PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.204–11 [Removed and Reserved]

■ 4. Remove and reserve section 52.204–11.

■ 5. Amended section 52.212–5 by—

■ a. Revising the date of the clause; and

■ b. Removing and reserving paragraph (b)(5).

The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (May 2014)

* * * * *

[FR Doc. 2014–12393 Filed 5–29–14; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 52

[FAC 2005–74; FAR Case 2012–017; Item III; Docket No. 2012–0017, Sequence No. 1]

RIN 9000–AM38

Federal Acquisition Regulation; Expansion of Applicability of the Senior Executive Compensation Benchmark

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act of 2012. This section expands the application of the senior executive compensation benchmark to a broader group of contractor employees on contracts awarded by DoD, NASA, and the Coast Guard. The senior executive compensation benchmark amount limits the reimbursement of contractor employee compensation costs.

DATES: *Effective:* May 30, 2014.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202–501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–74, FAR Case 2012–017.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 78 FR 38535, on June 26, 2013 to implement section 803 of the National Defense Authorization Act for Fiscal Year 2012. The interim rule required in FAR 31.205–6(p) that the incurred compensation costs for all contractor employees on all DoD, NASA, and Coast Guard contracts awarded on or after December 31, 2011, be subject to the senior executive compensation amount. The reference to 31.205–6(p) in FAR 52.216–7 was also updated to reflect this revision in 31.205–6(p).

Section 803(c)(2) stated that the expanded reach of the compensation cap ''shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act'' (which was December 31, 2011). This final rule addresses only the prospective application of section 803, *i.e.,* to contracts awarded on or after its enactment (December 31, 2011). A separate proposed rule (FAR Case 2012–025) was published in the **Federal Register** at 78 FR 38539, on June 26, 2013 to address the retroactive application of section 803 to contracts that had been awarded before its enactment.

A technical correction was published in the **Federal Register** at 78 FR 70481, on November 25, 2013, correcting the dates in 31.205–6(p)(2)(ii).

Three respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Significant Changes

Based on a review of the public comments, discussed below, the Councils have concluded that no change to the interim rule is necessary.

B. Analysis of Public Comments

1. Retroactive Application of Rule Not Appropriate

Comment: Respondents submitted comments stating that it was inappropriate to retroactively apply the rule. These comments included:

(a) The interim rule creates a breach of contract per case law cited in the General Dynamics and ATK Launch Systems decisions. Thus, the effective date of the interim rule should be June 26, 2013 (the effective date of the interim rule) and not the date of the statute (January 1, 2012).

(b) The interim rule's premise that section 803 of the NDAA must automatically prevail for contracts signed prior to the effective date of the rule but after enactment of the NDAA is incorrect. It is well established in the Federal Courts that a contract that conflicts with Federal statute should still be honored.

(c) Case law has established that statutory language which explicitly requires the issuance of implementing regulations is not self-executing but instead takes effect upon the promulgation of implementing regulations.

(d) The Government was mistaken in its conclusion that the holdings in the General Dynamics and ATK Launch Systems decisions cited in the preamble would impact only contracts awarded before the effective date of the statute. A close reading of those decisions reveals the Government would also be in breach of FAR 52.216–7 in implementing this interim rule because it attempts to impose its requirements on contracts awarded before the published date of the interim rule (June 26, 2013).

(e) The retroactive application of this rule is expressly prohibited per FAR 1.108(d).

Response: Section 803(c)(2) states that the expanded reach of the compensation cap ''shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act'' (which was December 31, 2011). This final rule addresses only the prospective application of section 803, *i.e.,* to contracts awarded on or after its enactment (December 31, 2011). A separate proposed rule (FAR Case 2012–025) was published in the **Federal Register** at 78 FR 38539 on June 26, 2013 to address the retroactive application of section 803 to contracts that had been awarded before its enactment.

FAR 1.108(d) does not expressly prohibit retroactive application of FAR changes, but instead states that unless otherwise specified, FAR changes apply to solicitations issued on or after the effective date of the change. In this instance, however, section 803(c)(2) of the National Defense Authorization Act for Fiscal Year 2012 explicitly states that that the expanded reach of the compensation cap ''shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act'' (which was December 31, 2011). Therefore, in accordance with the National Defense Authorization Act for Fiscal Year 2012 and consistent with FAR 1.108(d), the specified effective date for this rule is January 1, 2012. The General Dynamics and ATK Launch Systems decisions only addressed contracts that predate the enactment of the statute; those decisions did not specifically address contracts awarded during the period beginning on the date of enactment of the underlying statute through the date before implementation of the statute in the regulations. The Councils are required to implement the statute in the FAR to the maximum extent that is legally permissible.

2. Exceptions for Scientists and Engineers Must Be Addressed

Comment: One respondent believed that the expansion of the executive compensation cap to all contractor employees and the exceptions for scientists and engineers must align. Any future Defense Federal Acquisition Supplement rule relative to exception for scientist and engineers would be in conflict with this interim rule.

Response: This rule does not prohibit DoD from considering an exception for scientists and engineers.

3. Urgent and Compelling Determination Inappropriate

Comment: One respondent stated that the urgent and compelling determination in the preamble was inappropriate. These comments included the following:

(a) The statement in the preamble that urgent and compelling reasons exist to issue an interim rule without public comment was reached in error because the interim rule does impose reporting, recordkeeping, or other information collection requirements.

(b) The 18-month time period to issue the interim rule is inconsistent with the statement that urgent and compelling reasons existed to issue the interim rule. If truly urgent and compelling, the interim rule would have been issued much sooner.

Response: There are no reporting or record keeping burdens associated with the interim or final rule that require the approval of the Office of Management and Budget. The determination to issue the interim rule prior to the receipt of public comments was necessary because it allowed agencies to immediately implement the requirements of the law. The delay in issuing the interim rule was necessary to resolve issues in the development of the interim rule and obtain necessary clearances. The delay did not alleviate the urgency of implementing the rule in the FAR.

4. Impact on Contractors' Ability To Perform

Comment: One respondent stated that application of an arbitrary cap on the compensation of all contractor employees will reduce contractors' ability to attract and retain experienced and talented individuals and will jeopardize contractors' ability to support Government mission critical requirements. The respondent also believed that the rule was a disincentive and created a barrier to commercial and small businesses entering the Federal Government market. With tight profit margins on Federal Government contracts, companies will evaluate viability of entering such a market that now imposes executive compensation caps which will lower profit margins even more.

Response: GAO Report 13–566, issued June 2013, ''Defense Contractors Information on the Impact of Reducing the Cap on Employee Compensation Costs,'' did not draw any conclusions on the impact of compensation caps. However, it found that less than .4 percent of employees would be affected if the cap were set at the President's salary of $400,000 and the vast majority of these would be executive employees. Further, using the caps established by the Office of Federal Procurement Policy for 2010 through 2012, GAO found that fewer than .1 percent of employees were affected, all of whom were executive employees (page 13 of report). In the case of small businesses surveyed, these businesses reported to GAO that they would only be minimally affected, or not affected, should the cap be reduced as low as $237,700, because they generally did not offer compensation above this threshold (page 23 of report). The FAR was revised (by the interim rule for this FAR case) to incorporate section 803 of the National Defense Authorization Act for Fiscal Year 2012 that mandated the expansion of the application of the contractor employee compensation cap.

5. Financial Impact on Contractors

Comment: One respondent commented that this rule will have a direct impact on company cash flows that will act as a disincentive to contractors considering entering the Government market. Furthermore, this rule will lower profit margins and have a negative impact on cash flow which will force current contractors out of the Government market and weaken the defense industrial base.

Response: The FAR was revised to implement section 803 of the National Defense Authorization Act for Fiscal Year 2012 that mandated the expansion of the application of the contractor employee compensation cap.

6. Potential To Reduce Industrial Base

Comment: One respondent believed that application of this rule is contrary to Government policy to encourage small business participation in the Government market. In fact, contractors are given specific requirements for small business participation in Government contracts and this rule impacts the ability of contractors to comply with these requirements.

Response: This rule was established to implement the National Defense Authorization Act for Fiscal Year 2012. The Councils do not anticipate that this rule will have a significant economic impact on a substantial number of small businesses.

7. Additional Recordkeeping Requirements

Comment: Some respondents stated that the statement ''imposes no reporting, recordkeeping, or other information collection requirements'' is unrealistic since contractors will need to adjust their accounting systems to capture data required by this rule and maintain more than one billing structure.

Response: The rule does not contain any additional information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD, GSA, and NASA do not expect this rule to 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, per data from the Federal Procurement Data System for fiscal year 2013, most contracts awarded to small entities are awarded on a competitive, fixed-price basis, and do not require application of the cost principle contained in this rule. With extremely few exceptions, compensation to small business employees remains below the compensation caps.

The rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule and no changes were made to the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 31 and 52

Government procurement.

Dated: May 22, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted As Final Without Change

Accordingly, the interim rule amending 48 CFR parts 31 and 52 which was published in the **Federal Register** at 78 FR 38535 on June 26, 2013 is adopted as a final rule without change.

[FR Doc. 2014–12408 Filed 5–29–14; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAC 2005–74; FAR Case 2012–028; Item IV; Docket No. 2012–0028, Sequence No. 1]

RIN 9000–AM40

Federal Acquisition Regulation; Contractor Comment Period, Past Performance Evaluations

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement provisions of law that change the period allowed for contractor comments on past performance evaluations and require that past performance evaluations be made available to source selection officials sooner.

DATES: *Effective:* July 1, 2014.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202–501–1448 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–74, FAR Case 2012–028.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 78 FR 48123 on August 7, 2013, under FAR Case 2012–028, to implement section 853 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239, enacted January 2, 2013) and section 806 of the NDAA for FY 2012 (Pub. L. 112–81, enacted December 31, 2011; 10 U.S.C. 2302 Note). Section 853, entitled ''Inclusion of Data on Contractor Performance in Past Performance Databases for Executive Agency Source Selection Decisions,'' and section 806, entitled ''Inclusion of Data on Contractor Performance in Past Performance Databases for Source Selection Decisions,'' require revisions to the acquisition regulations on past performance evaluations at FAR subpart 42.15 so that contractors are provided ''up to 14 calendar days . . . from the date of delivery'' of past performance evaluations ''to submit comments, rebuttals, or additional information pertaining to past performance'' for inclusion in the database. In addition, paragraph (c) of both sections 853 and 806 requires that agency evaluations of contractor performance, including any information submitted by contractors, be ''included in the relevant past performance database not later than the date that is 14 days after the date of delivery of the information'' to the contractor.

Ten respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided in the following sections.

A. Analysis of Changes

No changes were made from the proposed rule as a result of the public comments.

B. Analysis of Public Comments

1. Contractor Response Time of Fourteen Days

Comments: Almost all respondents commented on the burden imposed on contractors to submit comments in a maximum of 14 days, especially given that FAR 42.1503 provides ''a minimum of 30 days'' for contractors to provide comments, rebuttals, or additional information. One respondent cited statistics from the Contractor Performance Assessment Rating System (CPARS) Program Office for DoD past performance evaluations completed in FY 2010–2012:

Percentage	Contractor response times
19	No comments provided.
43	Comments provided within 14 days.
30	Comments provided between 14–30 days.
9	Comments provided after 30 days.

Two other respondents noted that, when the contractor disagrees with any given Government evaluation or comment, it takes time for the contractor