

BERRY AMENDMENT RULES AND REGULATIONS UPDATE
ESCALATION PROVISIONS
AFFIRMATIVE ACTION CONSIDERATIONS
AUDIT ISSUES

Presented to the Government Systems Committee
Parachute International Association
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Amended

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I. Berry Amendment Update

A. Statutory Provisions and Prohibitions, 10 USC 2533a
Implementing regulations at DFAR 225.7000 et. seq.

1. Prohibits the Department of Defense from acquiring any item listed unless the item has been “grown, reprocessed, reused or produced in the United States.”
2. Amended as of December 18, 2005 (Hayes Amendment) to provide:
 - a. The restriction on the acquisition of clothing includes “...The materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (**and the materials and components thereof**).” (emphasis added)
 - b. Requires DOD to post in FedBizOps within 7 days of a contract award notice of any waiver or other exception to the Berry requirements that pertains to such contract action.
3. The prohibition is absolute. The prohibition takes precedence over the

provisions of the Buy American Act. Do not confuse the Berry Amendment with the Buy American Act.

4. Items covered by the prohibition include:

- Clothing
- Tents, tarpaulins or covers
- Cotton and other natural fiber products
- Woven silk or silk blends
- Spun silk yarn for cartridge cloth
- Synthetic fabric or coated synthetic fabric, including all fibers and yarns for such fabrics
- Canvas products
- Wool, whether in fiber, yarn or in fabrics, materials or end items
- Any equipment item in FSC 8465 mfg'd from or containing items listed

B. Exceptions

1. Prime contracts below Simplified Acquisition Threshold (\$100,000.00)
2. When Secy of Defense determines that items covered cannot be obtained in satisfactory quality or sufficient quantity from domestic sources
3. Acquisition of items listed in FAR 25.104(a)
Presently included textile type products are:
 - Yarn, 50 dernier rayon
 - Goat and kidskins
 - Hemp yarn
4. Acquisitions outside US in support of combat operations
5. Emergency acquisitions outside of US to support personnel of such activities
6. Acquisitions by vessels in foreign waters
7. Items purchased for commissary resale
8. Acquisitions of end products incidentally incorporating cotton, other natural fibers or wool for which such components are not more than 10% of the total price of the end item and not more than \$100,000.00
9. Acquisitions of fibers or yarns for synthetic or coated synthetic fabrics (but not the fabric itself) if the fabric is to be used as a component of an end item that is not a textile product. Parachutes are listed specifically as being textile products. See DFAR 225.7002-2(o)(1)(iv).
10. Acquisitions of para-aramid fibers or yarns for synthetic or coated synthetic fabrics (but not the fabric itself) if the para-aramid fibers or yarn has been produced in the Netherlands or another qualifying country under limited circumstances.

11. Acquisitions of specialty metals (and specialty metal components) when the acquisition furthers an agreement with a qualifying country as set forth at DFAR 225.872. Qualifying countries include Australia, Belgium, Canada, Denmark, Egypt, Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, Great Britain, Northern Ireland.

II. Waiver Procedures

A. Permitted under 10 USC 2534(a) when

1. The Under Secy of Defense for Acquisition, Technology and Logistics approves for DLA activities and Secy of the Service approves for other DOD activities after determining that:
 - a. There is inadequate domestic supply
 - b. US producers of the item would not be jeopardized by competition from a foreign country source and the country in question does not discriminate against defense items produced in the US /or/
 - c. Application of the restriction would impede cooperative programs entered by the US with other countries
2. Notice of a prospective waiver must be published in the Federal Register and given to Congress at least 15 days before the effective date of the waiver
3. The effective period of the waiver shall not exceed one year

B. Applicability

1. To all contracts issued after the effective date of the waiver
2. To all options awarded after the effective date of the waiver
3. To all subcontracts entered into after the effective date of the waiver
4. Adequate consideration must be given to the prime contractor to defray any added costs incurred as a result of the waiver if the prime contract was awarded before the waiver was issued.

II. Price Escalation Clauses

A. Permitted by FAR 14.408-4 and 16.203

1. Permitted under three circumstances:

- a. Based on established prices - such as when there are established or published price increases.
 - b. Based on actual costs of labor or materials - similar to transportation price adjustments or increases permitted by the Service Contract Act.
 - c. Based upon cost indices of labor or materials - such as increases in CPI.
2. Escalation clauses may be used when (FAR 16.203-2):
 - a. there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance;
 - b. Contingencies that would otherwise be included in contract price can be identified and addressed separately by use of such a provision; or
 3. Escalation clauses may only be used if the Contracting Officer determines that such is necessary to protect the contractor **and** the Government from **significant** fluctuations in labor or material costs.
 4. Escalation clauses still must comply with the provisions of the Anti-Deficiency Act, therefore they must have ceiling price provisions included.
 5. Contract clauses are set forth at FAR 52.216-2, 3 and 4; however, where an escalation is contemplated based upon cost indices, the Contracting Officer will be permitted to develop a customized clause for inclusion in the contract. See FAR 16.203-4(d)
 6. DSCP does consider the use of escalation clauses. Decisions are made in advance of issuance of solicitations. Therefore, it is necessary to advise the agency as soon as notice of intent to procure is issued of any circumstance which may require the use of an escalation clause.
 7. Escalation clauses are not generally added to contracts after award. To do so could be construed as a modification without consideration.
 8. However, where extreme volatility in a particular market sector (for instance a rapid and huge rise in crude oil prices) renders continued performance impossible, a force majeure circumstance may exist which may excuse contract performance, or permit contract reformation. All such circumstances have to be examined on a case by case basis.

9. Escalation clauses are not generally mandatory flow-down clauses, but their impact will be to the benefit of lower tier subcontractors.
10. A commercial contract sample escalation clause is as follows:
Price Escalation Provision. Seller reserves the right to increase the price(s) quoted hereunder for each year after the base year of any contract entered as a result of this quotation by the percentage increase in the Consumer Price Index (CPI) from the base year to the succeeding year for the second year of the contract and by the percentage increase in the CPI from each year to the following year for each successive year thereafter. Seller will not increase the price more than ten percent (10%) per year without the express consent of the Buyer; however, if the percentage increase in the CPI should exceed ten percent (10%) for any such year and the Buyer does not consent to an equivalent increase in price, Seller may terminate the contract without liability or penalty whatsoever.

III. Affirmative Action Considerations

A. Applicability

1. Applies to all Government contractors who have 50 or more employees and a contract of \$50,000.00 or more.
2. Once a contractor reaches the threshold listed above, the contractor has 120 days to prepare and maintain an affirmative action program (AAP) at each establishment of the contractor.
3. The AAP must be updated annually.
4. The Contractor must submit a copy of the AAP to OFCCP for review within 30 days of receiving a request for the same from OFCCP.
5. The AAP must be available to all employees for review if an employee so requests.

B. Requirements

1. E.O. 11246 of 1965; E.O. 11141; Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 USC 4212; FAR 22-800 et. seq. Regulations are located at 41 CFR 60-2.

2. The contractor must have a policy that it will not discriminate on the basis of race, color, religion, sex or national origin or age or veteran status.
3. An AAP must include:
 - a. A statement of corporate policy of non-discrimination which also must be posted in the workplace and which must describe in detail the procedure to pursue a complaint of non-compliance.
 - b. A workforce analysis and a job group analysis with an availability analysis.
 - c. Identification of problem areas.
 - d. Statement of efforts undertaken by the company to be in compliance including internal auditing and reporting, community outreach, and consideration of minorities and women not in the work force.
4. Identification of personnel and applicants as being within a particular classification including veteran classification.
5. Identification through voluntary self identification for internet received applications.
6. All affirmative action provisions are mandatory flow-down clauses to be included in subcontracts at all tiers.

C. Enforcement

1. Department of Labor is responsible for review and enforcement
2. Award of contracts over \$10million require pre-award clearance from OFCCP
3. Penalties for non-compliance include:
 - a. Publication of the names of the contractors who are non-compliant.
 - b. Cancellation, termination or suspension of contracts or any portion thereof.
 - c. Debarment from contracting with the Government. Debarment procedures go through DOL.
 - d. Referral to the Department of Justice for appropriate civil or criminal proceedings.
 - e. 30 days permitted to reply to a show cause notice.

IV. Audit Issues.

A. Audit Principles.

1. Firm fixed price contracts generally are not audited.
2. Whenever costs are reimbursed to a contractor – either under a cost reimbursement type contract, a modification to a contract, or even a fixed price contract where costs are paid as they are incurred up to the fixed price of the units to be delivered – the contract and/or orders thereunder may be audited.
3. A Contracting Officer may request audit assistance to verify cost and pricing information in conjunction with the negotiation of a contract where permissible and where other than cost and pricing information is not sufficient or otherwise available to enable the Contracting Officer to negotiate the contract. This is not the preferred method of negotiation. See FAR 15.404-2.
4. Generally, contract actions under \$100,000.00 do not require full audit, but may be subject to audit in the Contracting Officer's discretion. New contract actions under \$550,000.00 do not generally require submission of cost and pricing data, and therefore are generally not subject to audit. See FAR 15.403-4.
5. All costs must be both allowable and allocable.
 - a. A cost is allowable if it is reasonable, allocable to the contract in question, complies with the terms of the contract and FAR Part 31, and where applicable to the contract complies with the Cost Accounting Standards. See FAR 31.201-2
 - b. A cost is allocable to a contract if it is incurred specifically for that contract, benefits both the contract and other work and can be apportioned to them reasonably, or is necessary to the overall operation of the business. See FAR 31.201-4.
 - c. A cost is reasonable if it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.

B. Exceptions to the Requirement for Cost and Pricing Data - FAR 15.403-1.

1. When there is adequate price competition.
2. When prices are set by law or regulation.

3. When a commercial item is being acquired.
4. When a waiver for the review of cost and pricing data has been granted.

C. TINA Certification - FAR

1. When cost and pricing data is required, the Truth in Negotiation Act (TINA) certification will be required. See FAR 15.406-2.
2. The TINA certification requires that the contractor certify that the cost and pricing data provided is current, complete and accurate as of the time it was provided to the Government.
3. False certification of cost and pricing data is subject to civil and criminal penalties and TINA contains a triple damages provision for all sums so falsely represented.
4. False certification may also result in violations of:
 - a. False Claims Act 31 USC 3729-3731
 - b. False Statements 18 USC 1001
 - c. Fraud by Wire, Radio or Television 18 USC 1343
 - d. Frauds and Swindles 18 USC 1341

D. Record Retention and Government Right to Audit

1. Comptroller General (GAO) has the right to audit contracts except in minimal circumstances. Contractors are required to keep all records pertaining to the contract for 3 years after final payment under the contract.
2. FAR 15.215-2 prescribes the provision for audit of contract records in negotiated contracts. It also provides for GAO right of review and audit. Records pertaining to the contract must be maintained for 3 years after final payment under the contract or until final resolution of any open disputes under the contract, whichever is later.
3. The Government's right to audit is limited to that which directly pertains to the contract being audited and which is reasonable. See BOWSHER V. MERCK & CO., Supreme Court of the United States, 1983. 460 U.S. 824, 103 S.Ct. 1587, 75 L.Ed.2d 580.

