DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–46; FAR Case 2008–008; Item IV; Docket 2009–0036, Sequence 1]

RIN 9000–AL42

Federal Acquisition Regulation; Award-Fee Language Revision

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 adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007 entitled, Appropriate Use of Incentive Contracts.

DATES: *Effective Date:* October 29, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward Chambers, Procurement Analyst, at 202–501–3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–46, FAR Case 2008–008.

SUPPLEMENTARY INFORMATION:

A. Background

This rule implements the provisions of section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled "Appropriate Use of Incentive Contracts," by amending and/or integrating where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

This final rule adopts the interim rule with one change for clarification. This clarification entails the addition of the phrase "in the aggregate" to FAR 16.401(e)(2), Table 16–1, and FAR 16.401(e)(3)(v), to make it clear that the objective is to consider the contractor's cost, schedule, and technical performance in the aggregate when performing award-fee assessments.

B. Discussion and Analysis

An interim rule with request for comments was published in the **Federal Register** on October 14, 2009 (74 FR 52856). The FAR Secretariat received seven responses to the interim rule. These responses included a total of 22 comments on 15 issues. Each issue is discussed in the following sections.

1. Change in DFARS Rule Required

Comment: One respondent wrote that this interim rule, without concurrent change to DFARS, particularly in allowing higher fixed fee, negates the value of this rule change.

Response: DoD is considering a possible DFARS case to address this concern. The Councils further note that the rationale for allowing a higher fixed fee is not clear in this comment. In reading the comment in total, a reasonable inference is that the respondent meant to address base fee and not fixed fee.

2. Clarification Regarding Award-Fee Rating Definitions

Comment: Two respondents commented on the need to clarify whether an unsatisfactory evaluation in one category (*e.g.,* cost) requires an overall unsatisfactory rating and thus no award fee in any category (*e.g.,* schedule and technical) for the evaluation period.

Response: The Council's intent with the use of "overall cost, schedule, and technical performance in the aggregate" is to avoid the situation where, for example, contractors would receive no award fee in an evaluation period if they were rated below satisfactory on one of the criteria (*e.g.,* in schedule performance) and above satisfactory in other criteria (*e.g.,* technical and cost performance). The Councils believe that this would not be equitable. In such a situation, the contractor could receive a reduced percentage of the award-fee amount to account for the below satisfactory schedule performance, but they would not receive 100 percent of the award-fee amount, nor would they receive zero award fee for that evaluation period. The final rule adds clarifying language of "in the aggregate" to FAR 16.401(e)(2), Table 16–1, and FAR 16.401(e)(3)(v), to make it clear that the objective is to consider overall cost, schedule, and technical performance in performing award-fee assessments.

3. Requested Clarification as to Whether Firm Fixed Price Award-Fee Contract Is an Incentive Fee Type Contract

Comment: One respondent recommended that the FAR be clarified as to whether a firm-fixed-price award-fee contract is an incentive-type contract citing that the language in FAR 16.404, FAR 16.202–1, and FAR 16.401(a) appears to be contradictory.

Response: The Councils take no position on this recommendation because it is outside the scope of this case, which was limited to the implementation of the section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled "Appropriate Use of Incentive Contracts."

4. Permit Use of Rollover Within Certain Parameters

Comment: Three respondents recommended that the language prohibiting the use of rollover be revised to allow rollover under certain circumstances and at the discretion of the head of the contracting activity. Respondents contend that rollover can be an effective incentive tool if used properly.

Response: The Councils disagree with the respondents. Award fee is structured to incentivize contractors to perform throughout the contract. Therefore, rollover of unearned award fee provides a disincentive for contractors to perform throughout the entire period of performance. If a contractor did not perform adequately during an award-fee rating period and was rated appropriately and then allowed to recover that unearned award fee in a subsequent period, the incentive for the contractor to perform consistently throughout the entire contract would be reduced.

5. Interim Rule Presumes Award-Fee Determinations Represent Only Subjective Measures and Not Objective Measures as Well

Comment: One respondent recommended that the language in FAR 16.401(e)(1)(i) be revised to address the concept that in addition to subjective award-fee performance measures that we also include the use of objective performance measures.

Response: The Councils disagree with this recommendation. A key tenet in determining if an award-fee incentive is suitable for an acquisition is whether one can devise predetermined objective incentives applicable to cost, schedule, and technical performance. If one can, then an award-fee incentive is not appropriate and an incentive arrangement based on predetermined formula-type incentives should be utilized instead.

6. Eliminate Risk and Cost-Benefit Analysis

Comment: Two respondents recommended deleting the requirement to perform a risk and cost-benefit analysis stating that the content and methodology for this analysis is not specified.

Response: The Councils disagree with this recommendation. The FAR currently requires that no award-fee contract shall be awarded unless the contract amount, performance period, and expected benefits are sufficient to warrant the additional administrative effort. This requirement was reinforced in the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled "Appropriate Use of Incentive Contracts." The Councils believe it is within the purview of each Federal agency to provide supplemental guidance on how to perform this analysis.

7. Contractor Should Be Allowed To Earn Award Fee Even if Performance Is Less Than Satisfactory

Comment: One respondent wrote that under an award-fee contract, even when performance is less than satisfactory, there should be some level of fee earnings but potentially at a significantly decreased rate of earnings since the Government received some benefit from the work accomplished. The respondent maintained that even under a fixed-fee contract, a contractor can still earn some amount of fee, even when performance is less than satisfactory. The respondent recommended that Table 16–1 include an additional rating category, entitled "less than satisfactory," with a percentage range from 2 percent–48 percent as well as changing "is below satisfactory" in FAR 16.401(e)(3)(v) to "fail to meet the basic requirements of the contract".

Response: The Councils disagree with this recommendation. Section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) were very clear that the FAR "shall ensure that no award fee may be paid for contractor performance that is judged to be below satisfactory performance". The Councils note that the regulations do allow the use of a base fee in an award-fee incentive arrangement.

8. Award-Fee Determination Being Unilateral Decision

Comment: One respondent recommended that the language in FAR 16.401(e)(2) regarding the award-fee determination being a unilateral decision by the Government be struck since the Courts have determined that such decisions are reviewable under the Contract Disputes Act.

Response: The Councils agree that award-fee determinations are reviewable under the Contract Disputes Act but the language in this section does not address that issue. This language in FAR 16.401(e)(2) was included to point out that while the award-fee determination may be subject to the Contract Disputes Act, it is still a unilateral decision by the Government.

9. Consider Different Language Relative to Adjectival Rating Descriptions

Comment: One respondent recommended replacing the word "supplement" with "tailor" in the FAR 16.401(e)(3)(iv) sentence, contracting officers may supplement the adjectival rating description.

Response: The Councils believe that these descriptions cannot be tailored but can be supplemented to fit the specific needs of the acquisition based upon the requirements in section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), which stated: The FAR "shall establish standards for determining the percentage of the available award fee, if any, which contractors should be paid for performance * * * ".

10. Clarification Regarding Adjectival Descriptions

Comment: One respondent wrote that the imprecise adjective modifiers in Table 16–1 could be problematic since what distinguishes "almost all of" from "many" or what establishes a "significant" criterion for "insignificant" criterion. A second respondent recommended revising Table 16–1 to delete the requirement to "exceed" significant award-fee criteria to earn a better than satisfactory rating.

Response: The Councils disagree and maintain that the term "exceeds" is a reasonable term to differentiate contractor performance between the various ratings. In addition, the adjectives used in the rating table adequately distinguish between the different rating levels and provide the contracting officer with the flexibility to supplement the descriptions as appropriate.

11. Published as Interim Rule

Comment: One respondent wrote that they were disappointed that this rule change was published as an interim rule and not a proposed rule and recommended that the Councils publish rules of this magnitude as proposed rules in the future.

Response: The Councils issued a statement of urgency which was published in the **Federal Register** notice with this interim rule.

12. Stringent Adjectival Ratings

Comment: One respondent wrote that since Table 16–1 adjectival rating descriptions and associated percentages are so stringent, the final rule should specify that the available award-fee pool must be at least 20 percent of estimated costs for complex development contracts.

Response: The Councils do not believe that a pre-established award-fee floor is appropriate since the contracting officer negotiates a fair and reasonable award-fee pool for each acquisition based upon the effort and risk associated with that acquisition.

13. Consider Different Rating Definitions

Comment: One respondent wrote that the final rule should include the rating definitions from the Office of the Under Secretary of Defense/Acquisition, Technology, and Logistics/Defense Procurement and Acquisition Policy memorandum dated April 24, 2007, since these ratings are based on meeting a higher percentage of award-fee criteria in order to earn higher ratings.

Response: The Councils disagree. The two rating scales are very similar but the FAR rating scale provides contracting officers with more latitude in assigning ratings against subjective criteria.

14. Utilization of Base Fee

Comment: Two respondents commented on the utilization of base fee. One respondent recommended that the final rule encourage contracting officers to award base fee on cost-plus-award-fee (CPAF) contracts subject only to the statutory restrictions on fee cited at FAR 15.404–4(c)(4)(i). A second respondent suggested that a minimum fee be referenced in the base amount of fee noted in FAR 16.405–2.

Response: The Councils believe that the contracting officer negotiates a fair and reasonable profit or fee for each acquisition based upon the effort and risk associated with that acquisition. Consequently, it would not be appropriate to encourage the use of or set a minimum base-fee rate, since the establishment of base fee is subject to negotiation and the specific circumstances of each acquisition.

15. Eliminate Requirement Relative to Completing a Determination and Finding

Comment: One respondent wrote that the requirement in the interim rule for a determination and finding (D&F) was redundant with other FAR requirements and increases the workload of overburdened contracting officers without providing any value added. The respondent recommended deleting this requirement in the final rule.

Response: The Councils appreciate the respondent's concern for the contracting officer's workload but disagree with eliminating this requirement from the final rule. The completion of the D&F and Head of Contracting Agency approval satisfy the requirements in section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) to establish the appropriate approval level for using award-fee contracts. They are also necessary to ensure that the suitability factors to use an award-fee contract are properly addressed and documented because of the large investment of resources required to administer an award-fee contract.

C. Regulatory Planning and Review

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1933. This rule is not a major rule under 5 U.S.C. 804.

D. 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 the rule largely covers a broad range of aspects of award-fee contracting, whose upshot will be a more consistent use and administration of award fees Governmentwide which will provide a small benefit to all entities both large and small. In addition, the changes promulgated in this final rule do not directly affect the current business processes of Federal contractors. In the matter of the rule's prohibition on the rollover of unearned award fee, the Councils believe this will have a negligible impact on small businesses for the following reasons. First, award-fee contracts are largely the province of large businesses with large dollar contracts. Second, the ability to roll over unearned award fee may have caused evaluators in the past to be more conservative in their ratings because of their awareness that contractors may have a second opportunity to earn unearned award fees.

E. 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. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 52856 on October 14, 2009, is adopted as a final rule with the following changes:

PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 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).

16.401 [Amended]

■ 2. Amend section 16.401 by—

■ a. Removing from paragraph (e)(2) the words "performance is" and adding "performance in the aggregate is" in its place each time it appears (twice);

■ b. Removing from Table 16–1 that follows paragraph (e)(3)(iv) the words "contract as" and adding "contract in the aggregate as" in its place each time it appears (five times); and

■ c. Removing from paragraph (e)(3)(v) the words "performance is" and adding "performance in the aggregate is" in its place.

[FR Doc. 2010–24161 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005–46; FAR Case 2009–020; Item V; Docket 2010–0103, Sequence 1]

RIN 9000–AL68

Federal Acquisition Regulation; Offering a Construction Requirement—8(a) Program

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) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), to conform to the Small Business Administration (SBA) regulations. The FAR Council did not publish this rule for comment because this change will not have a significant effect beyond the internal operating procedures of the Government and will not have a significant effect on contractors or offerors. Furthermore, this requirement has existed in the Small Business Administration Regulations since January 1, 2009, and the FAR is being updated to conform to these regulations. This revision changes the location for submitting offering letters to SBA for a construction requirement for which a specific offeror is nominated and impacts internal procedures that the contracting officer is now required to follow.

DATES: *Effective Date:* October 29, 2010

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–46, FAR case 2009–020.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to revise FAR 19.804–2(b) to conform to the SBA regulation 13 CFR 124.502(b)(3). The current FAR requires sole source offerings for construction