



DEFENSE LOGISTICS AGENCY
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IN REPLY
REFER TO

DLSC-P
FARS DEV 00. 03

APR - 5 2000

MEMORANDUM FOR DSCR-CGB

SUBJECT: Request for Deviations to Certain FAR Clauses for the Pilot Strategic Supplier
Alliance Catalog Contract with Honeywell, Inc.

As requested by DSCR memorandum of March 29, 2000, I hereby approve individual deviations to the following FAR clauses for the pilot strategic supplier alliance catalog contract with Honeywell, Inc. Contract SPO410-00-D-0007.

- 52.215-2 Audit and Records - Negotiation
- 52.215-15 Pension Adjustment and Asset Reversions
- 52.215-18 Revision or Adjustment of Plans
- 52.215-19 Notification of Ownership Changes
- 52.215-21 Requirements for Cost or Pricing Data
- 52.227-1 Authorization and Consent
- 52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement
- 52.243-1 Changes Fixed Price
- 52.246-23 Limitation of Liability

HENRY T. GLISSON
Lieutenant General, USA
Director



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IN REPLY
REFER TO DSCR-CGB

MAR 29 2000

**MEMORANDUM FOR EXECUTIVE DIRECTOR, PROCUREMENT MANAGEMENT,
DEFENSE LOGISTICS SUPPORT COMMAND
(ATTN: DLSC-PPP)**

SUBJECT: FAR/DFARS Deviation Request

The Defense Supply Center Richmond (DSCR) is requesting an individual deviation from certain Federal Acquisition Regulation (FAR) clauses in connection with a proposed contract with Honeywell.

I. PROBLEM

The Defense Supply Center Richmond (DSCR) and Honeywell are negotiating a long-term contract for sole-source items manufactured by Honeywell. Honeywell has objected to the inclusion of certain FAR clauses in the proposed "catalog" contract between DSCR and Honeywell.

II. RECOMMENDATION

That the Executive Director, Procurement Management, Defense Logistics Support Command, pursuant to his individual FAR deviation authority, approve an individual FAR deviation request for the FAR clauses discussed in Section III of this memorandum.

III. DISCUSSION

Background:

In order to improve customer support and responsiveness, the Defense Logistics Agency (DLA) has initiated efforts to enter into a pilot strategic supplier alliance with Honeywell. The pilot strategic supplier alliance program was developed through a joint DoD/AlliedSignal (now Honeywell) Rapid Improvement Team (RIT). This pilot initiative involves identifying demand patterns for sole-source National Stock Numbered (NSN) items and putting those NSNs in supplier support contracting models that will permit Honeywell to more efficiently manage production schedules, with resulting cost efficiencies and improved delivery times for DoD.

A goal of this pilot program is to fully utilize Honeywell's commercial product support. Honeywell's commercial support involves forecasting item demand, overseeing item production, stocking items for immediate delivery, and providing direct delivery to customers. Under the pilot strategic supplier alliance and the proposed catalog contract, Honeywell will provide this support for both commercial items and military unique items. A majority of the items identified as possible candidates for the proposed catalog contract are commercial items that meet the definition of a commercial item at FAR 2.101. However, some items proposed for this effort are military unique items. DSCR would like to take advantage of Honeywell's commercial delivery supply support for any military unique items that may be included in the 886 NSNs which are potential candidates for the catalog contract. However, Honeywell refuses to provide this support for military unique items if the resulting contract is subject to different terms and conditions than the commercial items under the catalog contract. DSCR, therefore, is seeking a deviation from certain clauses in the FAR that impose unique requirements on the procurement of non-commercial items.

Deviation Request:

Pursuant to FAR Subpart 1.4, a FAR deviation is required whenever an agency omits a solicitation provision or contract clause when the FAR prescription requires its use or when a contract clause with modified or alternate language is used that is not authorized by the FAR. An individual FAR deviation may be granted unless the deviation is precluded by law, executive order, or regulation. FAR 1.402. Therefore, in order to make the proposed contract terms and conditions for commercial items and military unique items as uniform as possible, DSCR is requesting, where not precluded by statute or regulation, a FAR deviation to omit select FAR clauses when the prescription requires use of the clause.

After negotiations with Honeywell, DSCR is requesting an individual FAR deviation from the following clauses:

- 52.215-2 Audit and Records - Negotiation
- 52.215-15 Pension Adjustment and Asset Reversions
- 52.215-18 Revision or Adjustment of Plans
- 52.215-19 Notification of Ownership Changes
- 52.243-1 Changes Fixed Price
- 52.246-23 Limitation of Liability
- 52.227-1 Authorization and Consent
- 52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement

Analysis:

Pursuant to FAR Subpart 1.4, unless precluded by law, executive order, or regulation, deviations from the FAR may be granted when necessary to meet the specific needs and

requirements of the agency. Deviation for purposes of the FAR includes the "omission of any solicitation provision or contract clause when its prescription requires its use." This deviation request has been reviewed by local counsel. In the attached memorandum (TAB A), counsel has provided an analysis for each clause that is subject to this deviation request. In accordance with DLAD Subpart 1.4, local counsel has reviewed and concurs with this deviation request.

52.215-2. Audit and Records - Negotiation

FAR Clause 52.215-2 is prescribed by FAR 15.209(b). The prescription at 15.209(b)(1)(iii) provides that this clause does not apply to the acquisition of commercial items exempted under 15.403-1, Prohibition on Obtaining Cost or Pricing Data. The statutory origin for this clause is 10 U.S.C. 2313(c) which provides that each contract awarded using procedures other than sealed bid procedures shall provide that the Comptroller General is authorized to examine any records that directly pertain to and involve transactions relating to the contract. This statutory requirement is also implemented at 52.212-5(d) for commercial items contracts. DSCR is requesting a FAR deviation to allow for the use of FAR 52.212-5(d) in lieu of FAR 52.215-2. Counsel has advised that use of the FAR 52.212-5 clause is not inconsistent with the statutory requirement that the Comptroller General have access to records. Therefore, DSCR requests a deviation to use the 52.212-5(d) clause in lieu of the FAR 52.215-2 clause.

52.215-15 Pension Adjustment and Asset Reversions

FAR clause 52.215-15 is prescribed by 15.408(g) which requires use of this clause if it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to Part 31. This clause does not have a direct statutory origin, rather it is related to the Cost Accounting Standards. See 63 FR 58595, Pay-As-You Go Pension Costs, October 30, 1998. As uncertified cost data was reviewed by DCAA for this proposed contract, there is an argument that a preaward cost determination was made that was subject to Part 31. Therefore, the FAR prescription would apply. Provided the CAS waiver is approved, DSCR requests a deviation to omit this clause from the proposed contract.

52.215-18 Revision or Adjustment of Plans

FAR Clause 52.215-18 is prescribed by 15.408(j) which requires use of this clause if it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to Part 31. This clause does not have a direct statutory origin, rather it is related to the Cost Accounting Standards (CAS). See 56 FR 29124, Federal Acquisition Regulations - Miscellaneous Amendments, June 25, 1991. As uncertified cost data was reviewed by DCAA for this proposed contract, there is an argument that a preaward cost determination was made that was subject to Part 31. Therefore, the FAR prescription would apply. Provided the CAS waiver is approved, DSCR requests a deviation to omit this clause from the proposed contract.

52.215-19 Notification of Ownership Changes

FAR Clause 52.215-19 is prescribed by 15.408(k) which requires use of this clause if it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost

determinations will be subject to Subpart 31.2. This clause does not have a statutory origin, rather it is regulatory in nature. See 55 FR 16056, Improving Government Regulations, Semiannual Agenda of Regulations, April 23, 1990. As unclassified cost data was reviewed by DCAA for this proposed contract, there is an argument that a preaward cost determination was made that was subject to Part 31. Therefore, the FAR prescription would apply. Provided the CAS waiver is approved, DSCR requests a deviation to omit this clause from the proposed contract.

52.243-1 Changes Fixed Price

52.243-1 is prescribed by 43.205(a)(1) which requires use of the clause when a fixed-price contract for supplies is contemplated. This clause permits the Government to make unilateral changes: 1) in drawings when supplies are specially manufactured for the Government, 2) in the method of shipment of packaging, or 3) place of delivery. The clause also provides notice to the contractor that if the change increases or decreases in the cost of performance, the contracting officer shall make an equitable adjustment. There is also a commercial changes clause at 52.212-4(c). That clause differs in that changes in terms and conditions may be made only by written agreement of the parties. Counsel has not identified any statutory or regulatory requirement that would preclude a FAR deviation to use the 52.212-4 clause in lieu of the 52.243-1 clause. The contract will also contain a clause that will permit unilateral changes in packaging and delivery during contingency operations and time of war. Therefore, DSCR requests a deviation to use the 52.212-4 clause in lieu of the 52.243-1 clause, except during contingency operations and time of war as noted above.

52.246-23 Limitation of Liability

52.246-23 is prescribed by 46.805 which requires use of this clause for non-high value items that are not based on catalog or market prices (in accordance with 46.804, the limitation of liability clause is generally not used when items are priced by catalog or market prices). This clause implements the Government policy of generally self-insuring by relieving contractors of liability for loss or damage to property of the Government that occurs after acceptance and results from defects in the supplies under contract. However, the Government does not relieve the contractor of liability for loss or damage to the contract end item itself. This clause is similar to the 52.212-4(p) clause that applies to commercial items. Therefore, DSCR requests a FAR deviation to use the 52.212-4(p) limitation of liability clause in lieu of the 52.246-23 clause.

52.227-1 Authorization and Consent

52.227-1 is prescribed by 27.201-2(a) which requires the inclusion of the clause in contracts except when using other than simplified acquisition procedures or both complete performance and delivery are outside of the United States. 28 U.S.C. 1498(a) provides that "whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States ...". The statute does not require the use of this clause, therefore, the clause may be subject to a FAR deviation request. Therefore, DSCR requests a FAR deviation to omit this clause from the proposed contract.

52.227-2. Notice and Assistance Regarding Patent and Copyright Infringement

52.227-2 is prescribed by 27.202-2 which requires the inclusion of the clause in contracts above the simplified acquisition threshold except when both complete performance and delivery are outside of the United States. The clause provides notice of patent infringement claims and is related to the 52.227-1 clause. Counsel has not identified a statutory requirement that requires the inclusion of this clause. Therefore, DSCR requests a FAR deviation to omit this clause from the proposed contract.

CONCLUSION

We request approval of this deviation request by April 3, 2000. Should you have any questions regarding this issue, please contact John Kazlo at (804) 279-3403.



LAWRENCE E. VADALA

Captain, SC, USN

Executive Director for Procurement

Attachment



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IN REPLY
REFER TO DSCR-G

February 28, 2000

MEMORANDUM FOR DSCR-CGB
ATTN: John Kazlo

SUBJECT: FAR/DFARS Deviation Request

Pursuant to your request, I have reviewed the below FAR/DFARS clauses to determine whether they are potential candidates for an individual FAR/DFARS deviation request. My analysis and conclusion with respect to each FAR/DFARS clause is contained in Section III of this memorandum. Additionally, I would recommend that certain clauses discussed in Section IV of this memorandum be added to the proposed contract or be included as part of the FAR/DFARS deviation request.

I. Background

Pursuant to FAR Subpart 1.4 and DFARS Subpart 1.4, a FAR/DFARS deviation is required whenever an agency omits a solicitation provision or contract clause when the FAR or DFARS prescription requires its use or when a contract clause with modified or alternate language is used that is not authorized by the FAR or DFARS. A deviation from the FAR or DFARS may be granted unless the deviation is precluded by law, executive order, or regulation. FAR 1.402.

Honeywell has objected to the inclusion of certain FAR/DFARS clauses in a proposed "catalog" contract between DSCR and Honeywell. The proposed catalog contract implements the pilot Strategic Supplier Alliance Program which was developed through a joint DoD/AlliedSignal (now Honeywell) Rapid Improvement Team. The goal of this pilot program is to integrate commercial and military products and processes in an agency-wide corporate contract with Honeywell to achieve advantageous pricing, decreased response times, more accurate forecasting, and decreased administrative costs. This pilot program is limited to sole-source items manufactured by Honeywell. A majority of the items identified as possible candidates for the proposed catalog contract are commercial items that meet the definition of a commercial item at FAR 2.101. However, some items proposed for this effort are military unique items. Honeywell has refused to participate in this pilot program if the items identified as candidates for this contract are subject to different contract terms and conditions. Therefore, in order to make the proposed contract terms and conditions for commercial items and military unique items as uniform as possible, DSCR is seeking, where not precluded by statute or

regulation, FAR and DFARS deviations to omit select FAR and/or DFARS clauses when the prescription requires use of the clause.

II. Deviation Request

Honeywell has requested a FAR/DFARS deviation from the following clauses:

- 52.215-2, Audit and Records - Negotiation
- 52.215-10 Price Reduction for Defective Cost or Pricing Data
- 52.215-12 Subcontractor Cost or Pricing Data
- 52.215-14 Integrity of Unit Prices
- 52.215-15 Pension Adjustment and Asset Reversions
- 52.215-18 Revision or Adjustment of Plans
- 52.215-19 Notification of Ownership Changes
- 52.215-21 Requirements for Cost or Pricing Data
- 52.215-16 Facilities Capital Cost of Money
- 252.215-7000 Pricing Adjustments
- 252.215-7002 Cost Estimating System Requirements
- 52.230-2 Cost Accounting Standards
- 52.230-3 Disclosure and Consistency
- 52.230-6 Administration of Cost Accounting Standards
- 252.231-7000 Supplemental Cost Principles
- 52.243-1 Changes Fixed Price
- 252.243-7001 Pricing of Contract Modifications
- 252.243-7002 Requests for Equitable Adjustments
- 52.244-2 Subcontracts
- 52.244-5 Competition in Subcontracting
- 52.244-6 Subcontracts in Commercial Items
- 52.245-2 Government Property
- 252.245-7001 Reports of Government Property
- 52.246-23 Limitation of Liability
- 52.246-9G01 (DSCAP) Warranty of Supplies
- 52.226-1 Utilization of Indian Organizations
- 52.227-1 Authorization and Consent
- 52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement
- 52.227-9 Refund of Royalties
- 52.229-3 Federal, State, and Local Taxes
- 52.229 5 Taxes - Contracts Performed in the U.S. Possessions or Puerto Rico
- 52.229-9000 (DLAD) Kentucky Sales Tax

III. Analysis

52.215-2 Audit and Records - Negotiation

FAR Clause 52.215-2 is prescribed by FAR 15.209(b). The prescription at 15.209(b)(1)(iii) provides that this clause does not apply to the acquisition of commercial items exempted under 15.403-1, Prohibition on Obtaining Cost or Pricing Data. The statutory origin for this clause is 10 U.S.C. 2313(c) which provides that each contract awarded using procedures other than sealed bid procedures shall provide that the Comptroller General is authorized to examine any records that directly pertain to and involve transactions relating to the contract. This statutory requirement is also implemented at 52.212-5(d) for commercial items contracts. A FAR deviation to allow for the use of FAR 52.212-5(d) in lieu of FAR 52.215-2 is not inconsistent with the statutory requirement that the Comptroller General have access to records. Therefore, I concur with omission of the 52.215-2 clause and using in its place FAR clause 52.212-5(d).

52.215-10 Price Reduction for Defective Cost or Pricing Data

FAR Clause 52.215-10 is prescribed by 15.408(b) which requires the use of this clause in solicitations and contracts when it is contemplated that cost or pricing data will be required from the contractor or any subcontractor. This FAR clause implements 10 U.S.C. 2306a(e). 10 U.S.C. 2306a(e) requires a price reduction clause when the offeror is required to certify that the cost or pricing data submitted are accurate, complete and current. However, the clause will not apply if a waiver of certified cost or pricing data is approved under the authority of 10 U.S.C. 2306a(b)(1)(C) (waiver authority is implemented in the FAR at 15.403-1(c)(4)). If Honeywell is not required to submit certified cost or pricing data, this clause would become inapplicable once the waiver of certified cost or pricing data is approved. This clause may be omitted if the waiver of certified cost and pricing data is approved in accordance with FAR 15.403-1(c)(4). If the waiver of certified cost or pricing data is approved, this clause will become inapplicable and no action is needed with respect to a FAR deviation for its omission from the contract.

52.215-12 Subcontractor Cost or Pricing Data

FAR Clause 52.215-12 is prescribed by 15.408(d) which requires the use of this clause in solicitations that also use the 52.215-10 clause. The statutory origin is 10 U.S.C. 2306a which requires certification of subcontractor cost or pricing data exceeding the thresholds of 10 U.S.C. 2306a(a)(1)(C). This clause will not apply if a waiver of certified cost or pricing data is approved under the authority of 10 U.S.C. 2306a(b)(1)(C) (waiver authority is implemented in the FAR at 15.403-1(c)(4)). If Honeywell is not required to submit certified cost or pricing data, this clause would become inapplicable once the waiver of certified cost or pricing data is approved in accordance with FAR 15.403-1(c)(4). Therefore, no further action is needed with respect to a FAR deviation for the omission of this clause from the contract.

52.215-14 Integrity of Unit Prices

FAR Clause 52.215-14 is prescribed by 15.408(f)(1). The FAR does not mandate the use of this clause for commercial items (15.408(f)(1)(v)). This clause requires that vendors that are awarded contracts without adequate price competition identify those supplies which they will not

manufacture or to which they will not contribute significant value. This clause is required by 10 U.S.C. 2304(T)(2). Recommend that this clause not be included in the FAR deviation request package.

52.215-15 Pension Adjustment and Asset Reversions

FAR clause 52.215-15 is prescribed by 15.408(g) which requires use of this clause if it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to Part 31. This clause does not have a direct statutory origin, rather it is related to the Cost Accounting Standards. See 63 FR 58595, Pay-As-You Go Pension Costs, October 30, 1998. Provided the CAS waiver is approved, I concur that this clause may be omitted from the contract pursuant to a FAR.

52.215-18 Revision or Adjustment of Plans

FAR Clause 52.215-18 is prescribed by 15.408(j) which requires use of this clause if it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to Part 31. This clause does not have a direct statutory origin, rather it is related to the Cost Accounting Standards. See 56 FR 29124, Federal Acquisition Regulations - Miscellaneous Amendments, June 25, 1991. Provided the CAS waiver is approved, I concur in that this clause may be omitted from the contract with a FAR deviation.

52.215-19 Notification of Ownership Changes

FAR Clause 52.215-19 is prescribed by 15.408(k) which requires use of this clause if it is anticipated that cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to Subpart 31.2. This clause does not have a statutory origin, rather it is regulatory in nature. See 55 FR 16056, Improving Government Regulations, Semiannual Agenda of Regulations, April 23, 1990. Provided the CAS waiver is approved, I concur in that this clause may be omitted from the contract with a FAR deviation.

52.215-20 Requirements for Cost or Pricing Data

FAR clause 52.215-20 is prescribed by 15.408(l) which provides the contracting officer may insert the provision if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required. The clause is essentially instructional in nature. Use of the clause does not appear inconsistent with the goals of the SSA. Alternate IV should be used if cost or pricing data are not expected to be required because an exception may apply, but information other than cost or pricing data is required. Therefore, I recommend that Alternate IV be included in the contract. No FAR deviation is necessary to use Alternate IV in lieu of the full text of 52.215-20.

52.215-21 Requirement for Cost or Pricing Data-Modifications

Clause 52.215-21 is prescribed by 15.408(m) which provides the contracting officer may insert the provision if it is reasonably certain that cost or pricing data or information other than cost or pricing data will be required. Alternate IV should be used if cost or pricing data are not expected to be required because an exception may apply, but information other than cost or pricing data is

required. Therefore, I recommend that Alternate IV be included in the contract. No FAR deviation is necessary to use Alternate IV in lieu of the full text of 52.215-21.

52.215-16 Facilities Capital Cost of Money

Clause 52.215-16 is prescribed by 15.408(h) which requires the clause in solicitations expected to result in contracts that are subject to the cost principles for contracts with commercial organizations, Subpart 31.2. If the contractor did not propose this cost, the resulting contract shall include 52.215-17, Waiver of Facilities Capital Cost of Money. No deviation appears necessary. The 52.215-16 clause should apply if the Facilities Capital Cost of Money was an included cost. The 52.215-17 clause should apply if the Facilities Capital Cost of Money was not an included cost.

252.215-7000 Pricing Adjustments

DFARS Clause 252.215-7000 is prescribed by 215.804-8 which requires the use of 252.215-7000 (which is simply a definition of a pricing adjustment) when the solicitation or contract includes any one of the following FAR clauses: 52.215-11, Price Reduction for Defective Cost or Pricing Data, 52.215-12, Subcontractor Cost or Pricing Data, or 52.215-13, Subcontractor Cost or Pricing Data-Modifications. If none of these FAR clauses are included in the resulting contract as a result of a CAS waiver, the prescription would not make the 252.215-7000 clause applicable. Therefore, if the CAS waiver is granted, no FAR deviation is necessary for the omission of this clause.

252.215-7002 Cost Estimating System Requirements

DFARS Clause 252.215-7002 is prescribed by 215.811-70(h) which requires the use of the clause in all solicitations and contracts to be awarded on the basis of cost or pricing data. This clause would not be required if cost or pricing data is not obtained. If the CAS waiver is approved, this clause would not be applicable. Therefore, if the CAS waiver is approved, no FAR deviation is necessary for the omission of this clause.

52.230-2 Cost Accounting Standards

DLA is pursuing a CAS waiver from the CAS Board. Should the waiver be granted, this clause would become inapplicable and may be omitted without a FAR deviation.

52.230-3 Disclosure and Consistency

DLA is pursuing a CAS waiver from the CAS Board. Should the waiver be granted, this clause would become inapplicable and may be omitted without a FAR deviation.

52.230-6 Administration of Cost Accounting Standards

DLA is pursuing a CAS waiver from the CAS Board. Should the waiver be granted, this clause would become inapplicable and may be omitted without a FAR deviation.

252.231-7000 Supplemental Cost Principles

DFARS clause 252.231-7000 is prescribed by 231.100-70 which requires use of the clause in all

solicitation and contracts which are subject to the principles and procedures at FAR Subparts 31.1, 31.2, 31.6, or 31.7. In accordance with DFARS 201.402(1), USD(A&T)DP is the approval authority for any deviation from FAR or DFARS Subpart 31.1 or 31.2. I recommend that this DFARS clause not be included in a FAR deviation request. (Pursuant to our discussions with Honeywell, Honeywell will accept this clause).

52.243-1 Changes Fixed Price

52.243-1 is prescribed by 43.205(a)(1) which requires use of the clause when a fixed-price contract for supplies is contemplated. This clause permits the Government to make unilateral changes: 1) in drawings when supplies are specially manufactured for the Government, 2) in the method of shipment of packaging, or 3) place of delivery. The clause also provides notice to the contractor that if the change increases or decreases in the cost of performance, the contracting officer shall make an equitable adjustment. There is also a commercial changes clause at 52.212-4(c). That clause differs in that changes in terms and conditions may be made only by written agreement of the parties. I have not identified any statutory or regulatory requirement that would preclude a FAR deviation to use the 52.212-4 clause in lieu of the 52.243-1 clause. Therefore I concur that this clause may be omitted from the contract and the 52.212-4 clause used in its place.

252.243-7001 Pricing of Contract Modifications

DFARS clause 252.243-7001 is prescribed by 243.205-71 which is required in solicitations and contracts when anticipating and using a fixed price type contract. The clause provides that when costs are a factor in any price adjustment under the contract, the contract cost principles and procedures in FAR Part 31 and DFARS 231 apply. Although I have not been able to identify any statutory requirement that would preclude a FAR deviation, DLA does not have deviation authority for the cost principles contained in FAR Part 31. The Director, Defense Procurement, is the approval authority for any individual deviation from FAR/DFARS 31.2, Contracts with Commercial Organizations. Pursuant to earlier discussions with Honeywell, Honeywell is willing to accept FAR/DFARS Part 31.2 coverage. Therefore, I recommend that this clause remain in the contract.

252.243-7002 Requests for Equitable Adjustments

DFARS clause 252.243-7002 is prescribed by 243.205-72 and is required in solicitations and contracts estimated to exceed the simplified acquisition threshold. The clause contains notice that a request for equitable adjustment shall bear a certificate executed by an individual authorized to certify the request. This requirement for the certification comes from 10 U.S.C. 2410(a). However, the statute does not direct that the clause be included in the contract. Therefore, this clause is eligible for a FAR deviation. However, I would recommend that the clause remain in the contract as it provides the procedures for an equitable adjustment and is merely instructional in nature.

Commercial Subcontracting Plan

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires that each contract that exceeds \$500,000 include a subcontracting plan. Pursuant to 52.219-9(g), a commercial plan is the preferred type of plan for contractors furnishing commercial items. FAR Clause 52.219-9 contains the requirements for all small business subcontracting plans. The distinction between commercial subcontracting plans and other types of subcontracting plans is not statutory in nature. OFPP Policy Letter 80-2 authorized the use of annual commercial subcontracting plans. As the statutory requirement is only for a subcontracting plan, the nature of the plan itself (i.e., individual or commercial) is a regulatory issue provided the actual plan otherwise satisfies the statutory requirements for a subcontracting plan (15 U.S.C. 637(d)). OFPP Policy Letter 95-1 reaffirmed this view and provided additional guidance on commercial subcontracting plans. As the statutory requirement under 15 U.S.C. 637(d) is for a subcontracting plan, and the subcontracting plan submitted by Honeywell otherwise satisfies the requirements of 15 U.S.C. 637(d) for a subcontracting plan, a FAR deviation would permit the acceptance of a commercial subcontracting plan in lieu of an individual plan for any military unique items added to the proposed contract. As the majority of the items proposed for the catalog contract are also commercial items that meet the definition of FAR 2.101 for a commercial item, the acceptance of the plan is also consistent with the FAR preference for a commercial subcontracting plan. Therefore, I concur that a commercial subcontracting plan may be accepted under FAR Clause 52.219-9 in lieu of an individual subcontracting plan. This may be accomplished by a FAR deviation as the deviation, while not omitting the 52.219-9 clause, will permit the modification of the clause to apply the commercial subcontracting plan to all items placed under the proposed contract.

52.244-2 Subcontracts

52.244-2 is prescribed by 44.204(a)(1) which requires use of the clause in cost reimbursement contracts, letter contracts, or fixed-price contracts that exceed the simplified acquisition threshold under which unpriced contract actions are anticipated. As no unpriced contract actions (or other trigger contract actions) are anticipated, use of this clause is not required. Therefore, this clause may be omitted without a FAR deviation.

52.244-5 Competition in Subcontracting

52.244-5 is prescribed by 44.204(c) which requires the use of the clause unless it is a firm-fixed price contract awarded on the basis of adequate price competition. The clause itself requires that the contractor select subcontractors on a competitive basis to the maximum extent practicable. The clause itself is more a statement of policy than contract requirement. I recommend that this clause remain in the proposed contract.

52.244-6 Subcontracts in Commercial Items

52.244-6 is prescribed by 44.403 which requires use of the clause when the contract is for other than a commercial item. The clause itself encourages the incorporation of commercial items as components to the maximum extent practicable. The clause also limits the flow down of other clauses and requires the use of the terms of the clause in all subcontracts awarded under the

contract. As this clause encourages the incorporation of commercial items into components and is otherwise consistent with the objectives of the goals of this contract, I recommend that this clause remain in the proposed contract.

52.245-2 Government Property

52.245-2 is prescribed by 45.106(b)(1) which requires the use of this clause when a fixed price contract is contemplated. The clause relates to the contractor's acceptance and use of Government furnished property. As no Government furnished property is being provided to Honeywell under this contract, this clause is not applicable to this contract. Although the clause is not applicable to the contract, 45.106(b)(1) prescribes its use. Therefore, I concur that this clause be omitted with a FAR deviation.

252.245-7001 Reports of Government Property

252.245-7001 is prescribed by 245.505-14(a) which requires use of the clause in all contracts that contain the 52.245-2, Government Property, clause. Provided the FAR deviation for 52.245-2 is approved, this clause would become inapplicable and no additional DFARS deviation would be necessary.

52.246-23 Limitation of Liability

52.246-23 is prescribed by 46.805 which requires use of this clause for non-high value items that are not based on catalog or market prices (in accordance with 46.804, the limitation of liability clause is generally not used when items are priced by catalog or market prices). This clause implements the Government policy of generally self-insuring by relieving contractors of liability for loss or damage to property of the Government that occurs after acceptance and results from defects in the supplies under contract. However, the Government does not relieve the contractor of liability for loss or damage to the contract end item itself. This clause is similar to the 52.212-4(p) clause that applies to commercial items. I have identified no statutory or regulatory authority that would preclude a FAR deviation to accept the 52.212-4(p) limitation of liability clause in lieu of the 52.246-23 clause. Therefore, I concur that this clause may be omitted with a FAR deviation.

52.246-9G01 Warranty of Supplies

This clause is a local DSCR clause. Omission of this clause does not require a FAR or DFARS deviation.

52.226-1 Utilization of Indian Organizations

52.226-1 is prescribed by 26.104 which requires the inclusion of that clause in DoD contracts that include the clause at 52.219-9, Small Business Subcontracting Plan. However, pursuant to 52.226-1(a), the clause does not apply to contracts awarded based on commercial subcontracting plans. Therefore, if the FAR deviation is approved to accept the commercial subcontracting plan in lieu of the individual subcontracting plan, this clause self-deletes and no additional FAR deviation is necessary.

52.227-1. Authorization and Consent

52.227-1 is prescribed by 27.201-2(a) which requires the inclusion of the clause in contracts except when using other than simplified acquisition procedures or both complete performance and delivery are outside of the United States. 28 U.S.C. 1498(a) provides that "whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States ...". The statute does not require the use of this clause, therefore, the clause may be subject to a FAR deviation request.

52.227-2. Notice and Assistance Regarding Patent and Copyright Infringement

52.227-2 is prescribed by 27.202-2 which requires the inclusion of the clause in contracts above the simplified acquisition threshold except when both complete performance and delivery are outside of the United States. The clause provides notice of patent infringement claims and is related to the 52.227-1 clause. I have not identified a statutory requirement that requires the inclusion of this clause. Therefore, this clause may be subject to a FAR deviation request.

52.227-9. Refund of Royalties

52.227-9 is prescribed by 27.206-2 which provides that the contracting officer shall insert the clause in negotiated fixed price contracts if the contracting officer determines that circumstances make it questionable whether or not substantial amounts of royalties will have to be paid by the contractor or subcontractor at any tier. If the contracting officer does not believe substantial amounts of royalties have to be paid, this clause is not applicable and does not need to be included in a FAR deviation request.

52.229-3. Federal, State, and Local Taxes

52.229-3 is prescribed by 29.401-3 which requires the use of the clause in competitive contracts that are performed in the United States and exceed the simplified acquisition threshold. As the proposed Honeywell contract is non-competitive, the 52.229-4 clause, not the 52.229-3 clause, should be used. This clause provides that unless otherwise provided in the contract, the contract price includes all applicable Federal, State, and local taxes and duties. It also provides for adjustments if taxes increase or decrease. Clause 52.229-4 should be included in the proposed contract.

52.229-5. Taxes-Contracts Performed in the U.S. Possessions or Puerto Rico

52.229-5 is prescribed by 29.401-5 and requires the use of this clause in contracts that contain either the 52.229-3 or 52.229-4 clause. It provides that local taxes include taxes imposed by a possession of the United States or Puerto Rico. This clause should remain in the contract.

52.229-9000 (DLAD). Kentucky Sales Tax

52.229-9000 is a DLAD clause which is prescribed by DLAD 29.490. DLAD 29.490(c) provides that solicitations that anticipate responses from firms in the Commonwealth of Kentucky should include clause 52.229-9001. However, there is no 52.229-9001 clause. Therefore, I assume the reference is to the 52.229-9000 clause. The clause provides procedures

for obtaining an exemption of Kentucky Sales and Use Tax for sales made directly to the Federal Government. If Kentucky Sales and Use Taxes are applicable, this clause should be contained in the contract. If these taxes are not anticipated, the clause may be omitted without a DLAD deviation.

IV. Additional Clauses

Although the following clauses were not contained in the solicitation, my review has identified that these clauses should either be included in the resulting contract or be subject to a FAR deviation request:

52.203-5, Covenant Against Contingent Fee

52.203-5 is prescribed by 3.404 which requires the use of this clause in all contracts exceeding the simplified acquisition threshold, other than those for commercial items. This clause is statutorily required by 10 U.S.C. 2306(b) and is not subject to a FAR deviation. Therefore, I recommend that this clause be included in the proposed contract to apply to any noncommercial items covered by the contract.

52.223-1, Clean Air and Water Certification

52.223-1 is prescribed by 23.105(a) which requires use of the certification in solicitations containing clause 52.223-2, Clean Air and Water. Clause 52.223-2 is contained in the solicitation. However, 33 U.S.C. 1368(f) provides that no certification may be required in the case of a contract for the acquisition of a commercial item. Therefore, the 52.223-1 clause is properly omitted for commercial items. However, the clause is required by the FAR for non-commercial items. The statute, however, does not contain a certification requirement for non-commercial items. As the FAR requires the certification requirement only for non-commercial items, and the certification requirement is non-statutory for non-commercial items, the 52.223-1 clause may be included in a FAR deviation request.

V. Conclusion

As discussed above, I have reviewed the statutory and regulatory history of the above FAR/DFARS clauses to determine whether there is any statutory or regulatory requirement which would preclude the omission of these clauses in the proposed catalog contract with Honeywell. Should you have any questions regarding any of these clauses, please contact me at extension 4815.



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