

year of the contract and cover termination or cancellation costs. Section 210 also authorizes award of up to 10 contracts (*i.e.*, 5 for DOD, NASA, and the Coast guard, and 5 for other agencies) during fiscal years 2003, 2004, and 2005 when funds are not made specifically available for the full costs of cancellation or termination of the contract—provided that the amount of unfunded contingent liability associated with cancellation and termination does not exceed the lesser of (a) 25 percent of the estimated costs of a cancellation or termination or (b) \$5 million. In signing the E-Government Act into law, the President stated that the executive branch shall “limit authorized waivers for funding of potential termination costs to appropriate circumstances, so as to minimize the financial risk to the government” and ensure SIS contracts are operated according to sound fiscal policy.

This past winter, the General Accounting Office (GAO) released a report examining non-federal entities’ experience with SIS contracts. See *CONTRACT MANAGEMENT: Commercial Use of Share-in-Savings Contracting*, GAO–03–327 (January 2003). The GAO found that SIS contracting can be highly effective in motivating contractors to generate savings and revenues for their clients. At the same time, the GAO cautioned that contracting parties must be “specific and in agreement in their goals and objectives as well as how to achieve them.” The GAO identified several specific elements that are necessary for Share-in-Savings contracts to be successful, namely: (1) A clearly specified expected outcome, (2) defined incentives, (3) a baseline and good performance measures to gauge exactly what savings or revenues are being achieved, and (4) the commitment of senior level management. The GAO emphasized that effective planning is critical: “[Parties] need to carefully consider the potential risks and rewards of an SIS arrangement and whether the conditions that facilitate success are present—something that may not be easily achievable in Government, which is frequently unable to calculate a baseline.”

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Solicitation of Public Comment

The Councils, along with the Office of Management and Budget (OMB), wish to

ensure the necessary guidance is in place—in the FAR and other documents as appropriate—for agencies to effectively motivate contractors and successfully capture the benefits of an SIS contract. Given the Government’s limited experience with this tool and the GAO’s cautions, the Councils are soliciting public comment for consideration in drafting implementing FAR regulations. Comments received may also be shared with Federal agencies for related guidance (regulatory or nonregulatory) that they may wish to issue to address SIS contracting. Respondents are welcome to share any insights that may assist in managing the use of SIS contracts, but are especially encouraged to comment on the following issues:

- *Proposal preparation.* What type of information or guidance will vendors need in the solicitation to adequately prepare a proposal for an SIS contract?
- *Share ratios.* What criteria should be taken into account in developing an appropriate share ratio and schedule for payment? Should ROIs be market-based? In light of the generally short life cycle of IT, can the Government’s interests be adequately protected if it does not share in savings each year?
- *Baselines.* What general factors or criteria should be considered in determining a quantifiable baseline?
- *Cancellation and termination costs.* How, if at all, should the determination of cancellation and termination costs differ from that used in connection with multi-year contracts (see FAR 17.106–1(c))?
- *Ownership rights.* Should ownership rights of hardware or property acquired under the SIS contract be addressed in the FAR (*e.g.*, in the coverage on cancellation costs or in a standard contract clause)?
- *Applicability of requirements.* What contract valuation method should be used to determine the applicability of various FAR requirements that are triggered by the dollar amount of the acquisitions?
- *Contract structure.* Should there be a preference for structuring SIS contracts as firm-fixed price or fixed-price with economic price adjustment? Under what, if any, circumstances would other contract types be appropriate?
- *Use of FAR 37.6.* Which, if any, of the policies pertaining to performance-based contracting in FAR Subpart 37.6 should not be applicable to an SIS contract, and why?
- *Potential projects.* What types of activities in the IT arena might be especially conducive to SIS contracting?

## C. Regulatory Amendments Under Consideration.

The Councils are currently planning to amend FAR part 39 to establish a new subpart on SIS contracting for IT. FAR subpart 16.4, addressing incentive contracts, would also be amended to add a cross-reference both to the new subpart 39.3 as well as FAR 23.204, which provides guidance on energy-savings performance contracts, a type of Share-in-Savings contract authorized by the National Energy Conservation Policy Act, 42 U.S.C. 8287.

Although the Councils have not yet agreed upon FAR amendments, their preliminary thinking on regulatory implementation as of the publication of this notice is set forth below. The public is welcome to comment on these preliminary changes as part of their comments in response to this notice.

### List of Subjects in 48 CFR Parts 16 and 39

Government procurement.

**Laura Auletta,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 16 and 39 as set forth below:

1. The authority citation for 48 CFR parts 16 and 39 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 16—TYPES OF CONTRACTS

### 16.401 [Amended]

2. Amend section 16.401 by adding paragraph (e) to read as follows:

#### 16.401 General.

\* \* \* \* \*

(e) For related incentive concepts, refer to Subpart 39.3, Share-in-Savings Contracting, and 23.204, Energy-savings performance contracts.

## PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

### Subpart 39.3 [Added]

3. Add subpart 39.3 consisting of sections 39.300 through 39.309, to read as follows:

#### Subpart 39.3—Share-in-Savings Contracting

##### 39.300 Scope of subpart.

This subpart implements section 210 of the E-Government Act of 2002 (Public Law 107–347) by prescribing policies and procedures for Share-in-Savings contracts for information technology.