■ a. In paragraph (b)(1), removing ''September 11, 2001'' and adding, in its place, ''November 1, 1990''.
■ b. Removing paragraph (g).

[FR Doc. E8–10635 Filed 5–12–08; 8:45 am]
BILLING CODE 8320–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204 and 252

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to update an Internet address and a cross-reference.

DATES: *Effective Date:* May 13, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0311; facsimile 703–602–7887.

SUPPLEMENTARY INFORMATION: This final rule amends DFARS text as follows:

○ *204.7005.* Updates the Internet address for DoD order code assignments.

○ *252.211–7003.* Updates a cross-reference.

List of Subjects in 48 CFR Parts 204 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 204 and 252 are amended as follows:
■ 1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 204—ADMINISTRATIVE MATTERS

■ 2. Section 204.7005 is amended by revising paragraph (d) to read as follows:

204.7005 Assignment of order codes.

* * * * *

(d) Order code assignments can be found at *http://www.acq.osd.mil/dpap/dars/order_code_assignments.html.*

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.211–7003 [AMENDED]

■ 3. Section 252.211–7003 is amended in Alternate I, in the introductory text, by removing ''211.274–4(c)'' and adding in its place ''211.274–5(a)(4)''.

[FR Doc. E8–10667 Filed 5–12–08; 8:45 am]
BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 231, and 252

RIN 0750–AF67

Defense Federal Acquisition Regulation Supplement; Excessive Pass-Through Charges (DFARS Case 2006–D057)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 852 of the National Defense Authorization Act for Fiscal Year 2007. Section 852 requires DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor.

DATES: *Effective date:* May 13, 2008.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before July 14, 2008, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2006–D057, using any of the following methods:

○ Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

○ E-mail: *dfars@osd.mil*. Include DFARS Case 2006–D057 in the subject line of the message.

○ Fax: 703–602–7887.

○ Mail: Defense Acquisition Regulations System, Attn: Ms. Sandra Morris, OUSD (AT&L) DPAP (CPF), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

○ Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Morris, 703–602–0296.

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 72 FR 20758 on April 26, 2007, to implement Section 852 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364). Section 852 requires DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. To enable DoD to ensure that pass-through charges are not excessive, the interim rule included a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted and, when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit and value added with regard to the subcontract work.

General Response to Comments: Fourteen sources submitted comments on the interim rule. In general, the public comments expressed concern that the rule discourages use of subcontractors and will lead to inappropriate application or adjustment of indirect costs. The comments also expressed concern that the contract is always open to oversight and opinions on excessive pass-through charges.

DoD points out that the statute requires that DoD not pay excessive pass-through charges, and DoD believes that the rule represents appropriate implementation of the statute. The rule is intended to protect the Government from those situations where there appears to be an agreement with a contractor to perform the contract scope of work, including ''managing'' subcontractors, then after award, the contractor subcontracts substantially all the effort without providing the required value-added subcontract management functions that were expected. There is no intent in this rule to disrupt the subcontracting process or other arrangements for firms that furnish supplies and services.

The rule is to be applied consistent with existing Cost Accounting Standard (CAS) and Federal Acquisition Regulation (FAR) rules related to subcontract management, indirect cost allocation, and profit analysis.

Adding value to the contract includes contractor performance of subcontract management functions that are consistent with the contractor's subcontract management policies and procedures (these functions are normally described in the contractor's CAS disclosure statement and/or accounting policies). When subcontract management is part of the contractor's proposal and scope of work, indirect costs must be applied consistent with existing CAS and FAR allocation rules. This rule does not discourage other business practices (e.g., distributors, vendors) when the contracting officer determines that these arrangements add value, which will be determined on a case-by-case basis using business judgment (FAR 1.602–2).

To ensure that the Government can make a determination as to whether or not excessive pass-through charges exist, the rule incorporates a reporting threshold that affords the contracting officer the ability to understand what functions the contractor will be performing (e.g., consistent with the contractor's disclosed practice) and will be providing ''added value,'' whether it be before award, or if the contractor subsequently decides to subcontract substantially all of the effort. The rule provides a recovery mechanism for those situations where a contractor subcontracts all or substantially all the performance of the contract and does not perform the subcontract management functions, or other value-added functions, that were charged to the Government through indirect costs and related profit.

The intent of the reporting threshold is for the contracting officer to make a determination that excessive pass-through charges do not exist at the time of award when at least 70 percent of the work will be subcontracted, based on contractor demonstrated functions, and to not re-address this determination during contract performance. To that end, this interim rule includes an Alternate I to the clause at 252.215–7004 to address those instances in which the contracting officer has made a determination prior to contract award. It also incorporates a requirement for the contractor to notify the contracting officer in writing if the contractor decides after award to subcontract more than 70 percent of the total cost of the work to be performed, and to verify in that document that the contractor will add value consistent with the definition in the contract clause. If the contractor does not perform the demonstrated functions or does not add value, the rule makes the excessive pass-through charges unallowable and provides for recoupment of the excessive pass-through charges consistent with the legislation.

DoD recognizes that there are acquisition strategies where substantial subcontracting will exist, and this rule provides for early notification so that the parties have an understanding of the value that will be added by the contractor. DoD also recognizes that there will be business arrangements, such as buying from a distributor, where the contracting activity has determined there is ''added value'' by the distributor or there is no other method for obtaining the parts. The 70 percent threshold is a reporting mechanism so that the parties have an opportunity to address potential excessive pass-through charges either before award, or before subcontract award if a decision (e.g., make/buy) to subcontract more than 70 percent was made by the contractor after award. Once the contracting officer determines there are no excessive pass-through charges (e.g., the contractor is performing acceptable subcontract management functions or otherwise adds value), there is no subsequent review for excessive pass-through charges unless the contractor did not perform subcontract management functions.

The 70 percent reporting threshold is meant to capture those contracting situations where there is a higher risk that substantially all of the effort could be subcontracted without providing the required subcontract management or other value-added functions. Excessive pass-through charges are unallowable on any subcontracting effort when the contractor or subcontractor does not provide subcontract management consistent with its policies and procedures or does not otherwise provide value to the contract or subcontract.

The following is a discussion of the specific comments received in response to the interim rule published at 72 FR 20758 on April 26, 2007:

1. Impact on Indirect Costs

a. *Comment:* The legislative history accompanying Section 852 (i.e., Section 844 of the Senate Report) is entirely focused on contractors that provide ''no value'' to the Government. Therefore, the focus of the rule should not be overhead rates, costs, allocation of costs, accounting practices, etc.

DoD Response: The legislation clearly requires that the regulation ensure that the Government does not pay excessive pass-through charges, and defines excessive pass-through charges as overhead and profit related to contractors or subcontractors that add ''* * * no, or negligible, value * * *'' This interim rule adds a definition of ''added value'' to make it clear that subcontract management functions are included in the types of functions that represent ''added value.''

b. *Comment:* Because indirect costs are handled differently from company to company (or even business unit to business unit), excessive pass-through should focus on excessive profit. The regulations must be conformed to the legislation by deleting the phrase ''indirect costs'' each place it appears in the contract clause and the solicitation provision and by substituting in each case the word ''overhead,'' consistent with the language used in the legislation.

DoD Response: The legislation explicitly requires a regulation that ensures the Government does not pay overhead and related profit when the contractor adds no or negligible value. This rule is intended to be used consistent with disclosed accounting practices and does not require special treatment of subcontract management costs. DoD believes that the new definition of what is ''added value'' is needed and has made the appropriate revision, as mentioned in the response to comment 1.a. above. ''Indirect cost'' is the more appropriate term for the costs DoD does not intend to pay if the scope of work was subcontracted with no ''added value'' by the contractor; but see the response to comment 1.a. for clarification of what is value-added effort.

c. *Comment:* The application of the cost disallowance for excessive pass-through charges appears to penalize contractors that classify their activities for ''managing subcontracts'' as indirect, while rewarding contractors that classify those activities as direct. The rule specifies that the charges for ''managing subcontracts and applicable indirect costs and profits based on such costs'' are excluded from any excessive pass-through disallowance. In other words, if a contractor's accounting practices include subcontract management in an indirect cost pool, rather than direct, all of these costs could become unallowable when allocated to subcontractor work performed, i.e., if and when the excessive pass-through provision—when no or negligible value is added—is triggered. Also, the rule violates FAR

31.203 and 31.204, which state that general and administrative costs are allowable and allocable, while the rule implies they are not allowable costs.

DoD Response: The statutory language prohibits payment of excessive pass-through charges, which includes overhead costs. The rule is consistent with the statute by disallowing the costs, or obtaining a price reduction, for excessive pass-through charges, including indirect costs.

d. *Comment:* The rule may require contractors to submit proposals that are inconsistent with their CAS Disclosure Statements. Under CAS-covered contracts, contractors do not have the option to book costs differently than as stated in their CAS Disclosure Statements.

DoD Response: The rule does not provide any allocation requirements. It only makes excessive pass-through charges unallowable. The rule does not require contractors to submit proposals that are inconsistent with their CAS Disclosure Statements.

2. Pre-Award Determination

a. *Comment:* The rule should focus on whether or not contractors and/or subcontractors ''add value'' with a disclosure, discussion, resolution, determination, and documentation that should be made up front, pre-award by the contracting officer, who either negotiates appropriate costs or does not award the contract. In DFARS 252.215–7004(b), after ''determine,'' the phrase ''prior to the award of a contract'' should be added. Also, there is no direction about what the contracting officer does with this information or which contracting officer makes the determination.

DoD Response: DoD expects that, during pre-award discussions, the contractor will disclose its intent to subcontract more than 70 percent of the total cost of the work to be performed and its intent to perform the subcontract management or other functions that provide ''added value'' per its disclosure statement, accounting polices, or otherwise (e.g., the functions that make up the subcontract management costs being allocated to the effort). DoD expects the contracting officer to make a determination that there is ''added value'' and that excessive pass-through charges do not exist based on the expectation of performance of the disclosed functions that will add value. Under these conditions, there will be no further challenge to demonstrate ''added value.'' This interim rule includes an Alternate I to the contract clause to address those instances in which the contracting officer has made a determination prior to contract award that there is ''added value'' and, therefore, there are no excessive pass-through charges based on performance of those functions that will add value.

However, a post-award notification is required when a contractor changes its decision to subcontract (e.g., make/buy) after award from subcontracting less than 70 percent to a subsequent decision to subcontract more than 70 percent. Upon written notification, the contracting officer will rely on the contractor's written notice that the contractor will provide ''added value'' consistent with the definition in the clause.

Implementation of the statute requires that DoD ''not pay'' excessive pass-through charges. Post-award adjustments are required in the clause should a contractor decide after contract award to subcontract all the effort without providing ''added value'' to the contract or subcontract.

b. *Comment:* Should the contracting officer determine that pass-through charges are not excessive (considering the contractor's established and disclosed accounting practices), that assessment should be determinative and the need for post-award audits eliminated.

DoD Response: Post-award audit rights are required and remain to provide the needed audit rights in situations where award was based on the contractor performing more than 30 percent of the effort, but the contractor later subcontracts substantially all of the work (or more than 70 percent), including delivery, and does not provide ''added value'' (subcontract management functions).

c. *Comment:* The rule should be written solely as direction to the contracting officer. A new subparagraph at DFARS 215.404–1 entitled ''Excessive Pass-Through Charges'' could be added that includes policy direction that contracts should not be entered into when the contracting officer believes the offeror adds no or negligible value to the proposed acquisition. Alternatively, the entire excessive pass-through cost issue can be better addressed by better acquisition strategies and revised profit policies.

DoD Response: The rule should not be directed solely to the contracting officer. The legislation requires a ''regulation'' to prevent the Government from paying excessive pass-through charges. DoD plans to monitor implementation and to provide guidance as required. It is not sufficient to address this issue only in acquisition strategies and profit policies, as they will not prevent the Government from paying excessive pass-through charges in situations where contracts are awarded anticipating very little subcontracting, then subsequently the contractor subcontracts all or substantially all of the effort and provides no ''added value''—the situations that generated this legislation.

d. *Comment:* The rule should include guidance that permits the contracting officer to enter into an advance agreement with respect to the contracting officer's determination that the requirements of the clause at 252.215–7004 have been complied with and that the contractor (or subcontractor) has not incurred ''excessive pass-through charges.''

DoD Response: This interim rule includes an Alternate I to the contract clause to address those instances where the contracting officer determines there will be no excessive pass-through charges provided the contractor performs the disclosed value-added functions.

3. Impact on Fixed-Price Contracts

Comment: The rule does not detail how it would be implemented for fixed-price noncompetitive contracts. For example, if at the time the contract was negotiated, the contractor did not exceed the 70 percent threshold, no adjustment would have been considered in negotiating the price of the contract. However, if during the contract performance there were make/buy business decisions or cost fluctuations that resulted in the 70 percent threshold being exceeded, there is no clear way to determine the excessive pass-through charges, as a price was negotiated, not elements of cost.

DoD Response: Similar to CAS noncompliance cost impact situations and defective pricing, a determination of a price adjustment will be made on a case-by-case basis considering the facts and circumstances.

4. Statutory Exclusions and Exception

a. *Comment:* The statute is explicit that the excessive pass-through requirement does not apply to any firm-fixed-price subcontract or task or delivery order awarded based on adequate price competition or when the award is for the acquisition of commercial items. This statutory exclusion has not been properly included in the regulations; its coverage as a flow-down limitation in 252.215–7004(f) is an insufficient implementation of the statute.

DoD Response: The prescription at DFARS 215.408(4) clearly reflects the requirements and exclusions of the legislation. As required by the

legislation, this rule must flow down to subcontracts, and the flow-down requirement at 252.215–7004 appropriately excludes those subcontracts that meet the exclusion in the legislation.

b. *Comment:* An exception should be made for any proposal based on cost data. When the Truth in Negotiations Act (TINA) and Cost Accounting Standards (CAS) apply, there should be every opportunity for the contracting officer (as well as any audit assistance that may be utilized) to understand the value being added by the offeror and to raise any objections at that point to any ''excessive'' costs.

DoD Response: DoD believes the new definition of ''added value'' will clear up any misunderstanding of the expected implementation. TINA and CAS do not ensure the Government does not pay excessive pass-through charges, as required by the legislation. For example, at the time of award it may not be known that the contractor will subcontract the effort. Subsequent to award, the contractor may subcontract all effort, including delivery, and not perform its subcontract management functions, or any other ''added value'' functions, yet the contractor applies its indirect costs and profit to the subcontractor costs when billing the Government for the effort. Without the requirement to notify the contracting officer of the change in the level of subcontracting (e.g., make/buy decision), the Government does not have the ability to discuss/negotiate the value added by the contractor, nor the opportunity to change its procurement strategy and go directly to the subcontractor, since there was no ''added value'' from the contractor.

c. *Comment:* The rule should have some reasonable parameters with regard to the number of subcontractors to whom this requirement flows down. It seems reasonable that subcontracts that are minimal in value or less than 1–2 percent of the cost of the contract should be exempt.

DoD Response: DoD agrees that a minimum threshold is required and has established a threshold tied to the cost or pricing data threshold.

d. *Comment:* CAS-covered contractors should be excluded from the coverage of the rule. In complying with CAS, contractors allocate indirect costs to final cost objectives on a causal/beneficial basis in accordance with CAS 418 and CAS 410. Based on these standards, final cost objectives would not have excessive pass-through costs applied to them. If the indirect costs have less benefit to a final cost objective than would be achieved through the contractor's normal allocation process, CAS provides for special allocations to achieve the proper allocation of costs, which could be a reduced allocation or no allocation at all.

DoD Response: DoD does not agree that CAS-covered contractors should be excluded. Cost allocation principles in CAS are separate from allowability provisions in this rule. This rule implements the statutory provision to prohibit excessive pass-through charges.

e. *Comment:* The rule should explicitly exclude competitively awarded time-and-materials (T&M) contracts from its applicability; contractors are already prohibited from applying profit to material costs, and the contractor is required to propose separate rate tables for subcontractors. In addition, the exceptions to the rule should include all current regulatory exceptions to the submission of cost or pricing data specified at FAR 15.403–1, as well as those pricing actions below the Truth in Negotiations Act threshold specified at FAR 15.403–4. For example, the exceptions in current regulations to submitting cost or pricing data based on ''adequate price competition'' and ''commercial item'' are not limited to fixed-price type contracts as specified in the interim rule.

DoD Response: DoD disagrees with the suggestion to exclude additional contract types for the reasons stated in the response to comment 4.b. above. The same potential risk for T&M contracts exists as for cost-type contracts, if award was made with the intent to subcontract little of the work and subsequently the contractor decides to have a subcontractor perform substantially all the work without providing the value-added subcontract management functions. In addition, while the statute specifically excluded certain contract types, it did not exclude T&M contracts.

f. *Comment:* DoD should consider an exception for small business, as the rule's Regulatory Flexibility Act comments indicate a relatively minor impact on small businesses.

DoD Response: The exclusion would not be appropriate, since the statute did not provide an exclusion. Considering the clarification addressed in the response to comment 1.a. above, DoD does not believe it is burdensome for a contractor or lower-tier subcontractor, whether small business or otherwise, to demonstrate its planned subcontract management functions. Also see the response to comment 6.b above.

g. *Comment:* In the clause at 252.215–7004, paragraph (d), Recovery of Excessive Pass-Through Charges, a retroactive adjustment to previously determined firm-fixed prices based on changes during contract performance has no basis in the law and must be eliminated. Also, the only recovery possible for such a negotiated fixed-price contract would have to have occurred because the contracting officer agreed to a price that included ''excessive pass-through charges'' and then later changed his/her mind about that price agreement, which is inequitable.

DoD Response: DoD believes the rule is consistent with the statutory requirement prohibiting payment of excessive pass-through charges. However, DoD has revised the rule to include an Alternate I to the clause for use when a contracting officer makes a determination that there is ''added value.'' DoD disagrees that a fixed-price adjustment must be eliminated, and also disagrees with the premise that the contracting officer would have agreed to excessive pass-through charges. If a contractor, after contract award, decides to subcontract all the contract effort and does not perform any subcontract management or any other functions that add value, DoD receives no benefit for the indirect costs and profit added on by the contractor or subcontractor, and DoD expects to re-coup those costs. The rule includes a reporting mechanism (i.e., 70 percent) for circumstances that pose a higher risk of excessive pass-through charges, so that the parties have an opportunity to address potential excessive pass-through charges either before award, or before subcontract award if a decision subsequently changes after contract award.

h. *Comment:* In the clause at 252.215–7004, paragraph (e) adds an access to records provision ''to determine whether the contractor proposed, billed, or claimed excessive pass-through charges.'' This provision introduces new and unnecessary rules on access to records, and there is no need for a special access to records provision for this regulation; audit rights under this provision can and should be based on the existing Audit and Records—Negotiation contract clause at FAR 52.215–2. The Audit and Records clause is already included in the contracts to which the interim rule is applicable.

DoD Response: The Audit and Records clause at FAR 52.215–2 does not provide the Government access to all records that might show excessive pass-through charges. The rule's access to records provision is needed to fully implement Section 852 and to ensure the Government is not paying excessive pass-through charges.

5. Unallowable Costs

a. *Comment:* Requiring these costs to be ''unallowable'' is too draconian and should be abandoned in favor of requiring the contracting officer to make a preaward determination of reasonableness.

DoD Response: DoD believes making these costs unallowable is required to comply with the statutory requirements. Furthermore, a preaward determination will not prevent potential excessive pass-through charges when a contractor changes its decision to subcontract after contract award.

b. *Comment:* The determination of an excessive pass-through charge should not be defined as a ''cost principle.'' The cost principles generally define various types of costs, and some of those costs are unallowable regardless of the amount of such costs incurred. For the costs addressed in the interim rule, the underlying costs are presumably allowable as to the type of cost, but it is only the amount of such cost that is considered excessive.

DoD Response: This interim rule clarifies the definitions of ''excessive pass-though charge'' and ''added value.'' If a contractor bills the Government excessive pass-through costs by subcontracting the contract effort without adding value (consistent with its subcontract management function), the entire indirect cost and profit should not be paid. The rule does not provide for questioning only a portion of the indirect costs for subcontract management charged to the Government when it is determined that the costs are excessive pass-through charges.

c. *Comment:* It is questionable to include that excessive pass-through charges are unallowable in a section (DFARS 231.201–2) that deals with ''Determining allowability'' of all costs. However, the requirements in FAR 3l.201–2(a)(2) (Allocability) and (a)(4) (Terms of the contract) already cover this, so adding this language is both unnecessary and redundant.

DoD Response: DoD believes this language is required to ensure implementation of the statute, which prohibits payment of excessive pass-through charges.

d. *Comment:* The language added to DFARS 231.203 appears to be misplaced, i.e., ''(d) Excessive pass-through charges, as defined in the clause at 252.215–7004, are unallowable.'' The added statement is purely an allowability statement and is added to a section of the DoD supplement to FAR 31.203, which deals exclusively with allocability of costs. One wonders whether the intent of this addition to 231.203 is to require those subcontract costs which are not benefited by G&A expenses remain as part of the G&A base. If so, it would be inequitable to eliminate unallocable G&A costs from the G&A pool and leave the costs to which no G&A is allocable in the G&A base.

DoD Response: FAR 31.203 deals with indirect costs. DoD will not pay indirect costs when a contractor does not add value (for example, adding value includes performing subcontract management functions in accordance with a contractor's disclosed accounting practices or policies or other value-added functions as determined by the contracting officer). The intent is to maintain compliance with existing cost allocation laws and regulations. The rule includes a reporting mechanism (i.e., 70 percent) so that the parties have an opportunity to address potential excessive pass-through charges either before award, or before subcontract award if a decision to subcontract subsequently changes after contract award. If it is determined that excessive pass-through charges will occur, the contracting officer has the opportunity to change the procurement strategy or to work with the contractor to ensure proper application of indirect costs in accordance with CAS and/or FAR requirements.

e. *Comment:* The interim rule makes a unique distinction between fixed-priced contracts and all other contracts regarding unallowable costs. The contract clause states that excessive pass-through charges are only considered ''unallowable'' when associated with non-fixed-price contracts. When associated with a fixed-price contract, they are not considered ''unallowable,'' but instead are an after-the-fact contract price reduction. This is contrary to the FAR provisions applicable to fixed-price contracts (i.e., FAR 31.102). Costs determined to be unallowable in accordance with FAR Subpart 31.2 or DFARS Subpart 231.2 are unallowable whether the contract being priced is a cost-type or flexibly priced contract or a competitively awarded fixed-price contract. If a contract cost is not determined to be unallowable prior to the award of a competitively awarded fixed-priced contract, there is no regulatory basis for making an after-the-fact contract price reduction if the contracting officer determines after award that incurred pass-through costs were excessive.

DoD Response: See response to comment 4.g. above.

f. *Comment:* It is unclear whether an excessive pass-through charge is intended to be ''expressly unallowable'' (e.g., specifically named and stated to be unallowable as defined in 48 CFR 9904.405–30(a)(2)) or unallowable based on ''reasonableness'' (e.g., as defined at FAR 31.201–3). It appears that the intent of the legislation is to treat the cost determination on the basis of ''reasonableness.''

DoD Response: See the ''General Response to Comments'' and the response to comment 1.a. above. The rule does not make indirect costs that are determined to be excessive pass-through charges expressly unallowable.

g. *Comment:* The rule defines an excessive pass-through charge to be made up of indirect costs and profit. However, DFARS Part 231 or FAR Part 31 does not address profit; they only address costs. Therefore, including statements in the DFARS relative to unallowable profit is inconsistent with the related FAR provision.

DoD Response: DFARS Part 231 simply refers to the definition at 252.215–7004, thereby addressing the indirect costs (DFARS 231.203). DoD has clarified the language to read ''Indirect costs related to excessive pass-through charges, as defined in the clause at 252.215–7004, are unallowable.''

6. Identification/Threshold of Subcontract Effort

a. *Comment:* The 70 percent supplier content threshold is arbitrary and is not a legislative requirement and is contrary to other FAR thresholds (e.g., that only a small business can only perform 50 percent or more of the work). It is unrealistic for construction activities where the contractor for construction work serves primarily as a project manager. Some contracts require that a certain percentage of work be subcontracted. Use of this 70 percent threshold is causing confusion, and some think the limitation on excessive pass-through charges only pertains to contracts with 70 percent or more subcontracting. Also, teaming is a common practice and 70 percent is too low. The contractor on such teams always adds significant value and should not be required to demonstrate that fact where it is performing 30 percent of the work. If retained, recommend increasing to 80–90 percent.

DoD Response: This rule does not affect subcontracting and teaming arrangements. See the ''General Response to Comments'' above. The 70 percent threshold is a reporting mechanism so that the parties have an opportunity to address potential excessive pass-through charges either before award, or before subcontract award if a decision changes after award

in those circumstances where there is a higher risk that excessive pass-through charges could exist (e.g., subcontracting all or substantially all of the work). Once the contracting officer determines there is ''added value'' (e.g., the contractor will perform acceptable subcontract management functions), there is no subsequent review for determining ''added value.'' This rule does not affect subcontracting and teaming arrangements; it simply provides a remedy to the Government when a contractor bills for work that is not ''added value'' as stipulated in the rule. The rule is intended to provide the Government the means to identify, determine, and seek recovery of charges for non-value-added functions as stipulated in the rule.

b. *Comment:* The final rule should include a contract threshold that triggers the applicability of the rule (e.g., $100,000 for construction contracts and $50 million for major systems acquisition, or $650,000).

DoD Response: This interim rule includes a threshold tied to the cost or pricing data threshold, which provides for periodic inflation adjustment. In addition, the clause also allows for contracting officer discretion below that threshold based on potential risks or other considerations.

c. *Comment:* The regulation should be clarified so as to treat the 70 percent amount as a binary, triggering, condition at the time of contract award. Thus, if the offeror's proposal does not identify 70 percent or more of the total cost of work to be performed, the contracting officer's one time determination—at the time of contract award—must be that there is no excessive pass-through of costs and no further action is required by either the contractor or the contracting officer, absent a change in the amount of subcontract effort (as identified by any one of the three circumstances described in 252.215–7004(c)). The rule does not address situations where the prime contractor underruns its portion of the effort so that the subcontracted value exceeds 70 percent of the final cost, but is not known at award. Also, how do you measure the 70 percent, especially when it happens after initial award?

DoD Response: See the ''General Response to Comments'' above. This interim rule includes an Alternate I to the contract clause for use when the contracting officer has determined that the contractor's functions are value-added and that excessive pass-through charges do not exist based on the performance of those functions.

d. *Comment:* The use of a fixed percentage factor excludes other potential situations where excessive pass-through costs may exist and, therefore, may not be consistent with the legislative purpose. Contractors and subcontractors should be required to provide pass-through cost detail on all subcontracts regardless of the total percent of subcontract costs in the proposal, e.g. direct/drop shipments.

DoD Response: DoD believes the significant risks for excessive pass-through charges are at the total contract/subcontract level (e.g., subcontracting all effort without providing subcontract management functions), and the use of a reporting threshold for a contracting officer decision on excessive pass-through charges is sufficient. CAS and FAR already address proper allocations when there is not a causal/beneficial relationship between indirect expenses and the allocation base, e.g., a special allocation for significant direct/drop shipments.

e. *Comment:* What does the phrase ''percentage of effort the offeror intends to perform'' in 252.215–7003(c) mean? Are the percentage measures at cost for both the contractor and subcontractor, price for both, or cost for contractor and price for subcontractor? There is an inconsistency between (c)(1) and (c)(2) of that provision.

DoD Response: The language has been revised to read '' * * * total cost of the work to be performed * * * '' to be consistent with the remainder of the provision and the corresponding contract clause.

f. *Comment:* If there is a change proposed to the scope of work or the contractor subsequently decides to increase the amount of subcontracting to more than 70 percent, the clause offers no guidance regarding the dollar threshold for launching the pass-through charge analysis. Is the calculation to be based on the change only, or on the entire contract?

DoD Response: At any point the contractor decides to subcontract more than 70 percent of the cost of work to be performed, whether or not the decision results from a change in the scope of work, the contractor must notify the contracting officer and identify the value-added functions (i.e., subcontract management functions) that benefit the Government. DoD believes that 252.215–7004(c)(1) and (2) adequately explain the reporting requirement.

g. *Comment:* It is unclear how the interim rule treats situations in which the definitized contract contains options which could significantly alter contract value when exercised at a later date. Would the contracting officer include the potential value of exercised options in the initial calculation, just rely on the firm business portion of the contract, or need to recalculate later at the time of option execution?

DoD Response: Priced options would be included.

h. *Comment:* All directed subcontractor cost of work should be subtracted from the percentage calculation, because the analysis of whether the prime contractor adds value should be made by the Government at the time the directed subcontract is designated. If there were no added value, the Government would logically procure that item and provide it as Government-furnished equipment.

DoD Response: The statutory provisions prohibit excessive pass-through charges when a contractor or subcontractor is providing no or negligible value. This applies to all subcontracts except those specifically excluded in the statute.

i. *Comment:* The rule does not take into consideration emergency and contingency contracts that might require extensive subcontracting to achieve the desired result, to include the Stafford Act requirement that mandates work be awarded to local companies when possible.

DoD Response: DoD expects contractors to provide ''added value'' functions under any conditions for which it subcontracts part of the contract effort.

7. Definitions and Contract Clause

a. *Comment:* At DFARS 252.215–7004(a), the definition of each of the following terms should be clarified to provide objective and uniform standards:

(i) No value.

(ii) Negligible value. The definition of this term should be expanded to link it to the specific work to be performed, based on the facts and circumstances of each such contract or subcontract. Thus, the definition would state: ''No or negligible value'' means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort will add substantive value to accomplishing the work to be performed under the specific contract or subcontract, based on the facts and circumstances of each contract or subcontract (*e.g.*, statement of work).''

(iii) Costs of managing subcontracts.

(iv) Applicable indirect costs or profit.

(v) Demonstrate.

(vi) Substantive value.

(vii) ''Value'' in ''value added.''

(viii) Excessive. ''Excessive pass-through charge'' needs to be more clearly defined, and specific examples

should be added for clarifying the definition of ''excessive''.

DoD Response: Although public comments did not provide alternative definitions, DoD believes the definition of ''added value'' in this interim rule clarifies the misunderstandings apparent in public comments and provides sufficient perspective for the terms identified by the respondent. Consistent with the requirements at FAR 1.602–2, the rule is written to allow wide latitude for the contracting officer to exercise business judgment in determining whether the subcontract management provides ''added value'' consistent with the contractor's practices and the expectations of the contracting officer.

b. *Comment:* In the definition of ''no or negligible value,'' ''added'' should be changed to ''will add,'' because the determination of DFARS 252.215–7004(b) should be made prior to contract performance and prior to the contractor certifying that it has only submitted allowable costs.

DoD Response: See the response to comment 7.a. above.

c. *Comment:* The phraseology in the solicitation provision at 252.215–7003(b) states: ''the offeror's proposal shall exclude excessive pass-through charges.'' This is not the proper statement of the law or the regulatory intent. Furthermore, the formulation of this subsection unnecessarily and inappropriately differs from the formulation of the related contract clause at 252.215–7004(b) that states: ''The Government will not pay excessive pass-through charges.'' The excessive pass-through charges must be excluded from the negotiated contract prices, not merely from proposals.

DoD Response: Section 852 states that the Government will not pay excessive pass-through charges. DoD believes that Section 852 is best implemented by making excessive pass-through charges unallowable. By requiring these unallowable costs to be excluded from proposals, DoD is ensuring that the Government will not pay excessive pass-through charges.

d. *Comment:* Paragraph (c) of the clause at 252.215–7004 improperly formulates a set of rules applicable to lower-tier subcontracting, without adopting the limitations on flow-down provided for at 252.215–7004(f); it also retains the coverage for ''indirect costs'' rather than for ''overhead'' costs as provided in the statute. Finally, it discusses the requirement for ''value added'' but improperly ignores the statutory test of ''no or negligible value'' expressly provided for in the statute and properly addressed in the definition in paragraph (a) of the clause at 252.215–7004.

DoD Response: Relative to paragraph (c) of the clause at 252.215–7004, the prescription for the clause at 215.408(4) properly accounts for all exceptions for use of the clause, and 252.215–7004(f) provides the exceptions for flowdown of the clause. ''Indirect costs'' is the more appropriate term for the costs DoD will not pay if the scope of work was subcontracted with no ''added value'' by the contractor. See the response to comment 1.a. above for a clarification of what is ''added value.''

e. *Comment:* To avoid further inconsistencies, errors, and confusion, the provision at 252.215–7003 should be deleted in its entirety as well as the cross-reference to this provision at 215.408(3).

DoD Response: DoD believes the changes in this interim rule address the confusion expressed in public comments and has retained the solicitation provision.

f. *Comment:* A better definition of what is considered a ''subcontract'' for the purposes of the rule's analysis is needed in order to establish the base upon which the currently proposed 70 percent will be evaluated. FAR defines ''subcontract'' in two places, in FAR 44.101 and FAR 15.401.

DoD Response: The rule is revised to incorporate definitions of ''subcontract'' and ''subcontractor'' consistent with the definitions at FAR 44.101.

g. *Comment:* There are a number of commercial and Government practices which should be clarified with regard to the determination of subcontract. The following are some examples:

(i) Inter-organizational transfers, while considered a subcontract with regard to pricing, should not be considered a subcontract for the purpose of pass-through charges, as they are not considered subcontracts within a company.

(ii) Many firms employ contract labor to supplement their own staff. These subcontract laborers are integrated into the contractor's work staff and report directly to and are supervised by company managers in much the same manner as its own employees. Accordingly, it is our belief that these categories of employees should be excluded from the subcontracting base.

(iii) Will the analysis of subcontract labor hours be made on the basis of the number of labor hours involved or the cost of those labor hours? In general, there is a tendency to subcontract work which involves routine labor categories while retaining more highly skilled and highly paid labor categories in-house. There are different types of material and supply purchases. Formerly Government-furnished property has been shifted to contractor-acquired; the rule may result in contractors being unwilling to continue this process.

DoD Response: The rule is intended to protect the Government from those situations where there appeared to be an agreement with a contractor to perform the contract scope of work, including ''managing'' subcontractors, then after award, the contractor subcontracts substantially all the effort without providing ''added value.'' There is no intent in this rule to disrupt the subcontracting process or other arrangements for firms that furnish supplies and services. The definitions of ''subcontract'' and ''subcontractor'' at FAR 44.101 apply and have been incorporated into the rule.

h. *Comment:* The definition at 252.215–7004(a) fails to adopt the ''70 percent standard'' as one of the key regulatory triggers for determining whether there is an ''excessive pass-through charge.'' The definition in 252.215–7004(a) should be modified to add, before the period at the end thereof, the phrase ''if the contractor intends to subcontract more than 70 percent of the total cost of work to be performed by each subcontractor, under the contract, task order or delivery order''.

DoD Response: The 70 percent threshold is just a reporting mechanism. See the ''General Responses to Comments'' and the response to comment 1.a. above.

8. Impact on Business Strategy, Spares Contracting, and Indefinite-Delivery Indefinite-Quantity or Delivery Order Contracts

a. *Comment:* A possible outcome of an overly broad application of the interim rule may be a reduction in the number of opportunities for lower-tier contractors to provide a best value solution, as prime contractors are encouraged to keep work in house to avoid the possibility of encountering arbitrary cost disallowance and price reductions. Make-or-buy decisions will be skewed in favor of ''Make'' as a way to reduce risk. Additionally, many small businesses that manage large subcontractors may simply decline to do business with a customer that is arguably hostile to their business model.

DoD Response: The rule implements the statutory requirement to prohibit excessive pass-through charges. The rule should have no impact on teaming, subcontracting, and other business arrangements (*e.g.*, distributors, vendors) when the contractor demonstrates ''added value.''

b. *Comment:* The rule may impact team assembly and formation decisions, due to emphasis on excessive pass-through charges on the amount of work subcontracted out, and is inconsistent with the July 12, 2004, DoD Acquisition, Technology, and Logistics (AT&L) memorandum entitled, ''Selection of Contractors for Subsystems and Components,'' which provides a reason to look outward and add non-affiliated subcontractors.

DoD Response: The rule is not inconsistent with the AT&L memorandum or other subcontracting or teaming initiatives. The rule is intended to protect the Government from those situations where there appeared to be an agreement with a contractor to perform the contract scope of work, including ''managing'' subcontractors, then after award, the contractor subcontracts substantially all the effort without providing the required ''added value.'' There is no intent in this rule to disrupt the subcontracting process.

c. *Comment:* For spares contracting, the Government will be required to contract directly with component and subsystems suppliers if the Government possesses sufficient data rights to do so. Prime contractors most likely will not pursue spares contracting if they receive virtually no profit for doing so. In addition, the rule will significantly increase administrative burden on indefinite-delivery indefinite-quantity (IDIQ) and requirements-type contracts. If a business cannot capture its allowable costs, why should it manage subcontracts for the Government?

DoD Response: This rule in no way changes the indirect costs or profit a contractor receives for subcontract effort. See the ''General Responses to Comments'' above. On IDIQ and other contracts, once the contractor demonstrates the ''added value'' of the subcontract management functions it will perform, and the contracting officer determines that the Government derives a benefit from the ''added value'' functions, there should be no issue related to excessive pass-through charges. DoD recognizes that, as part of performing IDIQ and requirements contracts, a contractor must perform subcontract management functions consistent with its disclosed accounting practices and policies, and in some cases may award more than 70 percent of a particular effort to a subcontractor. This rule is intended to ensure that any payments for indirect costs and profit to the contractor (or subcontractor) are consistent with ''added value'' of subcontract management functions performed.

d. *Comment:* Implementation of the rule may be extremely problematic when IDIQ task order/delivery order contracts are involved. These contract types for services routinely involve a general statement of work with a large proportion of subcontractors to fulfill a wide variety of requirements for the customer. It is very unlikely that the contractor or the Government will be able to clearly define the required tasks such that the actual usage of subcontractors in terms of work performed or overall percentage of the contract can be defined in advance of performance.

DoD Response: See response to comment 8.c. above.

e. *Comment:* If a firm-fixed-price IDIQ contract is awarded based on adequate price competition, must the clauses be incorporated into delivery and task orders? What if the IDIQ contract contains fixed labor rates for a prime and subcontractors? Most likely, the fixed subcontractor rates contain prime indirects and profit. If the contracting officer negotiates a task order consisting mostly of subcontract labor but concludes that the prime adds no or negligible value (since the subcontractor is doing most of the work), is the contracting officer expected to remove all costs and profit not related to subcontract management?

DoD Response: See the ''General Responses to Comments'' and the response to comment 8.c. above. Unless a contract meets the exclusions in the rule, the clause is required. Also see the response to comment 4.e. above. When the contracting officer determines that the contractor is providing subcontract management functions necessary to complete the contract requirements and consistent with its subcontract management functions, there are no excessive pass-through charges.

9. Planning and Guidance

Comment: This rule is no substitute for adequate contract planning and administration on the part of the Government. Without adequate guidance, the potential for mischief could become an issue.

DoD Response: DoD will monitor implementation and will provide guidance when necessary.

10. Profit

Comment: Contractor's assumption of risk is not discussed. Eliminating all profit on a subcontract is not equitable; profit should largely be a function of the risk assumed by the contractor.

DoD Response: DoD has added a definition of ''added value'' to clarify misunderstandings of the rule. The rule in no way prohibits or inhibits contracting officers from considering contractor risks when negotiating profit under existing regulations. Profit would only be eliminated (or possibly an award not made) if the scope of work was being subcontracted and the contractor or subcontractor did not perform any ''added value'' functions.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does 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 DoD does not expect a significant number of entities to propose excessive pass-through charges under DoD contracts or subcontracts, and the information required from offerors and contractors regarding pass-through charges is minimal. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2006–D057.

C. Paperwork Reduction Act

This interim rule contains an information collection requirement. The Office of Management and Budget (OMB) has approved the information collection requirement for use through October 31, 2008, under OMB Control Number 0704–0443. DoD proposes that OMB extend its approval for use for three additional years and invites comments on the following: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The following is a summary of the information collection requirement:

Title: Defense Federal Acquisition Regulation Supplement (DFARS); Excessive Pass-Through Charges.

Type of Request: Extension of a currently approved collection.

Number of Respondents: 12,650.

Responses Per Respondent: Approximately 1.

Annual Responses: 12,800.

Average Burden Per Response: .51 hour.

Annual Burden Hours: 6,550.

Needs and Uses: DoD needs this information to ensure that pass-through charges under DoD contracts and subcontracts are not excessive, in accordance with Section 852 of Public Law 109–364. DoD contracting officers will use the information to assess the value added by a contractor or subcontractor in relation to proposed, billed, or claimed indirect costs or profit on work performed by a subcontractor.

Affected Public: Businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Written comments and recommendations on the information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Sandra Morris, OUSD (AT&L) DPAP (CPF), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Sandra Morris, OUSD (AT&L) DPAP (CPF), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 852 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364). Section 852 requires DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts (or task or delivery orders) that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. Public comments received on the previous interim rule indicate that there is an immediate need to amend DFARS policy on this subject, to eliminate significant misunderstandings that could cause serious contracting problems. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 215, 231, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 215, 231, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 231, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Section 215.408 is amended by revising paragraph (3) and adding paragraph (4) to read as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) Use the provision at 252.215–7003, Excessive Pass-Through Charges—Identification of Subcontract Effort, in solicitations (including task or delivery orders)—

(i) With a total value that exceeds the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, except when the resulting contract is expected to be—

(A) A firm-fixed-price contract awarded on the basis of adequate price competition;

(B) A fixed-price contract with economic price adjustment, awarded on the basis of adequate price competition;

(C) A firm-fixed-price contract for the acquisition of a commercial item; or

(D) A fixed-price contract with economic price adjustment, for the acquisition of a commercial item; or

(ii) With a total value at or below the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, when the contracting officer determines that inclusion of the provision is appropriate.

(4)(i) Use the clause at 252.215–7004, Excessive Pass-Through Charges, in solicitations and contracts (including task or delivery orders)—

(A) With a total value that exceeds the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, except for—

(1) Firm-fixed-price contracts awarded on the basis of adequate price competition;

(2) Fixed-price contracts with economic price adjustment, awarded on the basis of adequate price competition;

(3) Firm-fixed-price contracts for the acquisition of a commercial item; or

(4) Fixed-price contracts with economic price adjustment, for the acquisition of a commercial item; or

(B) With a total value at or below the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, when the contracting officer determines that inclusion of the clause is appropriate.

(ii) Use the clause with its Alternate I when the contracting officer determines that the prospective contractor has demonstrated that its functions provide added value to the contracting effort and there are no excessive pass-through charges.

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Section 231.203 is revised to read as follows:

231.203 Indirect costs.

(d) Indirect costs related to excessive pass-through charges, as defined in the clause at 252.215–7004, are unallowable.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Sections 252.215–7003 and 252.215–7004 are revised to read as follows:

252.215–7003 Excessive pass-through charges—identification of subcontract effort.

As prescribed in 215.408(3), use the following provision:

EXCESSIVE PASS-THROUGH CHARGES—IDENTIFICATION OF SUBCONTRACT EFFORT (MAY 2008)

(a) *Definitions. Added value, excessive pass-through charge, subcontract,* and *subcontractor,* as used in this provision, are defined in the clause of this solicitation entitled ''Excessive Pass-Through Charges'' (DFARS 252.215–7004).

(b) *General.* The offeror's proposal shall exclude excessive pass-through charges.

(c) *Performance of work by the Contractor or a subcontractor.*

(1) The offeror shall identify in its proposal the total cost of the work to be performed by the offeror, and the total cost of the work to be performed by each subcontractor, under the contract, task order, or delivery order.

(2) If the offeror intends to subcontract more than 70 percent of the total cost of work

to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal—

(i) The amount of the offeror's indirect costs and profit 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).

(3) 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 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).

(End of provision)

252.215–7004 Excessive pass-through charges.

As prescribed in 215.408(4), use the following clause:

EXCESSIVE PASS-THROUGH CHARGES (MAY 2008)

(a) *Definitions.* As used in this clause—

Added value means 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, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit on work performed by a subcontractor (other than charges for the costs of managing subcontracts and applicable indirect costs and profit based on such costs).

No or negligible value means 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).

Subcontract means any contract, as defined in section 2.101 of the Federal Acquisition Regulation, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for the Contractor or another subcontractor.

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer shall determine if excessive pass-through charges exist.

(c) *Required reporting of performance of work by the Contractor or a subcontractor.* The Contractor shall notify the Contracting Officer in writing if—

(1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or

(2) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges.* If the Contracting Officer determines that excessive pass-through charges exist—

(1) For fixed-price contracts, the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price; and

(2) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in Subpart 31.2 of the Federal Acquisition Regulation (FAR) and Subpart 231.2 of the Defense FAR Supplement.

(e) *Access to records.* (1) The Contracting Officer, 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.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Flowdown.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts under this contract, except for—

(1) Firm-fixed-price subcontracts awarded on the basis of adequate price competition;

(2) Fixed-price subcontracts with economic price adjustment, awarded on the basis of adequate price competition;

(3) Firm-fixed-price subcontracts for the acquisition of a commercial item; or

(4) Fixed-price subcontracts with economic price adjustment, for the acquisition of a commercial item.

(End of clause)

Alternate I (MAY 2008). As prescribed in 215.408(4)(ii), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

[FR Doc. E8–10666 Filed 5–12–08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XH84

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch for Vessels in the Bering Sea and Aleutian Islands Trawl Limited Access Fishery in the Central Aleutian District of the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch for vessels participating in the Bering Sea and Aleutian Islands (BSAI) trawl limited access fishery in the Central Aleutian District of the BSAI. This action is necessary to prevent exceeding the 2008 Pacific ocean perch total allowable catch (TAC) specified for vessels participating in the BSAI trawl limited access fishery in the Central Aleutian District of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), May 8, 2008, through 1200 hrs, A.l.t., September 1, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 Pacific ocean perch TAC allocated as a directed fishing allowance to vessels participating in the BSAI trawl limited access fishery in the Central Aleutian District of the BSAI is