FAC 2005–04, FAR case 2004–035, in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005–04, FAR case 2004–035, in all correspondence related to this case. All comments received will be posted without change to *http://*

AUG 2 4 2005

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR ROBERT R. JARRETT
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH J. DESTEFANO, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
DIVISION

SUBJECT: FAR Case 2004-035, Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items

Attached is a late comment received on the subject FAR case published at 70 FR 33659; June 8, 2005. The comment closing date was August 8, 2005.

| Response Number | Date Received | Comment Date | Commenter |
|---|---|---|---|
| 2004-035-7 | 08/17/05 | 08/17/05 | Raytheon |

Attachment

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1800 F Street, NW
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2004-035-7

"Victoria A Stevens" <vastevens@raytheon.com>

08/17/2005 03:06 PM

To: farcase.2004-035@gsa.gov
cc:
Subject: FAC 2005-04, FAR case 2004-035

Mr. Olson, Analyst, suggested that I submit a comment pertaining to this case. However, I just discovered that the comment due date was August 8, 2005. If all possible, would you please still consider the following comment:

**Relative to the new language in the FAR 15.403-1(c)2(B) which allows for an exemption for modified commercial items where the total cost of the modifications do not exceed "the greater of $500,000 or 5 percent of the total price of the contract," it is unclear whether the word "contract" in this statement refers to the total price of the U.S. Government prime contract or whether it is intended to mean the total cost of the subcontract that may be purchasing the modified commercial item. Please clarify.**

Thank you.

Victoria Stevens

**Raytheon**

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