



## USAID PROCUREMENT EXECUTIVE

### PROCUREMENT EXECUTIVE BULLETIN NO. 2016-02

#### SUBJECT: ADDITIONAL GUIDANCE REGARDING PASS-THROUGH CHARGES

##### 1. SCOPE:

This Bulletin applies to all USAID Contracting Officers (COs) and Acquisition staff worldwide.

##### 2. PURPOSE:

The purpose of this PEB is to provide additional clarification and guidance to Contracting Officers concerning FAR 15.408(n) “Limitations on Pass-Through Charges” requirements and the “review and justification of pass-through” requirements in FAR 15.404-1(h)(2). Those FAR requirements are based on Section 802 of the 2013 NDAA, [PL 112-239 \(Jan 2, 2013\)](#).

##### 3. BACKGROUND/DISCUSSION:

Per FAR 15.408(n)(2), civilian agency Contracting Officers (CO) are required to insert **FAR clause 52.215-23, “Limitations on Pass-Through Charges”**, in solicitations and contracts including task or delivery orders when:

- (1) The total estimated contract or order value **exceeds the simplified acquisition threshold (SAT)** as defined in FAR section [2.101](#) and
- (2) The contemplated contract type is expected to be a **cost-reimbursement type contract** as defined in FAR [Subpart 16.3](#).

In addition, FAR 15.408(n)(2) gives COs the discretion to use the 52.215-23 clause when the total estimated contract or order value is below the simplified acquisition threshold and for any contract type, when the contracting officer determines that inclusion of the clause is appropriate. FAR Clause 52.215-23 extends the pass-through charges notification requirements to **post award** situations in which the subcontracted total exceeds the 70% threshold.

FAR 15.408(n) (1) requires that, whenever the CO includes the clause [52.215-23](#), “Limitations on Pass-Through Charges” in a solicitation (for cost reimbursement contract over the SAT) the CO must also include FAR provision 52.215-22, “**Limitation on Pass-Through Charges-Identification of Subcontract Effort**”. That FAR provision requires an offeror to notify the CO in writing when the offeror intends to subcontract **more than 70%** of the total cost of the work to be performed.

The 52.215-22 provision states that if the offeror intends to subcontract more than 70% of the total cost of the work to be performed, the offeror shall identify in its proposal—

(i) *The amount of the offeror’s indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and*

(ii) *A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).*

If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal—

(i) *The amount of the subcontractor’s indirect costs and profit/fee applicable to the work to be performed by the lower-tier subcontractor(s); and*

(ii) *A description of the added value provided by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).*

#### **4. CLARIFICATION/GUIDANCE FOR ANALYING PASS-THROUGH CHARGES**

When presented with a proposal in which more than 70% of the work to be performed is being subcontracted, the CO is reminded about the definitions in FAR clause 52.215-23 and the COs responsibility to ensure that there is “added value” for the proposed subcontracted work and that the Government will not be paying excessive pass-through charges. In addition, COs are reminded about the pass-through charges review and justification requirements contained in FAR 15.404-1(h).

##### **Definitions:**

FAR clause 52.215-23(a) defines:

- **“Added value”** to mean that the contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).
- **“Excessive pass-through charge”**, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, to mean a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).  
**“No or negligible value”** to mean the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

**General Guidance Regarding Pass-Through Charges Review:** When reviewing pass-through charges, COs are reminded about the relevant proposal analysis techniques covered in FAR

15.404-1, as well as the normal resources that are available to COs when making good business judgment decisions, e.g. review of historical cost information, market research, additional supporting documentation from the offeror, etc. COs are also reminded that, just as with all proposal analysis, when reviewing pass-through charges, COs have the discretion to request the advice and assistance of other experts to ensure that an appropriate analysis is performed, if necessary. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required.

If the CO determines that excessive pass-through charges exist, the excessive pass-through charges are unallowable in accordance with the provisions in FAR subpart [31.2](#).

If the CO determines that the prospective contractor has demonstrated that its functions will provide added value to the subcontracted effort and there are no excessive pass-through charges, the CO must then include in the contract, “**Alternate I**” with FAR clause 52.215-23. (See FAR 15.408(n) (2) (iii)).

Per FAR 52.215-23, the CO, or authorized representative, shall have the right to examine and audit all the Contractor’s records (as defined at FAR [52.215-2\(a\)](#)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

**Guidance/Clarification Regarding FAR 15.404-1(h) Review:**

COs are reminded that FAR 15.404-1(h) contains additional review and justification requirements concerning pass-through charges. Paragraphs (2) and (3) of FAR 15.404-1(h) state:

*“(2) Except as provided in paragraph (h) (3) of this section, when an offeror for a contract or a task or delivery order informs the contracting officer pursuant to 52.215-22 that it intends to award subcontracts for more than 70 percent of the total cost of work to be performed under the contract, task or delivery order, the contracting officer shall—*

- (i) Consider the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work. If such alternative approaches are selected, any resulting solicitations shall be issued in accordance with the competition requirements under FAR part 6;*
- (ii) Make a written determination that the contracting approach selected is in the best interest of the Government; and*
- (iii) Document the basis for such determination.*

*(3) Contract actions awarded pursuant to subparts 19.5, 19.8, 19.13, 19.14, or 19.15 are exempt from the requirements of this paragraph (h) (see section 1615 of the National Defense Authorization Act for Fiscal Year 2014 (Pub. L. 113-66)).”*

When considering the “availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor”, the CO needs to exercise good business judgment and take into account the particular circumstances and needs of that procurement.

**Possible Questions/Information for CO to Consider When Implementing FAR 15.404-1(h):**

Below is some information and questions that COs might consider when evaluating the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor. (Note: If such alternative approaches are selected, any resulting solicitations shall be issued in accordance with the competition requirements under FAR [part 6](#)):

**1) Existing Contracts.**

Is the proposed subcontractor on the GSA Federal Supply Schedule (FSS) or Government-wide Agency Contract (GWAC)? If so, would that FSS or GWAC contract be appropriate for the proposed services? Is there an existing USAID IDIQ that might be appropriate for these services? How feasible is it to actually explore a direct contract with the subcontractor or use FSS or GWAC?

**2) Small business.**

If the dollar value is low enough, would the services be appropriate for a non-competitive 8a contract? If the dollar value is too high for a non-competitive 8a, would it be appropriate for competition among 8a's? Would the services be appropriate for any of the other small business categories?

**3) Competition and Program/Mission Impact.**

How feasible is it to undertake further competition at this time? Is there adequate time for further competition? How long would it take? Is this procurement time sensitive or mission critical? What would be the impact on the program/mission if further competition were undertaken at this time? Do the circumstances warrant a non-competitive direct award to the subcontractor and could it be adequately justified under competition requirements in FAR part 6?

**4) Schedule Impact.**

Are there any potential negative consequences if this procurement was delayed because an alternate procurement method had to be explored? Does this involve expiring funds? Would the program/technical office concur with an alternate approach at this time? What other schedule implications might come into play? Is this a follow-on program that involves a predecessor contract that will be expiring soon and the program cannot afford a delay? (As always, COs should consult closely with the program/technical office.)

**5) Cost and Performance Risk.**

What would be the cost implications of using an alternate contract vehicle? What are the potential benefits of using an alternate contract vehicle? Would those costs be significant or will there be a cost savings for the government? Are there potential performance risks? COs should identify any changes in performance risk as a result of eliminating prime contractor oversight and substituting direct government oversight. Risks might include loss of prime contractor knowledge of integration and program requirements.

Would the potential costs and performance risk outweigh the benefit of using an alternate contract vehicle?

**Example of Possible Determination for FAR 15.404-1(h):**

After considering the availability of alternative contract vehicles and the feasibility of contracting directly with a subcontractor or subcontractors that will perform the bulk of the work, FAR 15.404-1(h) requires that the CO make a written determination that the contracting approach selected is in the best interest of the Government and document the basis for such determination. COs should clearly label that determination and incorporate it into the negotiation memo.

**Example:** Below is one **example** of a possible CO written determination:

**FAR 15.404-1(h) Determination**

a) *With regard to solicitation number: (e.g. 123-16-000), XYZ Corp, included documentation in its proposal indicating that it intends to subcontract more than 70% of the total cost of work to be performed, namely (insert the percentage planned) \_\_\_\_\_ As required by FAR 15.404-1(h) (2) (iii), as Contracting Officer, I considered the availability of alternate contract vehicles and the feasibility of contracting directly with a subcontractor that will perform the bulk of the work. I have determined that it is in the best interest of the Government to:*

**(Here the CO needs to state the one approach that he/she considers to be the most feasible.)**

**Some examples might include:**

- **Continue with the procurement through a prime contractor as originally planned.**
- **Award a contract directly to the subcontractor using an existing IDIQ.**
- **Award an order to the proposed subcontractor, using the GSA FSS.**
- **Pursue a service disabled veteran owned small business setaside)**

b) The basis for my decision is as follows:

**(Here the CO needs to adequately describe the reasons supporting his/her decision).**

Below is an **example** of a possible “basis” for the decision:

*I performed market research and explored the possibility of using: (describe market research performed, other vehicles considered, such as GSA FSS, GWACS and existing USAID IDIQs, FAR Part 6. competition considerations, etc.) I have considered the funding and timing constraints involved with this procurement, consulted closely with the technical/program office, (describe any relevant and important info or considerations)\_\_\_\_\_*

*I have determined that none of those alternate vehicles presented a feasible option for the subject procurement because: \_ (adequately explain reasons)*

*I have reviewed the “added value” documentation that the offeror submitted in its proposal and have determined that the offeror will be providing added value for the subcontracted work.*

*Considering all of the above, I determine that continuing with the procurement through the prime contractor is in the best interest of the Government.*

\_\_\_\_\_/s/\_\_\_\_\_  
Contracting Officer Signature

**5. ACTIONS NOT SUBJECT TO PASS-THROUGH LIMITATIONS:**

Per FAR 15.404-1(h)(3), small business set-aside contract actions awarded pursuant to [subparts 19.5, 19.8, 19.13, 19.14, or 19.15](#) are exempt from the FAR 15.404-1(h) pass-through charges requirements.

Per FAR 15.408(n) (2) (i), except as provided in paragraph (n) (2) (ii), the limitations on pass-through charges **only apply** to cost reimbursement type contracts that are over the SAT. (Therefore non cost reimbursement type contracts, e.g. fixed price construction contracts , and contracts under the SAT, would not be subject to pass-through limitations, unless a CO chose to exercise his/her discretion to include them under FAR 15.408(n)(2)(ii))

**6. EFFECTIVE DATE.**

This Bulletin is effective immediately and will remain in effect until cancelled by the Procurement Executive or otherwise rescinded.

9/13/16  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
Roy Plucknett  
Procurement Executive