

G. DoDIG Access

Public Comment: Delete 3.7(f)(2) that states if Agreements Officer gets access, DoDIG also gets access. This is not supported by statute. The only audit access in section 804 of Public Law 106–398 is for GAO, not DoDIG (written public comment—two commenters).

DoD Response: While section 804 of Public Law 106–398 does not provide for DoDIG access, such access is provided for in the Inspector General Act (Public Law 95–452). Public Law 95–452 provides that the Inspector General shall have access to the same records as the agency (DoD) and its employees (e.g., the Agreements Officer). Thus, in accordance with this statute, if an agreement gives the Agreements Officer or another DoD component official access to a business unit's records, the DoDIG is granted the same access to those records.

H. Audit Performance

1. *Public Comment:* Delete the word “normally” from “Audits normally will be performed only when Agreements Officer determines it is necessary to verify the awardee's compliance with the terms of the agreement” (written public comment—one commenter).

DoD Response: The final rule deletes the word “normally.” The final rule states that “Audits will be performed when the Agreements Officer determines it is necessary to verify statutory cost share or to verify amounts generated from financial or cost records that will be used as the basis for payment or adjustment of payment.”

2. *Public Comment:* Consider adding a “problem statement” describing what the policy is intending to correct (public meeting).

DoD Response: DoD does not believe it adds value to include a “problem statement” in the final rule. However, in response to the public comment, DoD notes that in developing the proposed and final rule, DoD has considered the “problem” to be the extent of access to records required by the government on cost-type agreements. The goal is to achieve an appropriate balance between the need to access new technologies and the level of access required to assure compliance with the terms of the agreement.

3. *Public Comment:* Consider permitting reviews of records at the awardee facility only, i.e., the government would be precluded from removing records from the contractor's facility (public meeting).

DoD Response: DoD does not believe it is necessary to limit access to records at the awardee facility. However, DoD

recognizes the concern expressed at the public meeting. For traditional contractors, the final rule does not provide any more access than the government currently has under procurement contracts with those contractors. For nontraditional Defense contractors, the rule provides for the use of an IPA if the nontraditional Defense contractor refuses to grant access to the government. In those instances, the government has no direct access to the nontraditional Defense contractors' books and records, and can only make copies of the IPA's work papers if there is evidence the audit was not performed in accordance with GAGAS.

I. Flowdown to Subawardees/ Subagreements

1. *Public Comment:* Revise flow down requirements because they appear to be nonnegotiable (written public comment—one commenter).

DoD Response: The final rule provides for flexibility in negotiating flow down requirements for subagreements that are less than \$5 million. For cost-type subagreements that are in excess of \$5 million, a deviation from the flow down requirements is permitted when supported by the particular facts and circumstances. Note, that Single Audit Act requirements apply to subawardees/ subagreements where appropriate.

2. *Public Comment:* The threshold of \$300,000 for flow down to key participants is unusually low. Recommend using the \$500,000 in legislation for traditional contractors or the \$5 million used for GAO access (written public comments—two commenters).

DoD Response: DoD agrees that the \$300,000 threshold in the proposed rule was too low. The final rule establishes a subagreement threshold of \$5 million.

3. *Public Comment:* Delete the mandatory clauses for subagreements and instead make the awardee responsible for providing sufficient support for subawardee costs (public meeting).

DoD Response: The final rule deletes the requirement to apply the policy for subagreements that are less than \$5 million. For cost-type subagreements that are in excess of \$5 million, deviation from application of the policy is permitted when supported by the particular facts and circumstances.

4. *Public Comment:* The flow down requirements will discourage technology rich subcontractors from participating in other transactions (written public comment—one commenter).

DoD Response: DoD has strived to balance the potential discouragement of technology rich subcontractors from the need to assure compliance with the terms of the agreement. DoD believes this balance has been achieved in the final rule because (a) application of the policy is not required for subagreements that are \$5 million or less, and (b) deviation from the policy is permitted for subagreements that are in excess of \$5 million if warranted by the particular facts and circumstances.

J. Sample Audit Clauses

1. *Public Comment:* Sample audit clauses should revise “awardee” to “business unit of the awardee”, and “awardee's records” to “directly pertinent records of those business units of the awardee performing the work under the OT agreement” (written public comment—one commenter).

DoD Response: DoD has deleted the sample clauses from the final rule because they add unnecessary complexity and could serve to reduce the flexibility of the Agreements Officer by becoming quasi-standard and/or quasi-required clauses. Sample clauses maintained at <http://www.osd.mil/dp> (under the “Other Transactions” Special Interest Item in “Questions and Answers”) that are intended to serve as a guide do clarify access is to the specified business unit.

2. *Public Comment:* Consider adding language to the audit access clause that states when it applies (public meeting).

DoD Response: The final rule does provide specific language as to when a DoD access to records clause is applicable.

K. Traditional vs. Non-Traditional Contractor

1. *Public Comment:* Distinguish between nontraditional and traditional contractors based on the agreement value using TINA threshold of \$550,000, or based on the CAS threshold for full (\$50 million) or modified (\$7.5 million) coverage (public meeting).

DoD Response: The final rule distinguishes between traditional and nontraditional Defense contractors for purposes of determining the level of approval for (a) the use of an IPA and (b) deviating from application of the policy. DoD believes that, when used for these purposes, the statutory definitions are adequate. In addition, the use of definitions that are consistent with those in statute reduces complexity, thereby simplifying implementation of the rule.

2. *Public Comment:* Consider whether using the cost principles as a criteria for use of an Independent Public