



**Homeland
Security**

MEMORANDUM FOR: Keith O'Neill
Head of Contracting Activity
United States Coast Guard

FROM: Paul Courtney PAUL R COURTNEY
Chief Procurement Officer

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Date: 2021.10.25 16:15:30
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SUBJECT: **Federal Acquisition Regulation Class Deviation – United States Coast Guard (Number 22-03) Threshold for Obtaining Certified Cost or Pricing Data for Subcontracts and Price Adjustments**

Purpose: This class deviation implements section 814 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ([Pub. L. 116-283](#)), which modifies 10 U.S.C. 2306a by establishing a \$2 million threshold for obtaining certified cost or pricing data with respect to the award of subcontracts and price adjustments to contracts and subcontracts.

Effective Date: Immediately.

Background: Title 10 of the U.S. Code applies to the Department of Defense but, by operation of 10 U.S.C. § 2303(a)(5), Chapter 137 of Title 10 applies to the United States Coast Guard (USCG) and 10 U.S.C. § 2306a is part of Chapter 137.

Requirement: Effective immediately, contracting officers shall use \$2 million, in lieu of \$750,000 at Federal Acquisition Regulation (FAR) 15.403-4(a)(1), as the threshold for obtaining certified cost or pricing data for the award of a subcontract, at any tier, or a change or modification made to a prime contract or subcontract, at any tier.

Contracting officers shall use the clauses provided in Attachment 1 of this deviation in lieu of the following FAR clauses:

- 52.214-27 Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding.
- 52.214-28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding.
- 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications.
- 52.215-12, Subcontractor Certified Cost or Pricing Data.
- 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications.

Contracting officers shall not use Alternate I of FAR 52.214-28, Alternate I of FAR 52.215-12, or Alternate I of FAR 52.215-13. These alternates conflict with the attached deviation clauses.

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Further, contracting officers shall, upon request of the contractor, modify existing contracts as soon as practicable, without requiring consideration, to incorporate as applicable one or more of these deviation clauses.

Expiration: This class deviation remains in effect until it is incorporated into the FAR, Homeland Security Acquisition Regulation, or is otherwise rescinded.

Attachment:

Attachment: FAR Class Deviation 2022-03 Clauses

Questions or comments on this memo may be directed to Acquisition.Policy@hq.dhs.gov

52.214-27 Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding (OCT 2021) (DEVIATION).

Use the following clause, when contracting by sealed bidding, in lieu of the clause at FAR 52.214-27, Price Reduction for Defective Certified Cost or Pricing Data-Modifications, in solicitations and contracts if the contract amount is expected to exceed \$2 million:

52.214-27 PRICE REDUCTION FOR DEFECTIVE CERTIFIED COST OR PRICING DATA—MODIFICATIONS—SEALED BIDDING (OCT 2021) (DEVIATION)

a) This clause shall become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$2 million on the date of execution of the modification, except that this clause does not apply to a modification if an exception under FAR 15.403-1(b) applies.

b) If any price, including profit, negotiated in connection with any modification under this clause, was increased by any significant amount because 1) the Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense—

i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted;

ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer;

iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract; or

iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if—

A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

B) The Contractor proves that the certified cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

ii) An offset shall not be allowed if—

A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid—

1) Interest compounded daily, as required by 26 U.S.C. 6622, on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data which were incomplete, inaccurate, or noncurrent.

End of clause)

52.214-28 Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding OCT 2021) (DEVIATION).

Use the following clause, when contracting by sealed bidding, in lieu of the clause at FAR 52.214-28, Price Reduction for Defective Certified Cost or Pricing Data-Modifications, in solicitations and contracts if the contract amount is expected to exceed \$2 million:

**52.214-28 SUBCONTRACTOR CERTIFIED COST OR PRICING DATA—
MODIFICATIONS—SEALED BIDDING (OCT 2021) (DEVIATION)**

a) The requirements of paragraphs (b) and (c) of this clause shall—

1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$2 million on the date of execution of the modification, and

2) Be limited to such modifications.

b) Before awarding any subcontract expected to exceed \$2 million, on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modifications involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$2 million, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing, as part of the subcontractor's proposal in accordance with Federal Acquisition Regulation FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1(b) applies. If the \$2 million threshold for submission of certified cost or pricing data specified is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.406-2 of the Federal Acquisition Regulation that, to the best of its knowledge and belief, the data submitted under paragraph (b) above were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that, when entered into, exceeds \$2 million.

End of clause)

**52.215-11 Price Reduction for Defective Certified Cost or Pricing Data—Modifications
OCT 2021) (DEVIATION).**

Use the following clause, when contracting by negotiation, in lieu of the clause at FAR 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data-Modifications, in solicitations and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor for the pricing of contract modifications and FAR clause 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data, has not been included:

52.215-11 PRICE REDUCTION FOR DEFECTIVE CERTIFIED COST OR PRICING DATA—MODIFICATIONS (OCT 2021) (DEVIATION)

a) This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed \$2 million on the date of execution of the modification, except that this clause does not apply to any modification if an exception under Federal Acquisition Regulation (FAR) 15.403-1(b) applies.

b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because—

1) The Contractor or a subcontractor furnished certified cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data;

2) A subcontractor or prospective subcontractor furnished the Contractor certified cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data; or

3) Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which

1) The actual subcontract price; or

2) The actual cost to the Contractor, if there was no subcontract awarded, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current certified cost or pricing data had been submitted.

ii) The Contracting Officer should have known that the certified cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if—

A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

B) The Contractor proves that the certified cost or pricing data were available before the "as of" date specified on its Certificate of Current Cost or Pricing Data, and that the data were not submitted before such date.

ii) An offset shall not be allowed if—

A) The understated data were known by the Contractor to be understated before the "as of" date specified on its Certificate of Current Cost or Pricing Data; or

B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the "as of" date specified on its Certificate of Current Cost or Pricing Data.

e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid—

1) Interest compounded daily, as required by 26 U.S.C. 6622, on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted certified cost or pricing data that were incomplete, inaccurate, or noncurrent.

End of clause)

52.215-12 Subcontractor Certified Cost or Pricing Data (OCT 2021) (DEVIATION).

Use the following clause, in lieu of the clause at FAR 52.215-12, Price Reduction for Defective Certified Cost or Pricing Data-Modifications, in solicitations and contracts when FAR clause 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data, is included:

52.215-12 SUBCONTRACTOR CERTIFIED COST OR PRICING DATA OCT 2021) (DEVIATION)

a) Before awarding any subcontract expected to exceed \$2 million, on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed \$2 million, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with Federal Acquisition Regulation (FAR) 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1(b) applies. If the \$2 million threshold for submission of certified cost or pricing data is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

b) The Contractor shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

c) In each subcontract that, when entered into, exceeds \$2 million, the Contractor shall insert either—

1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of certified cost or pricing data for the subcontract; or

2) The substance of the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications (OCT 2021) (DEVIATION).

End of clause)

52.215-13 Subcontractor Certified Cost or Pricing Data—Modifications (Deviation OCT 2021).

Use the following clause in lieu of the clause at FAR 52.215-13, Price Reduction for Defective Certified Cost or Pricing Data—Modifications, in solicitations and contracts when clause 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications (OCT 2021) (DEVIATION) is included:

52.215-13 SUBCONTRACTOR CERTIFIED COST OR PRICING DATA—MODIFICATIONS (OCT 2021) DEVIATION)

a) The requirements of paragraphs (b) and (c) of this clause shall—

1) Become operative only for any modification to this contract involving a pricing adjustment expected to exceed \$2 million on the date of execution of the modification; and

2) Be limited to such modifications.

b) Before awarding any subcontract expected to exceed \$2 million, on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed \$2 million, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with Federal Acquisition Regulation (FAR) 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403-1(b) applies. If the \$2 million threshold for submission of certified cost or pricing data is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in FAR 15.406-2 that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds \$2 million on the date of agreement on price or the date of award, whichever is later.

End of clause)