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DEPARTMENT OF AGRICULTURE

48 CFR Parts 436 and 452

RIN: 0599-AA21

Agriculture Acquisition Regulation, Fire Suppression and Liability

AGENCY: Office of Procurement and Property Management, U.S. Department of Agriculture

ACTION: Final rule.

SUMMARY: The Office of Procurement and Property Management (OPPM) of the U.S. Department of Agriculture (USDA) amends the Agriculture Acquisition Regulation (AGAR) by adding a new clause entitled “Fire Suppression and Liability.”

Section 8205 of the Agricultural Act of 2014 (2014 Act) provided the USDA Forest Service with permanent authority for Stewardship End Result Contracting by adding a new Section 604 to the Healthy Forests Restoration Act of 2003. Section 8205 contains a requirement that the agency use a fire liability provision in all stewardship contracts and agreements that is in substantially the same form as the fire liability provisions contained in the integrated resource timber contract in Forest Service Contract Numbered 2400-13, Part H, Section H.4. This final rule establishes a new clause in the AGAR, the USDA supplement to the Federal Acquisition Regulation (FAR), for use in Integrated Resource Service Contracts (IRSC) subject to the FAR. This new AGAR clause addresses fire liability on stewardship contracts as required in the 2014 Agricultural Act.

DATES: Effective [insert 30 days after publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Ismaela Ramirez, Senior Procurement Analyst, USDA, Office of Procurement and Property Management at (202) 730-7997.

SUPPLEMENTARY INFORMATION:

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I. Authority

The enactment of Section 8205 of the Agricultural Act of 2014 (Pub. L. 113-79) establishes permanent authority to conduct Stewardship End Result Contracting projects by adding a new Section 604 to the Healthy Forests Restoration Act of 2003 (HFRA) (16 U.S.C. 6591c). Section 8205 of the 2014 Agricultural Act contains a requirement that the agency use a fire liability provision in all stewardship contracts and agreements that is in substantially the same form as the fire liability provisions contained in the integrated resource timber contract in Forest Service Contract Numbered 2400-13, Part H, Section H.4 and timber sale contracts conducted pursuant to Section 14 of the National Forest Management Act of 1976 (16 U.S.C. 472a).

II. Background

Beginning in 1998 with the enactment of Section 347 of the Department of the Interior and Related Agencies Appropriation Act, 1999, the Forest Service has

been authorized to carry out Stewardship End Result Contracting Projects; first on a pilot basis and then, through a succession of subsequent amendments, this authority was expanded. The enactment of Section 8205 of the Agricultural Act of 2014 sets forth the permanent authority for conducting Stewardship End Result Contracting Projects by adding a new Section 604 to the Healthy Forests Restoration Act of 2003. Section 8205 contains a provision that “not later than 90 days after the date of enactment of this section, the Chief of the Forest Service and the Director of the Bureau of Land Management shall issue for use in all contracts and agreements under this section fire liability provisions that are in substantially the same form as the fire liability provisions contained in— (A) integrated resource timber contracts, as described in the Forest Service Contract Numbered 2400–13, Part H, Section H.4; and (B) timber sale contracts conducted pursuant to Section 14 of the National Forest Management Act of 1976 (16 U.S.C. 472a).”

This final rule establishes a new AGAR clause for use in stewardship contracts subject to the FAR. This clause addresses fire liability on Stewardship End Result Contracting, as required in the 2014 Agricultural Act. The text of the clause is closely specified in the law.

III. Discussion of Comments

USDA solicited comments on the interim rule on May 22, 2014. USDA received two comments at the end of the posted comment period on June 23, 2014.

Both comments were received from the Federal Forest Resource Coalition (FFRC), a national trade association comprised of large and small companies, regional and state associations, county governments, and others concerned about the management of our National Forests and the landscape covered by Bureau of Land Management.

Both comments recommend changes to add clarity and consistency to the language in the regulations. The comments suggest that USDA follow the requirement of implementing a liability clause for IRSC contracts that mirrored Integrated Resource Timber Contracts (IRTC). The comments from FFRC are presented below, along with USDA's responses and are grouped by the Code of Federal Regulations (CFR) section numbers to which they apply.

48 CFR 436.578

Comment 1) In Section 436.578, we recommend that you delete “as applicable”. Section 8205 of the Agricultural Act of 2014 states that “... the Chief and Director shall issue for use in all [emphasis added] contracts and agreements under this section fire liability provisions ...”

48 CFR 452.236-78

Comment 2) In Section 452.236-78, we recommend that you change “may be inserted” to “shall be inserted”. Again, Section 8205 of the Agricultural Act of 2014 states that “... the Chief and Director shall issue for use in all [emphasis added] contracts and agreements under this section fire liability provisions ...”

Response: FFRC stated that the plain language in Section 8205 of the Agricultural Act of 2014 (Public Law No: 113-79) makes clear that Congress intended the fire liability provisions to be non-discretionary, both for the issuance of the provision and its use in all contracts. However, they believe that the language in the Interim Rule conveys discretion that is not found in the statute. The Forest Service agrees with both comments and will amend the CFR to read as follows: “the Chief shall issue for use in all contracts and agreements under this section fire liability provisions that are in substantially the same form (16 U.S.C. 472a) for all IRSC solicitations issued after May 22, 2014. Contracts and agreements in effect on May 22, 2014, are not eligible to insert this provision.” The Forest Service believes the aforementioned statement in response to the two comments reflects the intention of the Farm Bill with regards to implementing a fire liability clause for Integrated Resources Services Contracts that mirrors current Timber Sales Contracts. This creates the same fire liability for all Forest Service stewardship contract types.

IV. Summary of the Comments

As a result of public comments received on the interim rule, USDA will amend the CFR to add clarity and consistency that reflects the intention of the Farm Bill with regard to implementing a fire liability clause for IRSCs that mirrors current Timber Sales Contracts.

V. Regulatory Information

Regulatory Flexibility Act

USDA certifies that this final rule will not have a significant impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* There is no additional submission required as a result of this action. The rule will not have a significant impact on the small business community or on a substantial number of small businesses.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the final rule does not impose any record keeping or information collection requirements that require approval by the Office of Management and Budget.

Environmental Impact

The USDA has determined that this final rule falls within this category of actions and that no extraordinary circumstances exist that would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule would not have an annual effect of \$100 million or more on the economy, nor would it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments.

This final rule would not interfere with an action taken or planned by another agency, nor raise new legal or policy issues. Finally, this final rule would not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this final rule is not subject to Office of Management and Budget (OMB) review under Executive Order (E.O.) 12866.

No Takings Implications

The USDA has analyzed this final rule in accordance with the principles and criteria contained in E.O. 12630 and determined that the rule would not pose the risk of a taking of private property.

Civil Justice Reform Act

The USDA has reviewed this final rule under E.O. 12778, Civil Justice Reform. Under this rule, (1) all State and local laws and regulations that conflict with this rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to this final rule; and (3) it would require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination with Indian Tribal Governments

The USDA has considered this final rule under the requirements of E.O. 13132 on Federalism and has determined that this rule conforms to the Federalism principles in the E.O. The rule would not impose any compliance costs on the States; and would not have any substantial direct effects on the States, the

relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Moreover, this final rule does not have tribal implications as defined by E.O. 13175, Consultation and Coordination with Indian Tribal Governments, and therefore advance consultation with tribes is not required.

Energy Effects

The USDA has reviewed this final rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or use and has determined that this rule would not constitute a significant energy action as defined in the E.O.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the USDA assessed the effects of this final rule on State, local, and tribal governments and the private sector. This rule would not compel the expenditure of \$100 million or more by State, local, and tribal governments, or by the private sector. Therefore, a statement under Section 202 of the Act is not required.

List of Subjects 48 CFR Parts 436 and 452

Government procurement.

For the reasons set forth in the preamble, the U.S. Department of Agriculture amends 48 CFR Chapter 4, in the following manner:

PART 436-CONSTRUCTION AND ARCHITECT-ENGINEER

CONTRACTS

1. The authority citation for Part 436 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 121(c)

2. Section 436.578 is revised to read as follows:

436.578 Contract clause.

Insert the clause at 452.236-78, Fire Suppression and Liability in solicitations and contracts for Integrated Resource Service Contracts (IRSC) awarded for the Forest Service.

PART 452-SOLICITATION PROVISION AND CONTRACT CLAUSES

3. The authority citation for Part 452 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 121(c)

4. Section 452.236-78 is revised to read as follows:

452.236 -78 Fire Suppression and Liability.

As prescribed in section 436.578, the following clause shall be inserted in Intergrated Resource Service Contracts (IRSC) awarded for the Forest Service.

Fire Suppression and Liability Clause

- (a) Contractor's Responsibility for Fire Fighting. The Contractor, under the provisions of FAR clause at 52.236-9, Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements, shall immediately extinguish all fires on the work site other than those fires in use as a part of the work. The Contractor may be held liable for all damages and for all

costs incurred by the Government for labor, subsistence, equipment, supplies, and transportation deemed necessary to control or suppress a fire set or caused by the Contractor or the Contractor's agents or employees subject to the following fire classifications listed in subsection (b).

(b) Fire Suppression Costs. The Contractor's obligations for cost of fire suppression vary according to three classifications of fires as follows:

(1) Operations Fire. An "operations fire" is a fire caused by the Contractor's operations other than a negligent fire. The Contractor agrees to reimburse Forest Service for such cost for each operations fire, subject to a maximum dollar amount of [Contracting Officer insert amount]. The cost of the Contractor's actions, supplies, and equipment on any such fire, or otherwise provided at the request of Forest Service, shall be credited toward such maximum. If the Contractor's actual cost exceeds contractor's obligation stated above, Forest Service shall reimburse the contractor for the excess.

(2) Negligent Fire. A "negligent fire" is a fire caused by the negligence or fault of the Contractor's operations including, but not limited to, one caused by smoking by persons engaged in the Contractor's operations during the course of their employment, or during rest or lunch periods; or if the Contractor's failure to comply with requirements under this contract results in a fire starting, or permits a fire to spread. Damages and the cost of suppressing negligent fires shall be borne by the Contractor.

- (3) Other Fires on Contract Area. Forest Service shall pay the Contractor, at firefighting rates common in the area or at prior agreed rates, for equipment or personnel furnished by the Contractor at the request of Forest Service, on any fire on contract area other than an operations fire or a negligent fire.
- (c) Contractor's Responsibility for Notification in Case of Fire. The Contractor shall immediately notify the Government of any fires sighted on or in the vicinity of the work site.
- (d) Contractor's Responsibility for Responding to Emergencies. When directed by the Contracting Officer, the Contractor shall temporarily redirect employees and equipment from the work site for emergency work (anticipated to be restricted to firefighting). This is considered to be within the general scope of the contract. An equitable adjustment for any such redirection of employees and equipment will be made under the FAR clause at 52.243-4, Changes.
- (e) Performance by the Contractor. Where the Contractor's employees, agents, contractors, subcontractors, or their employees or agents perform the Contractor's operations in connection with fire responsibilities, the Contractor's obligations shall be the same as if performance was by Contractor.
- (f) State Law. The Contractor shall not be relieved by the terms of this contract of any liability to the United States for fire suppression costs recovered in an action based on State law, except for such costs resulting from operations fires. Amounts due to the Contractor for firefighting

expenditures on operations fires shall not be withheld pending settlement
of any such claim or action based on State law.

(End of Clause)

Gregory L. Parham
U.S. Department of Agriculture
Assistant Secretary
for

Date: February 4, 2016.

Administration

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