Regulatory Coordinating Committee

Clause Flowdown-Commercial Items

Summary to be added later.

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November 24, 1997

Ms. Linda Klein
FAR Secretariat (MVRS)
General Services Administration
1800 F Street, N.W., Room 4035
Washington, D.C. 20405

Re: Federal Acquisition Regulation; Clause Flowdown-
Commercial Items, FAR Case 96-023

Dear Ms. Klein:

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 Public Contract Law Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, 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.

I. THE PROPOSED RULE

The proposed rule would amend the clause at Federal Acquisition Regulation ("FAR") § 52.244-6, "Subcontracts for Commercial Items and Commercial Components," to clarify contractors' responsibilities...
regarding the inclusion of clauses in subcontracts for commercial items or components. The clause at FAR § 52.244-6, which must be inserted in solicitations and contracts for suppliers and services other than commercial items (see FAR § 44.403), provides in pertinent part:

[T]he Contractor is not required to include in any FAR provision or clause, other than those listed below, and as may be required to establish the reasonableness of prices under Part 15, in subcontract at any tier for commercial items or components. . . .1/

This rule would amend the clause to provide:

[T]he Contractor is not required to include any provision or clause, other than those listed below to the extent that they are applicable (and other clauses as may be required by addenda to this paragraph to establish the reasonableness of prices under Part 15) in a subcontract at any tier for commercial items or commercial components. . . .

(Emphasis added.)

The proposed rule clarifies that the clauses "listed below" are required to be included in subcontracts for commercial items or commercial components only when applicable or necessary to establish the reasonableness of prices under FAR Part 15. For example, among the listed flow-down clauses is the clause at FAR § 52.222-35, which deals with employment of Vietnam era veterans. The clause is to be included only in subcontracts "of $10,000 or more." See FAR 52.222-35(g). In addition, the rule clarifies that a contractor must include a "price reasonableness clause" in a commercial item or commercial component subcontract only if such flow-down is specifically required "by addenda to this paragraph."

The Section has no objections to the proposed rule. The amendment not only clarifies the existing rules relating to flow-down clauses for commercial item and commercial component subcontracts, but also makes the language relating to such flow-down requirements identical for prime contracts for other than commercial items and prime contracts for commercial items. The language proposed for the clause at FAR § 52.244-6, which is applicable to prime contracts for other than commercial items, is already included in the clause at FAR § 52.212-5, which is applicable to prime contracts for commercial items. There is no rationale for the existing differences between the language of the two clauses related to flow-down requirements.

II. RECOMMENDED CHANGES

Although the Section does not object to the proposed changes, the Section believes that additional changes relating to the flow-down of a "price-reasonableness" clause are necessary for the clauses at FAR § 52.212-5 and § 52.244-6. The FAR does not indicate which clauses may be required to establish price reasonableness under Part 15. The standard FAR clauses that best fit this description are the clauses at FAR § 52.215-12, "Subcontractor Cost or Pricing Data," and at FAR § 52.215-2, "Requirement for Cost or Pricing Data or Information other than Cost or Pricing Data."2/ Because these clauses are inapplicable to subcontracts for commercial items, references to "price reasonableness" clauses should be eliminated from the mandatory flow-down clauses for commercial item or commercial component subcontracts. These recommended changes would supersede portions of the proposed amendment to FAR § 52.244-6.

A. Inapplicability of Clause Requiring Submission of Cost or Pricing Data

The clauses at FAR § 52.212-5 and § 52.244-6 were added to the FAR in 1995, prior to the enactment of the Federal Acquisition Reform Act (Pub. L. 104-208), now known as the Clinger-Cohen Act. Prior to Clinger-Cohen, there was a rationale for allowing a contracting officer to include in commercial item subcontracts clauses requiring the submission of cost or pricing data; contracts and subcontracts for the acquisition of commercial items were not exempt from the data submission requirements of the Truth in Negotiations Act ("TINA") if price reasonableness could not be determined without the submission of certified cost or pricing data. See 10 U.S.C. § 2306a(d)(2)(c) (1995); 41 U.S.C. § 304A(d)(2)(c) (1995). Because of this limitation on the "commercial item" exception to TINA, it was possible that, in certain instances, a contracting officer would need to require the flow-down of the clause prescribed in Part 15.
(FAR § 52.215-12) providing for the submission of subcontractor cost or pricing data.

The Clinger-Cohen Act removed the limitations on the commercial item exception to TINA and expanded the exception to cover all contracts and subcontracts for commercial items or commercial components. See 10 U.S.C. § 2306a(b)(1)(B) (1997) and 41 U.S.C. § 304(b)(1)(B) (1997). Because commercial item or commercial component subcontractors now are statutorily excepted from the requirement for the submission of cost or pricing data, a contracting officer may not require the prime contractor to obtain cost or pricing data from such a subcontractor. See FAR § 15.403-(2)1. Accordingly, the Part 15 clause requiring subcontractors to provide cost or pricing data is no longer applicable to commercial item subcontracts and may not be designated as a flow-down clause for a commercial item or commercial component subcontract.

B. Inapplicability of Clause Requiring Submission of Information Other than Cost or Pricing Data

Although a commercial item prime contractor may not be required to provide certified cost or pricing data, a contracting officer may, in some instances, require such a prime contractor to furnish "information other than cost or pricing data." See FAR § 15.403-3(a)(1). This requirement is embodied in the clause at FAR § 52.215-20. This "price reasonableness" clause, however, is not appropriate for inclusion in commercial item or commercial component subcontracts.

The clause at FAR § 52.215-20 is not appropriate for inclusion in subcontracts for commercial items under prime contracts that are excepted from TINA requirements. If an offeror is not required to submit cost or pricing data, the contracting officer does not analyze the prime contractor's costs, but rather performs price analysis on the prime contractor's proposal. See FAR § 15.404-1(a)(2). Information about the contractor's costs is generally irrelevant in price analysis, which involves such activities as market research, the review of price lists, and comparison with prior contract prices. See FAR § 15.404-1(b). Thus, information regarding the reasonableness of a subcontractor's prices -- which relates to the prime contractor's costs -- is not relevant to price analysis of the prime contractor's proposal.

Likewise, the clause is not appropriate for inclusion in subcontracts for commercial items or commercial components under prime contracts subject to TINA data submission requirements. When a prime contractor or higher-tier subcontractor is required to submit cost or pricing data, it must analyze subcontractor proposals and provide such analysis to the contracting officer. See FAR § 15.404-3. Nevertheless, the prime contractor or higher-tier subcontractor, not the contracting officer, are in the best position to determine whether information other than cost or pricing data is necessary to determine the reasonableness of prices proposed by a commercial item subcontractor. For example, if a subcontractor is selected through adequate price competition, it is not necessary for a prime contractor or higher-tier subcontractor to obtain any information to determine price reasonableness. See FAR § 15.403-3(b). To require the flow-down of the clause at FAR § 52.215-20 in such a case would impose a requirement for submission of information other than cost or pricing data beyond what is currently required by statute or regulation.

C. Recommendation

Based on the discussion above, the Section recommends that the authority of the contracting officer to require the flow-down of "price reasonableness" clauses to commercial item subcontracts to be deleted from the clauses at FAR § 52.212-5 and § 52.244-6, so that both clauses would read as follows:

[T]he Contractor is not required to include in any FAR provision or clause, other than those listed below to the extent that they are applicable in a subcontract at any tier for commercial items or commercial components. . . .

III. CONCLUSION

The Section does not oppose the amendments made by the proposed rule. The Section recommends, however, that the proposed rule be redrafted to incorporate the changes discussed above.
The Section appreciates the opportunity to provide comments and is available to provide assistance as you may require.

Sincerely,

Marcia G. Madsen  
Chair  
Section of Public Contract Law

cc: David A. Churchill  
Rand L. Allen  
Gregory A. Smith  
Patricia A. Meagher  
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Footnotes:

1/ The clauses "listed below" the paragraph are: (1) Equal Opportunity (FAR § 52.222-26); (2) Affirmative Action for Special Disabled and Vietnam Era Veterans (FAR § 52.222-35); (3) Affirmative Action for Handicapped Workers (FAR § 52.222-36); and (4) Preference for Privately Owned U.S.-Flagged Commercial Vessels (FAR § 52.247-64).