



Federal Register

**Thursday,
July 24, 2003**

Part IV

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

**48 CFR Chapter I, et al.
Federal Acquisition Circular 2001-15;
Final Rules**

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 2001–15; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rules and technical amendments and corrections.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–15. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.arnet.gov/far>.

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–15 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.arnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Elimination of Standard Form 129, Solicitation Mailing List Application	2001–032	De Stefano.
II	Energy-Efficient Standby Power Devices	2001–028	Smith.
III	Electronic Listing of Acquisition Vehicles Available For Use By More Than One Agency	2001–030	Zaffos.
IV	Compensation Cost Principle	2001–008	Loeb.
V	Leadership in Environmental Management (E.O. 13148)	2000–005	Goral.
VI	Selling Cost Principle	2001–024	Loeb.
VII	Section 508 Micropurchase Exception Sunset Provision	2002–012	Nelson.
VIII	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–15 amends the FAR as specified below:

Item I—Elimination of Standard Form 129, Solicitation Mailing List Application (FAR Case 2001–032)

This final rule removes the requirement for contracting offices to establish and maintain manual solicitation mailing lists and the need to use the Standard Form (SF) 129, Solicitation Mailing List Application. The purpose of the rule is to broaden use and reliance on e-business applications. It is expected that this rule will eliminate, in part, the need for contracting offices to maintain paper-based sources of contractor information.

Item II—Energy-Efficient Standby Power Devices (FAR Case 2001–028)

This final rule implements Executive Order 13221, of July 31, 2001, Energy-Efficient Standby Power Devices, by providing guidance on energy-efficient standby power devices. The rule also clarifies requirements for the purchase of recovered material. The requirements of this rule apply to contracting officers that purchase products that use external standby power devices or that contain an internal standby power function, and products that are composed of recovered

material. Government contracting and technical personnel will need to ensure that proposed acquisitions comply with the Government preference for energy-efficient products.

Item III—Electronic Listing of Acquisition Vehicles Available for use by More Than One Agency (FAR Case 2001–030)

This final rule provides the regulatory underpinning for the operation and use of an online directory to facilitate greater awareness of contracts available for multiple agency use. The rule—

1. Adds a new Subpart 5.6, Publicizing Multi-Agency Use Contracts, that—
 - (a) Provides the Internet address to access the database;
 - (b) Requires agencies to enter information into the database within ten days of award of a Governmentwide acquisition contract (GWAC), multi-agency contract, Federal Supply Schedule contract, or other procurement instrument intended for use by multiple agencies including blanket purchase agreements under Federal Supply Schedule contracts; and
 - (c) Requires contracting activities to enter information into the database by October 31, 2003, on all existing contracts and other procurement instruments intended for use by multiple agencies, except for those expiring on or before June 1, 2004.
2. Adds language at FAR 7.105(b)(1) to consider the sources contained in the

database as prospective sources of supplies and services.

3. Adds language at FAR 10.002(b)(2)(iv) to encourage querying the database during market research for information relevant to agency acquisitions.

Item IV—Compensation Cost Principle (FAR Case 2001–008)

This final rule amends the FAR to revise the “compensation for personal services” cost principle by removing unnecessary and duplicative language and restructuring it. This rule is of particular interest to contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, e.g., price revision of fixed-price incentive contracts, terminated contracts, indirect cost rates.

Item V—Leadership in Environmental Management (E.O. 13148) (FAR Case 2000–005)

This final rule provides policies and procedures for obtaining contractor information so that agencies can implement environmental management systems and complete facility compliance audits. The rule implements Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management. The requirements of this rule apply to facilities owned or operated by Federal agencies, except

those facilities located outside the United States and its outlying areas.

Item VI—Selling Cost Principle (FAR Case 2001–024)

This final rule amends the FAR to revise the “selling costs” cost principle by restructuring the paragraphs and removing unnecessary and duplicative language to increase clarity. The rule does not change the allowability of selling costs. The case was initiated at the request of the Aerospace Industries Association (AIA). This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, e.g., price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

Item VII—Section 508 Micropurchase Exception Sunset Provision (FAR Case 2002–012)

The interim rule published in the **Federal Register** at 67 FR 80321, December 31, 2002, is converted to a final rule, without change, to extend the Electronic and Information Technology (Section 508) micropurchase exception to October 1, 2004.

Item VIII—Technical Amendments

These amendments update references and make editorial changes at FAR 19.1005 and 52.212–1.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–15 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC2001–15 are effective August 25, 2003, except for Items III, VII, and VIII which are effective July 24, 2003.

Dated: July 14, 2003.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: July 14, 2003.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: July 7, 2003.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 03–18532 Filed 7–23–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 5, 14, 19, 22, 36, 52, and 53

[FAC 2001–15; FAR Case 2001–032; Item I]

RIN 9000–AJ50

Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to remove the requirement for contracting offices to establish and maintain manual solicitation mailing lists and the need to use the Standard Form (SF) 129, Solicitation Mailing List Application.

DATES: Effective Date: August 25, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501–1758. Please cite FAC 2001–15, FAR case 2001–032.

SUPPLEMENTARY INFORMATION:

A. Background

In order to broaden use and reliance on e-business applications, the Councils have been working with the Office of Federal Procurement Policy to eliminate the need to maintain paper-based sources of contractor information. As part of this effort, the Councils have agreed to eliminate the SF 129, Solicitation Mailing List Application.

The SF 129 was created to enable contracting activities to obtain information from sources to develop a solicitation mailing list. At the time the

form was developed, manual processes were the only means available to assure access to adequate sources of supplies and services. Today, by sharp contrast, there are multiple tools available to agencies that can provide the functionality of the SF 129, but in a more efficient and effective manner. With the Administration’s encouragement, agencies are taking advantage of these tools. For example, an increasing number of agencies are requiring potential contractors to register in the Central Contractor Registration (CCR) System, a centrally located, searchable database, accessible via the Internet, as their tool of choice for developing, maintaining, and providing sources for future procurements. The CCR database enables prospective contractors to update their information in one place via a Web site. Contracting officers are now able to access, via the Internet, contractor data and industry information less expensively, and more efficiently identify sources for contracting opportunities. FAR changes are pending that will require use of CCR as the single validated source of data on contractors doing business with the Government (<http://www.ccr.gov>). Furthermore, agencies are continually working to develop new electronic means of matching interested businesses with Government contracting offices on “FedBizOpps,” <http://www.FedBizOpps.gov>, the designated single Governmentwide point of entry for public access to notices of procurement actions over \$25,000. FedBizOpp, through its interested vendors list, has the capability to generate a list of vendors who are interested in a specific solicitation for purposes of teaming opportunities, subcontracting opportunities, and other business relationships. In light of these electronic initiatives, we have eliminated the manual collection of contractor data using the SF 129.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 67762, November 6, 2002. Three sources submitted comments in response to the proposed rule. All respondents agreed with the rule as published. One respondent pointed out a typographical error at 52.214–10. That error has been corrected. Additionally, the proposed rule inadvertently omitted the phrase “except for construction,” at 14.201–6(e), the prescription for the use of the provision at 52.214–10, Contract Award–Sealed Bidding. That language has been corrected in this final rule.

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. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 the rule substitutes efficient electronic databases for solicitation mailing lists and the SF 129, Solicitation Mailing List Application. Continued reliance on the SF 129 would unnecessarily promote inefficiency associated with paper-based processes. The successful phase-out of the paper-based Commerce Business Daily in favor of reliance on FedBizOpps demonstrates that the Federal contracting community, including small businesses, is successfully transitioning to greater use of electronic tools and their associated efficiencies to conduct business.

C. Paperwork Reduction Act

The Paperwork Reduction Act no longer applies because the final rule eliminates reporting and recordkeeping requirements currently approved under OMB Control Number 9000-0002. This rule will reduce the current OMB inventory by 464,000 hours.

List of Subjects in 48 CFR Parts 1, 5, 14, 19, 22, 36, 52, and 53

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 5, 14, 19, 22, 36, 52, and 53 as set forth below:

1. The authority citation for 48 CFR parts 1, 5, 14, 19, 22, 36, 52, and 53 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106 in the table following the introductory paragraph by removing from FAR segment 14.205 its corresponding OMB Control Number "9000-0002" and adding "9000-0037" in its place; and by removing the FAR segments "14.205-4(c)" and "SF 129" and their corresponding OMB Control

Numbers "9000-0037" and "9000-0002", respectively.

PART 5—PUBLICIZING CONTRACT ACTIONS

3. Amend section 5.205 by revising the fourth sentence of paragraph (a) to read as follows:

5.205 Special situations.

(a) * * * Contracting officers must consider potential sources which respond to advance notices for a subsequent solicitation. * * *

5.403 [Amended]

4. Amend section 5.403 in paragraph (a) by removing "(a) Individual requests."; and by removing paragraph (b).

PART 14—SEALED BIDDING

14.103-1 [Amended]

5. Amend section 14.103-1 by removing paragraph (b) and redesignating paragraphs "(c)" and "(d)" as "(b)" and "(c)", respectively.

6. Amend section 14.201-6 by revising paragraph (e) to read as follows:

14.201-6 Solicitation provisions.

(e) Insert in all invitations for bids, except those for construction, the provision at 52.214-10, Contract Award-Sealed Bidding.

7. Amend section 14.203-1 by revising the first sentence to read as follows:

14.203-1 Transmittal to prospective bidders.

Invitations for bids or presolicitation notices must be provided in accordance with 5.102. * * *

8. Revise section 14.205 and its section heading to read as follows:

14.205 Presolicitation notices.

In lieu of initially forwarding complete bid sets, the contracting officer may send presolicitation notices to concerns. The notice shall—

(a) Specify the final date for receipt of requests for a complete bid set;

(b) Briefly describe the requirement and furnish other essential information to enable concerns to determine whether they have an interest in the invitation; and

(c) Normally not include drawings, plans, and specifications. The return date of the notice must be sufficiently in advance of the mailing date of the invitation for bids to permit an accurate estimate of the number of bid sets

required. Bid sets shall be sent to concerns that request them in response to the notice.

14.205-1 through 14.205-5 [Removed]

9. Remove sections 14.205-1 through 14.205-5.

14.211 [Amended]

10. Amend section 14.211 in the first sentence of paragraph (a) by removing "14.205-4(c)" and adding "14.205" in its place.

11. Amend section 14.503-1 by revising the introductory text of paragraph (a) to read as follows:

14.503-1 Step one.

(a) Requests for technical proposals shall be synopsized in accordance with Part 5. The request must include, as a minimum, the following:

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

19.202-2 [Amended]

12. Amend section 19.202-2 by removing paragraph (a) and redesignating paragraphs "(b)" and "(c)" as "(a)" and "(b)", respectively.

19.202-4 [Amended]

13. Amend section 19.202-4 by removing paragraph (c) and redesignating paragraph (d) as (c).

19.402 [Amended]

14. Amend section 19.402 in paragraph (c)(3) by removing the words "on solicitation mailing lists or".

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

15. Amend section 22.1009-2 by revising paragraph (b) to read as follows:

22.1009-2 Attempt to identify possible places of performance.

* * * * *

(b) Databases available via the Internet for lists of prospective offerors and contractors.

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.213-3 [Amended]

16. Amend section 36.213-3 in the parenthetical in paragraph (d) by removing "14.205 and".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**52.214–9 [Removed and Reserved]**

- 17. Remove and reserve section 52.214–9.

52.214–10 [Amended]

- 18. Amend section 52.214–10 in the prescription by removing “14.201–6(e)(2)” and adding “14.201–6(e)” in its place.

PART 53—FORMS**53.214 [Amended]**

- 19. Amend section 53.214 by removing and reserving paragraph (e).

53.301–129 [Removed]

- 20. Remove section 53.301–129.

[FR Doc. 03–18533 Filed 7–23–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 2, 11, and 23**

[FAC 2001–15; FAR Case 2001–028; Item II]

RIN 9000–AJ47

Federal Acquisition Regulation; Energy-Efficient Standby Power Devices

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13221 of July 31, 2001, Energy-Efficient Standby Power Devices, and to clarify requirements for the purchase of recovered material.

DATES: *Effective Date:* August 25, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Laura Smith, at (202) 501–1224. Please cite FAC 2001–15, FAR case 2001–028.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils have agreed to amend the FAR to—

1. Implement E.O. 13221, by providing guidance on energy-efficient standby power devices; and

2. Clarify requirements for the purchase of recovered material.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 64010, October 16, 2002. Four respondents submitted public comments. A discussion of the comments is provided below. The Councils concluded that the proposed rule should be converted to a final rule, with only minor editorial changes made to the proposed rule (*see* Response” to comment number 3).

1. *Comment:* The respondent supported the proposed revisions to the FAR, as “they provide the needed clarity in both these areas and will enhance contracting officers’ ability to effectively purchase green products.”

Councils’ Response: No change.

2. *Comment:* The proposed FAR 23.203(a)(1)(ii) authorizes the purchase of products that meet a Department of Energy Federal Energy Management Program (FEMP) standby power wattage recommendation. However, the FEMP recommended standby power wattage for about half of the product categories is higher than the one watt limit mandated by the E.O., even though the listing of products for the categories identify numerous products that consume one watt or less in their standby mode.

Councils’ Response: Nonconcur. In accordance with Section 1. of E.O. 13221, adherence to the one watt requirement is mandated only “when life-cycle cost-effective and practicable and where the relevant product’s utility and performance are not compromised as a result.” Pursuant to this direction, FEMP does not recommend restricting procurement within a product category to items that use only one watt or less of electricity when such a restriction would not permit adequate competition among producers.

3. *Comment:* The definition of energy-efficient standby power devices that was added in FAR 2.101 could apply to all products that use power (*e.g.*, a flashlight), rather than “commercially available, off-the-shelf products that use external standby power devices, or that contain an internal standby power function” per Section 1. of the E.O. The respondent recommended revising paragraph 1 of the definition to read: “(1) Use external standby power devices, or that contain an internal standby power function.”

Councils’ Response: Concur. The Councils have revised the definition of energy-efficient standby power devices at FAR 2.101 accordingly.

4. *Comment:* The proposed rule would amend FAR 11.002, Policy, by adding to paragraphs (d)(1) and (2) a reference to E.O. 13221 and text regarding products containing energy-efficient standby power devices. The amendment, as proposed, could be interpreted as giving preference to products that consume one watt or less while in standby mode over products that consume zero watts when switched off. This, of course, would run contrary to the intent of the E.O. Moreover, many office products rarely enter into a standby power mode and, hence, greater energy can be conserved via a power management function, a feature typical on Energy Star-qualified products.

Councils’ Response: Nonconcur. The policy statement does not express a preference for products with energy-efficient standby power devices over products which do not contain a standby power function. Rather, the policy statement indicates that if the Government requires a product that consumes power in a standby mode, the standby power device should be energy-efficient. Whether a product contains a standby power device will, in most instances, be determined by agency needs and related functions required of the product. For product categories covered by Energy Star, FEMP only considers a product for its standby power device list if it also meets the Energy Star criteria which includes power management functions.

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. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 this rule simply provides additional guidance to Government contracting and technical personnel with respect to the Government’s preference, set forth in FAR Subpart 23.2, for buying energy-efficient products and services. This rule requires a contracting officer, when acquiring a product that uses an external standby power device or that

contains an internal standby power function, to purchase an energy-efficient product (when commercially available, life-cycle cost-effective, and practicable), i.e., a product that uses no more than one watt in its standby power consuming mode. With respect to the change to the recovered material text, this rule only clarifies the condition for when the contracting office shall prepare a written justification.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 2, 11, and 23

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 11, and 23 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 11, and 23 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101, by adding in alphabetical order, the definition, “Energy-efficient standby power devices” to read as follows:

2.101 Definitions.

* * * * *

Energy-efficient standby power devices means products that use—

(1) External standby power devices, or that contain an internal standby power function; and

(2) No more than one watt of electricity in their standby power consuming mode or meet recommended low standby levels as designated by the Department of Energy Federal Energy Management Program.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 3. Amend section 11.002 by revising paragraph (d)(1) and the introductory text of (d)(2) to read as follows:

11.002 Policy.

* * * * *

(d)(1) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, et seq.), Executive Order 13101 of September 14, 1998, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition, Executive Order 13123 of June 3, 1999, Greening the Government through Efficient Energy Management, and Executive Order 13221 of July 31, 2001, Energy-Efficient Standby Power Devices, establish requirements for acquiring—

(i) Products containing recovered materials;

(ii) Environmentally preferable products and services;

(iii) Energy-efficient products and services;

(iv) Products and services that utilize renewable energy technologies; and

(v) Products containing energy-efficient standby power devices.

(2) Executive agencies shall consider use of recovered materials, energy- and water-efficient products and services, products containing energy-efficient standby power devices, environmentally preferable purchasing criteria developed by the EPA, and environmental objectives (see Subparts 23.2 and 23.4, and 23.703(b)) when—

* * * * *

■ 4. Amend section 11.101 in the introductory text of paragraph (b) by removing “must” and adding “shall” in its place; and by revising paragraph (b)(1) to read as follows:

11.101 Order of precedence for requirements documents.

* * * * *

(b) * * *

(1) Energy efficiency, including using products containing energy-efficient standby power devices and renewable energy technologies; and

* * * * *

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 5. Amend section 23.201 by adding paragraph (e) to read as follows:

23.201 Authorities.

* * * * *

(e) Executive Order 13221 of July 31, 2001, Energy-Efficient Standby Power Devices.

■ 6. Revise section 23.203 to read as follows:

23.203 Energy-efficient products.

(a) If life-cycle cost-effective and available—

(1) When acquiring energy-using products—

(i) Agencies shall purchase ENERGY STAR® or other energy-efficient items listed on the Department of Energy’s Federal Energy Management Program (FEMP) Product Energy Efficiency Recommendations product list; and

(ii) For products that consume power in a standby mode and are listed on FEMP’s Standby Power Devices product listing, agencies shall—

(A) Purchase items which meet FEMP’s standby power wattage recommendation or document the reason for not purchasing such items; or

(B) If FEMP has listed a product without a corresponding wattage recommendation, purchase items which use no more than one watt in their standby power consuming mode. When it is impracticable to meet the one watt requirement, agencies shall purchase items with the lowest standby wattage practicable; and

(2) When contracting for services that will include the provision of energy-using products, including contracts for design, construction, renovation, or maintenance of a public building, the specifications shall incorporate the applicable requirements in paragraph (a)(1) of this section.

(b) The requirements in paragraph (a) of this section only apply when the relevant product’s utility and performance meet the agency’s need.

(c) Information is available via the Internet about—

(1) ENERGY STAR® at <http://www.energystar.gov/>; and

(2) FEMP at <http://www.eere.energy.gov/femp/procurement>.

■ 7. Amend section 23.405 by revising the introductory text of paragraph (c) to read as follows:

23.405 Procedures.

* * * * *

(c) The contracting officer shall place in the contract file a written justification if an acquisition of EPA-designated products above the micro-purchase threshold does not meet applicable minimum recovered material content recommended by EPA guidelines. If the agency has designated an Environmental Executive, the contracting officer shall give a copy of the written justification to that official. The contracting officer shall base the justification on the inability to acquire the product—

* * * * *

■ 8. Amend section 23.406 by revising paragraph (a) to read as follows:

23.406 Solicitation provision and contract clause.

(a) Insert the provision at 52.223-4, Recovered Material Certification, in solicitations that are for, or specify the use of, EPA-designated products containing recovered materials.

* * * * *

[FR Doc. 03-18534 Filed 7-23-03; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 5, 7, and 10**

[FAC 2001-15; FAR Case 2001-030; Item III]

RIN 9000-AJ30

Federal Acquisition Regulation; Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Federal Acquisition Regulatory Council (Council) has agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require contracting activities to input information in an online contract directory for Governmentwide acquisition contracts (GWACs), multi-agency contracts, Federal Supply Schedule contracts, and other procurement instruments intended for multiple agency use, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts. The directory is located at <http://www.contractdirectory.gov>; and encourage consideration of the online contract directory during acquisition planning and market research.

The Office of Federal Procurement Policy (OFPP) seeks to improve application of acquisition basics generally and use of interagency contracts in particular. The contract directory furthers both of these objectives by providing easier access to information that will support more informed acquisition planning and market research. The contract directory also furthers the Administration's efforts to create a more efficient, effective, and citizen-centric government. See OFPP's

May 6, 2003, memorandum to the Federal Acquisition Council and Agency Senior Procurement Executives, "Roll-Out of the Inter-Agency Contract Directory" available at <http://www.acqnet.gov>.

DATES: This rule is effective July 24, 2003. This rule applies July 24, 2003 for the following procurement instruments, except for those expiring on or before June 1, 2004: GWACs, multi-agency contracts, Federal Supply Schedule contracts, and other procurement instruments intended for multiple agency use, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAC 2001-15, FAR case 2001-030.

SUPPLEMENTARY INFORMATION:**A. Background***1. The Proposed and Final Rules*

The Council published a proposed rule in the **Federal Register** on February 15, 2002 (67 FR 7255). The proposed rule would add a new FAR Subpart 5.6, Publicizing Multi-Agency Use Contracts, to—

- Make contracting officers and program managers aware of an online database of information about GWACs, multi-agency contracts, Federal Supply Schedule contracts, and other procurement instruments intended for multiple agency use, including BPAs under Federal Supply Schedule contracts;

- Require contracting activities, within ten days of award of a procurement instrument intended for use by multiple agencies, to enter into the database general information about the instrument, as specified on the Web site hosting the database; and

- Require contracting activities to enter information into the database on all existing contracts and other procurement instruments intended for multiple agency use by a date to be established in the final rule.

The final rule generally adopts the proposed rule with certain changes. In particular, the final rule amends—

- FAR 7.105(b)(1) to add a requirement that contracting officers and program managers consider the sources contained in the database of interagency contracts, to be known as the "contract directory", as prospective sources of supplies and services; and

- FAR 10.002(b)(2)(iv) to encourage querying the database during market research for information relevant to agency acquisitions.

Consistent with the proposed rule, agencies will have ten days after contract award to input information on new awards. See FAR 5.601(b)(1). In addition, as set forth at FAR 5.601(b)(2), agencies will be required to enter information on existing contracts by October 31, 2003. Agencies may, but are not required to, input information on contracts that would expire on or before June 1, 2004.

While the Council intends for the contract directory to provide increased visibility regarding the opportunities agencies are creating through interagency vehicles, it also recognizes that contracts relatively close to expiration may be nearing or at ceiling limits. Accordingly, in deciding whether to input such contracts, agencies may consider the administrative burden to input such contracts in light of the likely amount of customer usage prior to expiration.

2. Data Fields

The data elements that will populate the contract directory will not be prescribed in the FAR. As noted in the preamble to the proposed rule, specific elements will be listed on the Web site that hosts the database. The address for the Web site is <http://www.contractdirectory.gov>.

After consideration of public comments (discussed below), the following data fields have been selected for use in the initial population of the contract directory. The fields fall within one of three categories: (1) General information about the procurement instrument, (2) information about placing orders, and (3) information about the servicing agency. (The numbering of the data fields below is provided for easy reference in this preamble and may differ on the contract directory Web site.) The list has been annotated to identify which fields will be searchable as well as those that will have "drop-down" boxes with more detailed information.

Description of Initial Data Fields for Contract Directory

Information about the procurement instrument.

(1) Program name and acronym (searchable).

(2) Procurement instrument number (searchable).

(3) Type of procurement instrument (searchable) with drop down box that includes GWAC, multi-agency contract, Federal Supply Schedule contract, BPA under Federal Supply Schedule contract, other.

- (4) Contractor.
- (5) Data Universal Numbering System (DUNS) Number of the contractor.
- (6) North American Industrial Classification (NAICS) code (searchable).
- (7) Principal Product or Service Code (searchable).
- (8) Brief description of supplies and services (searchable).
- (9) Applicable socio-economic information (searchable) with drop down box to identify from the following status categories those that apply to the contractor: Small Business, Emerging Small Business, Small Disadvantaged Business, 8(a), Very Small Business, Woman-Owned Business, HUBZone, Veteran-Owned Small Business, Service-Disabled Veteran-Owned Small Business, Historically Black Colleges and Universities, Minority Institution, Javits-Wagner-O'Day Participating Nonprofit Agency, Large Business, Other.
- (10) Government Web site address where contract or program information is located, if available.
- Information about placing orders.*
- (11) Agencies that may place orders (searchable).
- (12) Date through which agencies may place orders.
- (13) Statutory authority for placing orders with a drop down box to include—
- (a) Clinger-Cohen GWAC authority (40 U.S.C. 11302(e));
- (b) Economy Act (31 U.S.C. 1535), including Clinger Cohen multi-agency contract authority (40 U.S.C. 11314(a)(2));
- (c) The Federal Property and Administrative Services Act authority for the Multiple Award Schedules Program (41 U.S.C. 259(b)(3)); and
- (d) Other statutory authority not subject to the Economy Act (to be specified).
- (14) Ordering procedures, unless addressed at the Web site identified in data field (10), above.
- (15) List of administrative fees, unless addressed at the Web site identified in data field (10), above.

Information about the servicing agency.

- (16) Agency or activity that awarded the procurement instrument (searchable).
- (17) Activity point of contact/telephone number/e-mail address.

The fields described above include the following changes from the fields that were described in the preamble to the proposed rule:

- *Increased search capabilities.* More fields will be searchable. For example, agencies will be able to search the field that identifies who may place orders. This will make it easier for agencies to identify vehicles that are available for their own use. The “type of procurement instrument” field (*i.e.*, field no. 3) is also being made searchable so that agencies may view offerings available through a particular type of procurement vehicle.

To improve the visibility of the small business community, data captured in the socio-economic information field will be made searchable. This field will

be further refined so that directory users can identify products offered by a Javits-Wagner-O'Day participating nonprofit agency.

The contract directory will not allow users to search for product and service offerings by contractor. The FAR Council seeks for the directory to be used, in general, to consider a range of sources. Broader searching will help agencies get a better sense of marketplace capabilities as they consider whether their needs are best met through an interagency contract or an open market new procurement action.

- *New field.* A field will be added to identify the contractor's Data Universal Numbering System (DUNS) number. DUNS numbers serve as a common link among Government databases. For example, DUNS numbers are required for contractors that register to do business with the Government in the Central Contractor Registration (CCR) database. Although DUNS numbers function as a useful business identifier, the directory will not provide for searches by DUNS number for the same reason that searches by contractor will not be enabled.

- *Easier entry and maintenance of data.* Data entry of the socio-economic field of the directory has been modified so that population of this information for woman-owned businesses matches the formats for forms DD 350 and SF 279. To aid agencies in maintaining the currency of their data, the directory will identify the last date information on a given entry was submitted or edited. In addition, at the point where agencies may no longer place orders, as identified by the agency, the directory will move the information to an inactive file.

The contract directory project is linked to a broader e-Government initiative to create an “integrated acquisition environment” (IAE). The goal of the IAE is to facilitate the migration and leveraging of information technology investments to modernized infrastructures. Once this transformation occurs, agencies will be able to effectively integrate the many functions critical to the successful operation of the acquisition process. Among other things, this effort will help to eliminate redundant processes. As efforts progress to modernize and integrate contract-writing systems, agencies will be able to populate fields in the contract directory without re-keying of information. In the meantime, electronic data submission is an option.

Like other IAE initiatives, the contract directory will be subject to a governance structure and its operations will be

overseen by a configuration management board. Currently, a Federal interagency users group, the “E-Catalogs Group,” under the aegis of GSA in its capacity as managing partner of the IAE, meets periodically to discuss how the contract directory will operate. The group has sought to minimize burden while ensuring the site supports acquisition planning and market research efforts.

3. Public Comments

Twelve respondents submitted public comments on the proposed rule and the planned fields for the contract directory (as described in the preamble to the proposed rule). The comments primarily focused on: (1) The purpose of FAR coverage, (2) the burden associated with populating and maintaining the contract directory, (3) the functionality of the directory, and (4) impact on small business. All comments were considered in developing the final rule and first generation of data elements. A summary of the more significant comments and their disposition is provided below.

a. *Purpose of FAR coverage.* One commenter recommended that the coverage proposed for FAR Subpart 5.6 establishing the requirement to enter interagency contracts into the database be moved to FAR Part 4, where administrative matters, including contract reporting, are covered. Another commenter supported finalizing the coverage in its proposed location in FAR Part 5.

The FAR Council recognizes that other data reporting requirements, such as that for the Federal Procurement Data System (FPDS), are addressed in FAR Part 4. However, the Council believes that the primary purpose of the contract directory, *i.e.*, to advertise existing contracts available for multiple agency use, is better aligned with the policies of FAR Part 5, which focus on publicizing contract actions.

One commenter suggested that FAR Parts 7 and 10 be revised to identify the database's usefulness in acquisition planning and market research. The FAR Council agrees with this suggestion and, as described above, has amended Parts 7 and 10 to ensure contracting officers and program managers consider information in the contract directory during these important early stages of the acquisition cycle.

b. *Burden.* A number of comments focused on the potential burden the rule and associated Web site instructions would place on agencies required to input information about their interagency contracts into the contract directory. The comments focused on

overall administrative burden, the mandatory nature of individual data fields, and the time for entering data.

i. *Overall administrative burden.* Several commenters suggested that entering the data described in the preamble to the proposed rule would create an administrative strain. As an alternative, they recommended that the desired information be collected through existing data sources, such as the FPDS.

The FAR Council agrees, in concept, that the functionalities of acquisition systems need to be integrated so that duplication of effort and associated burden is minimized. As stated above, this is a key goal of the ongoing IAE effort, the main acquisition initiative towards the creation of a more efficient, effective, and citizen-centric e-Government. Unfortunately, current information systems do not collect the information needed to populate the contract directory. The FPDS, for example, does not break out activity by multiple award contract vehicle. As a result, it is not possible to easily identify the multiple contractors who make up any given multi-agency contract.

The contract directory is designed to overcome these limitations and enable agencies to gauge the number and nature of inter-agency contracts currently in effect. This functionality will help senior managers better understand their own agency's use of these vehicles. Equally important, as noted above, the contract directory will help customers during acquisition planning and market research to identify whether there may be a suitable existing Federal contract that can satisfy their needs.

For these reasons, the Council believes the insight to be gained by the directory, by both customers and servicing agencies, will be worth the effort required to make it fully operational. In addition, the Council expects that the cost of input will be offset by the interagency activity and associated administrative fees servicing agencies will collect to cover costs.

ii. *Mandatory vs. non-mandatory data fields.* One commenter sought clarification as to whether inputs for all of the data fields are mandatory. Agencies will be expected to complete each of the 17 data fields described above, except that, in providing point of contact information (data field no. 17), an agency is not required to furnish an individual point of contact and may rely just on an e-mail address and/or phone number. Also, an agency is not required to create a Web site with program information (*i.e.*, data field no. 10); it is

only required to identify the address of the Web site, if one already exists.

The contract directory, like other IAE projects, is designed to minimize redundant effort. If information is already accessible elsewhere on the Web, agencies generally will be able to simply provide a Web address where users may access that information. For example, if ordering procedures (field no. 14) and administrative fees (field no. 15) are already discussed on an agency's Web site, the contracting officer need only provide the Web site address or URL to satisfy those fields.

Recent General Accounting Office (GAO) and agency Inspectors General (IG) reports confirm that customers of task and delivery order contracts need to understand ordering procedures (*e.g.*, fair opportunity processes) and be aware of fees if they are to take effective advantage of competition and make informed decisions. It is especially important in an interagency environment that customers external to the agency be aware of any special management steps a servicing agency has taken to reinforce strategic and accountable use of its vehicle. Accordingly, if information on ordering procedures or administrative fees is not available on an existing Web site, agencies will need to provide this information on the contract directory or otherwise indicate how users may obtain it.

iii. *Time for entering data.* Two commenters raised concerns regarding the time allotted for entering data. One commenter suggested increasing the input period on new contracts from 10 to 45 days. Another commenter proposed an exemption for existing contracts with fewer than twelve months to expiration.

The Council believes that information needs to be entered as close to the time of award as possible to make the directory as current and useful as possible. Hence, the time for input on new contracts will remain at 10 days. However, as discussed above, the FAR Council recognizes that contracts relatively close to expiration may be nearing or at ceiling limits. For this reason, the rule leaves to an agency's discretion the determination as to whether to input data on contracts that will expire on or before June 1, 2004.

c. *Functionality.* Numerous comments addressed the planned functionality for the database. Commenters focused, in particular, on the descriptions to be provided for available products and services, searching by individual contractor, information on order placement, data on limited use vehicles, and information on 8(a) contracting.

i. *Descriptions of products and services.* Several commenters raised concerns that the data field calling for a brief description of supplies or services (*i.e.*, data field no. 8) will not likely collect sufficiently meaningful information for an agency to determine if use of a given contract will meet its needs. They noted that the lack of standard nomenclature may further reduce the utility of information provided.

The FAR Council agrees that information placed in the database needs to provide a general level of insight into contract offerings in order for the contract directory to have a practical utility. As a general matter, the Council expects that agencies will have an incentive to exercise quality control and offer meaningful information because the Web site offers a means for agencies to secure greater visibility for, and use of, their vehicles. To assist agencies, the site will provide guidance to address how best to fill in this, and other, data fields. In addition, some degree of standardization will be provided by asking for principal service and product codes (*i.e.*, data field no. 7). While this type of information should help agencies in performing their front-end analysis, the Council recognizes that the contract directory will not, by itself, provide information sufficient for a complete analysis. At the same time, this is not the contract directory's role. It is intended to be just one tool for market research, and agencies will need to undertake additional efforts commensurate with the size and complexity of the acquisition in order to understand marketplace capabilities.

ii. *Searching by contractor.* A number of commenters requested that the "contractor" data element (*i.e.*, field no. 4) be searchable. The FAR Council acknowledges that there may be some utility in knowing what a contractor has offered through various vehicles with different agencies. At the same time, the Council is concerned that searches by contractor may, too often, conflict with the goal of encouraging thoughtful consideration of the marketplace and capabilities of multiple sources, as agencies consider whether their needs are better met through an interagency contract or through a new procurement action on the open market. Therefore, the contract directory will not provide for searches by contractor.

Notwithstanding whether the data field is searchable, one commenter suggested that contractor names be standardized in the contract directory. The FAR Council agrees with the intent of the comment and anticipates that the contract directory's integration with

other e-acquisition initiatives in the IAE will lead to this result over time.

iii. *Order placement.* One commenter remarked that while the rule provides benefit by laying the foundation for a new market research tool, the overall effort is shortsighted because it fails to capture any information regarding order placement. The commenter states that "procurement goals of transparency and accountability are not served when information about many millions of dollars spent under such vehicles is not readily available to the public."

The FAR Council strongly supports transparency and accountability in Government procurement and anticipates that other IAE initiatives, including the transformation of the FPDS, will facilitate greater insight of the type alluded to by the commenter. However, the Councils do not believe that the benefits of the contract directory should be delayed until this functionality is available.

iv. *Searching limited use vehicles.* Two commenters recommended that the contract directory include contracts available for use only to a single agency, command or even locale. The FAR Council believes the functionality of the directory should, at least initially, focus on contracts that are designed for broad usage. Once the directory is fully functional and is providing the desired insight, the Council may, at a later date, consider expanding the database to accommodate limited use contracts.

v. *8(a) contracting.* One commenter suggested providing a greater level of detail on the actual use and administration of 8(a) contracts. The commenter recommended, for instance, that the contract directory include information on how 8(a) contracting could be accomplished (e.g., sole source), the competitive procedures to be used when the task order exceeds the sole source threshold, agency administrative responsibilities, and procedures regarding limitations on subcontracting and reporting.

As noted above, the contract directory will offer basic socio-economic information, including whether a contractor is an 8(a) small business (see field no. 9). Moreover, information on ordering procedures (provided through field no. 14) should reflect the steps customers will be expected to take in order to make a purchase, including those that may need to be taken to be in compliance with 8(a) contracting procedures. However, additional detail on the specific operation of the 8(a) program (or another socio-economic program) would go beyond the general purpose and scope of the contract directory and is more appropriately

obtained through other means (e.g., from the servicing agency, the Small Business Administration (SBA)).

d. *Impact on small business.* One commenter stated that the rule would have a significant economic impact on a substantial number of small entities. The commenter asserted that FAR 8.404, which sets forth procedures for the use of FSS contracts, has had a "withering effect" on small business awards. The commenter further states that small business set-asides should be incorporated into the FAR 8.404 procedures.

The Council believes this comment is outside of the scope of this rule. The rule focuses on improving access to information about vehicles available for interagency use. This rule does not speak to specific practices for how these vehicles are to be used. However, the Council notes that separate rulemaking efforts have been undertaken to address the consideration of small businesses in order placement under task and delivery order contracts. See 68 FR 5138, January 31, 2003, for notice of proposed FAR changes, and 68 FR 5133, January 31, 2003, for notice of proposed changes to SBA regulations. These separate efforts are intended to address concerns regarding the impact of contract bundling on small business participation for Federal procurements.

B. Executive Order 12866.

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.

C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 the establishment of an online database as a tool to collect information on acquisition vehicles intended for multiple agency use in order to facilitate its availability to the acquisition community is a matter of internal Government operating procedure. In addition, the rule is not intended to alter existing requirements addressing the use of small businesses.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the

FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 5, 7, and 10

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 7, and 10 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 7, and 10 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 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Add Subpart 5.6 to read as follows:

Subpart 5.6—Publicizing Multi-Agency Use Contracts

5.601 Governmentwide database of contracts.

(a) A Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies is available via the Internet at <http://www.contractdirectory.gov>. This searchable database is a tool that may be used to identify existing contracts and other procurement instruments that may be used to fulfill Government needs.

(b) The contracting activity shall—

(1) Enter the information specified at <http://www.contractdirectory.gov>, in accordance with the instructions on that Web site, within ten days of award of a Governmentwide acquisition contract (GWAC), multi-agency contract, Federal Supply Schedule contract, or any other procurement instrument intended for use by multiple agencies, including blanket purchase agreements (BPAs) under Federal Supply Schedule contracts.

(2) Enter the information specified at <http://www.contractdirectory.gov> in accordance with the instructions on that Web site by October 31, 2003, for all contracts and other procurement instruments intended for use by multiple agencies that were awarded before July 24, 2003.

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.105 by revising the second sentence of paragraph (b)(1) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) *Plan of action—(1) Sources.* * * * Consider required sources of supplies or services (see Part 8) and sources identifiable through databases including the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at <http://www.contractdirectory.gov>. * * *

* * * * *

PART 10—MARKET RESEARCH

■ 4. Amend section 10.002 by revising paragraph (b)(2)(iv) to read as follows:

10.002 Procedures.

* * * * *

(b) * * *

(2) * * *

(iv) Querying the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at <http://www.contractdirectory.gov> and other Government databases that provide information relevant to agency acquisitions.

* * * * *

[FR Doc. 03-18535 Filed 7-23-03; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 22, 31, 37, and 52**

[FAC 2001-15; FAR Case 2001-008; Item IV]

RIN 9000-AJ36

Federal Acquisition Regulation; Compensation Cost Principle

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the “compensation for personal services” cost principle by restructuring the paragraphs, and by removing unnecessary and duplicative language.

DATES: *Effective Date:* August 25, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Procurement Analyst, at (202) 501-0650. Please cite FAC 2001-15, FAR case 2001-008.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 67 FR 19952, April 23, 2002, with request for comments. Three respondents submitted public comments. A discussion of the comments is provided below. Differences between the proposed and the final rule are discussed in paragraphs 1, 5, 13, 15, and 19 below.

Public Comments:

1. *Comment: Designate FAR 31.205-6(c) as Reserved.* The current paragraph designations, especially paragraph (j) for pensions, have been cited in many court cases, Government contracts, and other documents over the years. All the respondents expressed concerns that the re-designation of paragraphs (d) through (p) within FAR 31.205-6 as paragraphs (c) through (o) would create confusion.

Councils’ response: Concur.

2. *Comment: Move proposed FAR 31.205-6(g)(1) (Backpay) to FAR 31.205-6(a)(1).* The respondent did not provide an explanation for this recommendation.

Councils’ response: Do not concur. The Councils believe there is merit in maintaining a separate paragraph for backpay. See paragraph 16 for further discussion.

3. *Comment: Delete proposed FAR 31.205-6(a)(2) (total compensation).* The language is duplicative of FAR 31.201-3, Reasonableness, and the focus of the cost principle should be on the reasonableness of a contractor’s total compensation plan and not on individual employees or job classes.

Councils’ response: Do not concur. The proposed paragraph makes it clear that, although compensation must conform to FAR 31.201-3, it must also conform to the more specific provisions contained in this cost principle. The Councils do not agree with the concept that the reasonableness of compensation should be based “solely” on the contractor’s total compensation plan, without consideration of the reasonableness of the compensation for individual employees or job classes of employees. See paragraph 9 for further discussion.

4. *Comment: Delete proposed FAR 31.205-6(a)(5) (unallowable cost).* The proposed language states: “Costs that are unallowable under other paragraphs of this Subpart 31.2 are not allowable under this subsection 31.205-6 solely on the basis that they constitute compensation for personal services.” In lieu of the above statement, the respondent suggested adding the following language to FAR 31.204(c): “Cost made specifically unallowable under one cost principle in this subpart are not allowable under any other cost principle.”

Councils’ response: Do not concur. Similar proposals for such a global policy statement were rejected in the past by both industry and the Government. The current language at FAR 31.204(c) was adopted instead, and the “unallowable under other paragraphs” statements in individual cost principles were retained. The Councils agree with the original drafters of the current FAR 31.205-6(a)(5) that this language is needed to avoid a situation in which activity that is specifically designated unallowable in another cost principle becomes allowable merely because it meets the criteria for allowable “compensation.”

5. *Comment: Modify proposed FAR 31.205-6(a)(6)(i) (partners and sole proprietors).* Reinstate the following portion of the current language included in FAR 31.205-6(b)(2)(i): “Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits.” This insertion would become 31.205-6(a)(6)(i)(C). “Without this reinstatement costs previously allowed could become unallowable since there are instances where these costs are not distribution of profits and the deductible amount is zero.”

Councils’ response: Partially concur. Historically, the tax deductibility limitation on allowable compensation in the cost principle is solely for closely held corporations. The Councils did not intend to change the allowability of costs in this area. However, the proposed rule inadvertently removed the qualifying phrase for “closely held corporations.” In addition, the editorial restructuring unintentionally changed the allowability of costs covered by this subsection. Accordingly, the Councils have revised FAR 31.205-6(a)(6) to clarify and rectify this situation.

6. *Comment: Remove phrase in proposed FAR 31.205-6(a)(6)(ii)(A) (distribution of profits).* Remove the unnecessary phrase “which is not an allowable cost.”

Councils' response: Do not concur. The Councils' rationale for keeping this phrase is to affirm the unallowability of profit distributions.

7. *Comment: Revise proposed FAR 31.205-6(b)(1) (labor-management agreements).* Reposition the word "negotiated" and add the word "set" to the first sentence.

Councils' response: Do not concur. The Councils do not believe it improves the readability of this paragraph.

8. *Comment: Express rationale for deletion of current FAR 31.205-6(c)(1) and (c)(2) (unusual conditions).* "To make clear the contractor still has the opportunity to justify cost and consideration of unusual conditions(.) include express reason for language deletion of original rule sections (c)(1) and (c)(2)."

Councils' response: These paragraphs (c)(1) and (c)(2) were deleted because such guidance is not necessary in the cost principle.

9. *Comment: Revise proposed FAR 31.205-6(b)(2) (total compensation).* Revise FAR 31.205-6(b)(2) to reflect the concept that reasonableness of compensation should be reviewed at the total compensation plan(s) level and not at an individual employee or job class level.

Councils' response: Do not concur. Contractors should be able to determine their own mix of wages, bonuses, and benefits to fit the needs of their business and workforce. The Councils believe that compensation should be reviewed for reasonableness in total by employee or job class of employee and that "offsets" are implied in this concept. It should be noted that the concept of "review of total compensation reasonableness" does not waive the Government's right to review individual compensation elements in order to determine total reasonableness. It is impossible to determine the reasonableness of total compensation without reviewing individual compensation elements because reliable surveys of "total compensation" do not exist.

10. *Comment: Revise proposed FAR 31.205-6(b)(2) (ACO consideration).* Eliminate ACO consideration of the listed reasonableness factors and rely only on FAR 31.201-3 for determining reasonableness since rule enforcement should not vary according to individual ACO determination of relevancy. This list could cause misapplication, e.g., have to consider all four factors in each instance. Restore original language related to proposed FAR 31.205-6(b)(2)(iv), if factors remain. New language is confusing, difficult to

understand, and may lead to negative impacts.

Councils' response: Do not concur. In determining the reasonableness of compensation costs, both the criteria in FAR 31.201-3 and the criteria in FAR 31.205-6(b) should be used. The concept of listing various factors to be considered by the ACO has been in the cost principle for many years. The relevancy determination is an important and proper ACO function. The cost principle should continue to include coverage on the factors to be used in determining reasonableness, as well as the authority of the contracting officer to determine how to weigh such factors. We believe the proposed language is very straightforward and easy to understand.

11. *Comment: Change language in proposed FAR 31.205-6(c)(2)(i) (valuation date).* Suggest adding the phrase "to the employee" at FAR 31.205-6(c)(2)(i) to make clear that the award date is the date that compensation (in the form of securities) is awarded to the employee.

Councils' response: Do not concur. The proposed rule is basically the same language as in the current FAR. We merely deleted the term "measurement date" since the definition already included in the cost principle, i.e., "first date the number of shares awarded is known," is more precise. The proper measurement date is upon the award of the stock; however, this award may be to an employee or to another entity, such as a trust. The respondent's recommended change would radically alter the current valuation methodology.

12. *Comment: Delete proposed FAR 31.205-6(6)(d) (Income tax differential pay).* Affirmative statements of allowability, such as that included in FAR 31.205-6(d)(1) for foreign differential pay, should not be included in the cost principles. In addition, the provision at FAR 31.205-6(d)(2) making domestic differential pay unallowable is not consistent with commercial practices or the allowability of foreign differential pay.

Councils' response: Do not concur. The Councils revised this paragraph to apply only to the allowability of differential pay to cover income tax increases due to foreign or domestic assignments. Normally, affirmative statements of allowability are not value-added in a cost principle. However, in this case, coverage making foreign income tax differentials explicitly allowable should remain. If there were no coverage on foreign differentials, reviewers might use FAR 31.204(c) to find the closest cost principle (domestic differentials) and improperly disallow

the costs of foreign differentials. The Councils continue to believe domestic income tax differentials should be unallowable and do not agree with the respondent's argument that the treatment of domestic differentials has to be consistent with the treatment of foreign differentials. We continue to believe that there should be an incentive for employees to accept foreign assignments.

13. *Comment: Delete proposed FAR 31.205-6(e) (Bonuses and incentive compensation).* Specific limitations on bonuses and incentives are not necessary because these situations are covered by the general reasonableness provisions of FAR 31.201-3(b)(2), generally accepted sound business practices, and the executive compensation cap at FAR 31.205-6(p). "Streamlining should have the goal of defining what is unallowable; illustration of what is allowable makes regulation excessively detailed and cannot be comprehensive." There is no need to state in the proposed FAR 31.205-6(e)(1)(ii) that the basis of the award must be supported, since adequate documentation is required for all costs. In addition, the proposed paragraph (e)(2) at FAR 31.205-6 regarding deferred bonus and incentive compensation payment is not needed.

Councils' response: Do not concur. We have deleted those parts (e.g., the listing of various types of incentive compensation) that the Councils view as unnecessary. It is important for the cost principle to continue to explicitly require that "the basis for the award is supported" in order for the cost to be allowable. This requirement for documenting the basis for the payment is separate and distinct from documenting that the payment was made. In addition, the proposed language at FAR 31.205-6(e)(2) is necessary to ensure deferred bonus payments are subject to both the incentive compensation and the deferred compensation allowability criteria.

However, this final rule is deleting the qualifying phrase "based on production, cost reduction, or efficient performance" which is current in the proposed rule at 31.205-6(e)(1). Although we generally agree that such criteria may be good standards for determining allowability, we do not believe that the current rule or proposed rule actually accomplishes this. The wording of the current cost principle or proposed rule may be read as not covering an incentive payment if it doesn't fall within one of these three criteria, although this is clearly not the intent.

14. *Comment: Delete proposed FAR 31.205-6(f) except for legislative coverage at (f)(5) (Severance pay).* The deleted portion is adequately covered by the reasonableness criteria at FAR 31.201-3.

Councils' response: Do not concur. This paragraph makes it clear that, although severance pay must conform to the general reasonableness criteria of FAR 31.201-3, it must also conform to the more specific provisions contained in this cost principle.

15. *Comment: Deletion of "designee" in FAR 31.205-6(f)(5).* To avoid confusion, suggest that the express reason for deleting the term "designee" in the waiver provision of the proposed FAR 31.205-6(f)(5) be explained.

Councils' response: The term "or designee" is unnecessary because paragraph (b) under FAR 1.108, FAR conventions, states that "each authority is delegable unless specifically stated otherwise (see 1.102-3(b))." Accordingly, the term has been deleted from the final rule at FAR 31.205-6(g)(6), FAR 37.113-1(a), and FAR 37.113-2(b). To avoid any possible ambiguity in the clauses, "head of the agency, or designee," was changed to "agency" at FAR provision 52.237-8(a) and (b).

16. *Comment: Modify proposed FAR 31.205-6(g) (Backpay).* Replace the language at FAR 31.205-6(g) with the following sentence: "Backpay resulting from violations of Federal labor laws or the Civil Rights Act of 1964 other than that for work performed is unallowable." Under the current rule, the "backpay" provisions do not apply unless and until there is a violation of Federal labor laws or the 1964 Civil Rights Act. Until such a violation is found by a court, compensation costs are not covered by these backpay provisions and they are allowable to the extent they are reasonable as defined by the general reasonableness provisions at FAR 31.201-3 and not limited by additional compensation for work performed. This proposed change could be construed to expand the definition of backpay to now cover retroactive adjustment to salaries or wages for those instances in which there has been no finding of a violation of the 1964 Civil Rights Act or other Federal labor laws and limits recovery to the additional compensation for work performed.

Contractors are currently being reimbursed for prudent decisions to save litigation expense by settling wrongful discharge cases for nominal amounts. It is in the Government's interest to continue to incentivize contractors to make prudent decisions. If the Government begins disallowing all

settlements as unallowable "backpay," contractors may be incentivized to spend more allowable money litigating instead of settling.

Councils' response: Do not concur. The Councils rewrote this paragraph to improve its clarity without changing its meaning. Our intent was to emphasize that backpay for underpaid work is the only allowable retroactive adjustment, subject to the specific criteria listed in this paragraph. The current language might be improperly interpreted to mean that if a survey shows an employee is underpaid in a particular year, the contractor could make that underpayment up in a future year. Accordingly, we revised the language of the regulation to preclude such an interpretation.

Backpay for underpaid work that does not fall under the current FAR 31.205-6(h) criteria is unallowable, and the proposed FAR 31.205-6(g) language would not change that fact. The respondent's argument that all settlements would become unallowable is not correct. That part of the settlement that represents backpay for work actually performed is allowable.

17. *Comment: Eliminate FAR 31.205-6(m) (Fringe benefits).* Paragraph (m)(1) is covered by the general reasonableness provisions at FAR 31.201-3, and definitions and examples of allowable cost are not needed, only identification of unallowable cost. "List[s] of compensation elements have been eliminated throughout and should be eliminated here as well." Paragraph (m)(2), which covers the personal use of company furnished automobiles, should be eliminated unless legislated.

Councils' response: Do not concur. This paragraph needs to be retained as it includes needed criteria for allowability and not just general reasonableness criteria. The language on company furnished automobiles is required by 10 U.S.C. 2324(f)(1)(o).

18. *Comment: Eliminate FAR 31.206-6(n) (Employee rebate and purchase discount plans).* In an effort to move toward commercial practice, suggest the elimination of 31.205-6(n) "on the basis of immateriality and not cost efficient accounting." Also, employee rebates and purchase discounts are sales reductions and not compensation cost.

Councils' response: Do not concur. Employee rebates and discounts should be considered as a sales reduction; however, Generally Accepted Accounting Principles do allow such costs to be treated as compensation in some limited cases. Therefore, we retained this provision to prevent such sales reductions from being claimed as compensation costs.

19. *Additional change: Reinstate and revise FAR 31.205-6(g)(2)(ii).* This paragraph was deleted in the proposed rule because it was thought to be covered under FAR 31.201-4, Determining allocability. However, upon further analysis, the Councils have reinstated FAR 31.205-6(g)(2)(ii) (as FAR 31.205-6(g)(4) in the final rule) because the language exceeds the requirement stated in FAR 31.201-4 by expressly identifying what method equates to a proper allocation. The specific identification of what constitutes an allocable allocation of normal severance pay has worked and will continue to work to reduce disputes. The paragraph has been revised, however, to enhance its clarity.

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. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principle discussed in this rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 22, 31, 37, and 52

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 31, 37, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 31, 37, and 52 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 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.101-2 [Amended]

■ 2. Amend section 22.101-2 in the last sentence of paragraph (a) by removing “31.205-6(c)” and adding “31.205-6(b)” in its place.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Amend section 31.001 by adding, in alphabetical order, the definition “Compensation for personal services” to read as follows:

31.001 Definitions.

* * * * *

Compensation for personal services means all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor.

* * * * *

- 4. Amend section 31.205-6 by—
- a. Revising paragraphs (a) through (h);
 - b. Removing the word “subdivisions” from the last sentence of the introductory text of paragraph (j)(7) and adding “paragraphs” in its place; and removing the word “subdivision” from paragraph (j)(8)(iii) and adding “paragraph” in its place;
 - c. Removing the word “section” from the introductory text of paragraph (o)(2) and adding “subsection” in its place; and removing the word “subdivision” from the first sentence of paragraph (o)(5) and adding “paragraph” in its place; and
 - d. Removing the colon from the end of the introductory text of paragraph (p)(2) and adding “—” in its place.

The revised text reads as follows:

31.205-6 Compensation for personal services.

(a) *General.* Compensation for personal services is allowable subject to the following general criteria and additional requirements contained in other parts of this cost principle:

(1) Compensation for personal services must be for work performed by the employee in the current year and must not represent a retroactive adjustment of prior years' salaries or wages (but see paragraphs (g), (h), (j), (k), (m), and (o) of this subsection).

(2) The total compensation for individual employees or job classes of employees must be reasonable for the work performed; however, specific restrictions on individual compensation elements apply when prescribed.

(3) The compensation must be based upon and conform to the terms and

conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment.

(4) No presumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor has not provided the cognizant ACO, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under other paragraphs of this Subpart 31.2 are not allowable under this subsection 31.205-6 solely on the basis that they constitute compensation for personal services.

(6)(i) Compensation costs for certain individuals give rise to the need for special consideration. Such individuals include:

(A) Owners of closely held corporations, members of limited liability companies, partners, sole proprietors, or members of their immediate families; and

(B) Persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise.

(ii) For these individuals, compensation must—

(A) Be reasonable for the personal services rendered; and

(B) Not be a distribution of profits (which is not an allowable contract cost).

(iii) For owners of closely held companies, compensation in excess of the costs that are deductible as compensation under the Internal Revenue Code (26 U.S.C.) and regulations under it is unallowable.

(b) *Reasonableness—(1)*

Compensation pursuant to labor-management agreements. If costs of compensation established under “arm's length” labor-management agreements negotiated under the terms of the Federal Labor Relations Act or similar state statutes are otherwise allowable, the costs are reasonable unless, as applied to work in performing Government contracts, the costs are unwarranted by the character and circumstances of the work or discriminatory against the Government. The application of the provisions of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (e.g., work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a Government contract involving

significantly different circumstances and conditions of employment (e.g., work involving less hazardous activities or work continually requiring use of overtime). It is discriminatory against the Government if it results in employee compensation (in whatever form or name) in excess of that being paid for similar non-Government work under comparable circumstances.

(2) *Compensation not covered by labor-management agreements.*

Compensation for each employee or job class of employees must be reasonable for the work performed. Compensation is reasonable if the aggregate of each measurable and allowable element sums to a reasonable total. In determining the reasonableness of total compensation, consider only allowable individual elements of compensation. In addition to the provisions of 31.201-3, in testing the reasonableness of compensation for particular employees or job classes of employees, consider factors determined to be relevant by the contracting officer. Factors that may be relevant include, but are not limited to, conformity with compensation practices of other firms—

- (i) Of the same size;
- (ii) In the same industry;
- (iii) In the same geographic area; and
- (iv) Engaged in similar non-Government work under comparable circumstances.

(c) [Reserved]

(d) *Form of payment.* (1)

Compensation for personal services includes compensation paid or to be paid in the future to employees in the form of—

- (i) Cash;
- (ii) Corporate securities, such as stocks, bonds, and other financial instruments (see paragraph (d)(2) of this subsection regarding valuation); or
- (iii) Other assets, products, or services.

(2) When compensation is paid with securities of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the securities is the fair market value on the first date the number of shares awarded is known, determined upon the most objective basis available.

(ii) Accruals for the cost of securities before issuing the securities to the employees are subject to adjustment according to the possibilities that the employees will not receive the securities and that their interest in the accruals will be forfeited.

(e) *Income tax differential pay.* (1) Differential allowances for additional income taxes resulting from foreign assignments are allowable.

(2) Differential allowances for additional income taxes resulting from domestic assignments are unallowable. (However, payments for increased employee income or Federal Insurance Contributions Act taxes incident to allowable reimbursed relocation costs are allowable under 31.205–35(a)(10).)

(f) *Bonuses and incentive compensation.* (1) Bonuses and incentive compensation are allowable provided the—

(i) Awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment; and

(ii) Basis for the award is supported.

(2) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of paragraphs (f)(1) and (k) of this subsection.

(g) *Severance pay.* (1) Severance pay is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in paragraph (j)(7) of this subsection.

(2) Severance pay is allowable only to the extent that, in each case, it is required by—

(i) Law;

(ii) Employer-employee agreement;

(iii) Established policy that constitutes, in effect, an implied agreement on the contractor's part; or

(iv) Circumstances of the particular employment.

(3) Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable.

(4) Actual normal turnover severance payments shall be allocated to all work performed in the contractor's plant. However, if the contractor uses the accrual method to account for normal turnover severance payments, that method will be acceptable if the amount of the accrual is—

(i) Reasonable in light of payments actually made for normal severances over a representative past period; and

(ii) Allocated to all work performed in the contractor's plant.

(5) Abnormal or mass severance pay is of such a conjectural nature that accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, the Government will consider allowability on a case-by-case basis.

(6) Under 10 U.S.C. 2324(e)(1)(M) and 41 U.S.C. 256(e)(1)(M), the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States. Further, under 10 U.S.C. 2324(e)(1)(N) and 41 U.S.C. 256(e)(1)(N), all such costs of severance payments that are otherwise allowable are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country; this does not apply if the closing of a facility or curtailment of activities is made pursuant to a status-of-forces or other country-to-country agreement entered into with the government of that country before November 29, 1989. 10 U.S.C. 2324(e)(3) and 41 U.S.C. 256(e)(2) permit the head of the agency to waive these cost allowability limitations under certain circumstances (see 37.113 and the solicitation provision at 52.237–8).

(h) *Backpay.* Backpay is a retroactive adjustment of prior years' salaries or wages. Backpay is unallowable except as follows:

(1) Payments to employees resulting from underpaid work actually performed are allowable, if required by a negotiated settlement, order, or court decree.

(2) Payments to union employees for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiation are allowable.

(3) Payments to nonunion employees based upon results of union agreement negotiation are allowable only if—

(i) A formal agreement or understanding exists between management and the employees concerning these payments; or

(ii) An established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payments.

PART 37—SERVICE CONTRACTING

■ 5. Amend section 37.113–1 by revising the introductory text of paragraph (a) to read as follows:

37.113–1 Waiver of cost allowability limitations.

(a) The head of the agency may waive the 31.205–6(g)(6) cost allowability limitations on severance payments to foreign nationals for contracts that—

* * * * *

37.113–2 [Amended]

■ 6. Amend section 37.113–2 in paragraph (b) by removing “, or designee.”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.237–8 by revising the date of the provision, paragraph (a) and the introductory text of paragraph (b) of the provision to read as follows:

52.237–8 Restriction on Severance Payments to Foreign Nationals.

* * * * *

Restriction on Severance Payments to Foreign Nationals (Aug 2003)

(a) The Federal Acquisition Regulation (FAR), at 31.205-6(g)(6), limits the cost allowability of severance payments to foreign nationals employed under a service contract performed outside the United States unless the agency grants a waiver pursuant to FAR 37.113–1 before contract award.

(b) In making the determination concerning the granting of a waiver, the agency will determine that—

52.237–9 [Amended]

■ 8. Amend section 52.237–9 by revising the date of the clause to read “(Aug 2003); and by removing from paragraph (a) of the clause “31.205–6(g)(3)” and adding “31.205–6(g)(6) in its place.

[FR Doc. 03–18536 Filed 7–23–03; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 23 and 52**

[FAC 2001-15; FAR Case 2000-005; Item V]

RIN 9000-AJ44

**Federal Acquisition Regulation;
Leadership in Environmental
Management (E.O. 13148)**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

DATES: *Effective Date:* August 25, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Craig R. Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001-15, FAR case 2000-005.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 55670, August 29, 2002, with a request for comments. Two respondents submitted public comments. A discussion of the comments is provided below. Differences between the proposed and the final rule are discussed in paragraph 1 below.

1. *Comment:* One respondent recommended the following changes to FAR 23.1005:

a. Insert "or plans to implement" between "implemented" and "an EMS" at FAR 23.1005(b)(1) and (b)(2)(i);

b. Change "contractors" to "the contractor" at 23.1005(c)(1); and

c. Remove "FCA" and insert "facility compliance audit or an environmental management system audit" at FAR 23.1005(c)(2).

Councils' Response:

a. *Concur.* As proposed, FAR 23.1005 requires the use of FAR clause 52.223-5 at facilities with an environmental management system (EMS). The clarification expands the prescription for the use of the clause to include situations where an EMS is contemplated.

b. *Partially concur.* The Councils agree that there is a grammatical error, but corrected the error by substituting the term "contractor activities" for "contractors to conduct activities."

c. *Concur.* The inclusion of the phrase "or an environmental management system audit" acknowledges an agency's option to conduct an EMS audit in lieu of a facility compliance audit (FCA) as provided in section 402(b) of Executive Order 13148.

2. *Comment:* The respondent recommended that the FAR rule be reviewed to ensure that, wherever practicable, the FAR actively supports implementation of EMS at Federal facilities including, where the facility or agency deems appropriate, participation in the EMS by contracting entities, including suppliers. The FAR change requires more than the mere provision of information for implementation of an EMS, as the proposed rule now states, to instead include active participation in the EMS, where the facility or agency deems it necessary. At a minimum, the language should state that vendors, contractors, and/or subcontractors are required to be consistent with agency/bureau and/or facility EMS policies.

Councils' Response: Section 305(c) of E.O. 13148 states: "The Federal Acquisition Regulation (FAR) Council shall develop acquisition policies and procedures for contractors to supply agencies with all information necessary for compliance with this order." The Councils believe that the rule satisfies this requirement.

Per section 306 of E.O. 13148, an Interagency Environmental Leadership Workgroup "shall develop policies and guidance required by this order and member agencies shall facilitate implementation of the requirements of this order in their respective agencies." While the Councils recognize and fully appreciate the need for EMS policy and standards, these agency/bureau and/or facility EMS policies will vary among agencies/bureaus and will likely evolve as well. Additionally, the level of participation required by contractors/subcontractors will be contract-specific. Therefore, requirements for EMS participation by contractors/subcontractors would have to be identified in the contract itself. The recommended language does not serve

this purpose and would lead to contractual ambiguities.

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. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 as required by E.O. 13148, this rule does not change the current policies and procedures in FAR Subparts 23.8, 23.9, and 23.10. The final rule provides a means for agencies to obtain contractor information for the implementation of EMSs and the completion of FCAs at certain Federal facilities. Agencies will determine which facilities are appropriate for EMS implementation. Federal facilities include Government-owned, contractor-operated facilities, and Government-owned facilities on which multiple contractors perform services. The criteria for performing EMSs indicate that large, rather than small, Federal facilities are more likely to be included in EMSs, and these large Federal facilities are more likely to be operated by large businesses. If, on the other hand, several contractors are performing services on a Government-owned facility, many of the services performed by small businesses fall within the category of administrative support services considered "environmentally clean" and not included in EMSs. For similar reasons, the requirement pertaining to FCAs is not expected to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule contains information collection requirements. These changes to the FAR will increase the information collection requirement currently approved under Office of Management and Budget Control Number 9000-0147, since the rule requires contractors to provide information needed by a Federal facility to implement an EMS (Alternate I of FAR 52.223-5) and to complete an FCA (Alternate II of FAR 52.223-5). Accordingly, the FAR Secretariat has forwarded a request for approval of the

increased information collection requirement concerning Leadership in Environmental Management (E.O. 13148) to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Interested parties may obtain copies of the form and supporting documents increasing the burden hours from the FAR Secretariat by requesting OMB Control Number 9000-0147, Leadership in Environmental Management (E.O. 13148).

List of Subjects in 48 CFR Parts 23 and 52

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 23 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 23 and 52 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 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 2. Add section 23.001 to read as follows:

23.001 Definition.

Toxic chemical, as used in this part, means a chemical or chemical category listed in 40 CFR 372.65.

■ 3. Amend section 23.702 by revising paragraph (d) to read as follows:

23.702 Authorities.

* * * * *

(d) Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

* * * * *

■ 4. Amend section 23.801 by revising paragraph (b) to read as follows:

23.801 Authorities.

* * * * *

(b) Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

* * * * *

23.803 [Amended]

■ 5. Amend section 23.803 in the introductory text of paragraph (b) by removing “ensure that acquisitions”; and in paragraph (b)(1) by removing

“Executive Order 12843” and adding “Executive Order 13148” in its place.

Subpart 23.9—Contractor Compliance With Toxic Chemical Release Reporting

■ 6. Revise the heading of Subpart 23.9 as set forth above.

■ 7. Revise section 23.901 to read as follows:

23.901 Purpose.

This subpart implements the requirements of Executive Order (E.O.) 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

■ 8. In section 23.902, add a sentence to the end of paragraph (b) to read as follows:

23.902 General.

* * * * *

(b) * * * See EPA’s Web site at <http://www.epa.gov/tri> for guidance.

23.903 [Amended]

■ 9. In section 23.903, amend paragraph (a) by removing “(including all options)”;

23.904 [Removed]

23.905 through 23.907 [Redesignated as 23.904 through 23.906]

■ 10. Remove section 23.904 and redesignate sections 23.905, 23.906, and 23.907 as 23.904, 23.905, and 23.906, respectively;

■ 11. In the newly designated section 23.905, revise paragraphs (a) introductory text and (a) (2) (iv), and amend paragraph (d) by removing “E.O. 12969” and adding “E.O. 13148” in its place. The revised text reads as follows:

23.905 Requirements.

(a) E.O. 13148 requires that solicitations for competitive contracts expected to exceed \$100,000 include, to the maximum extent practicable, as an award eligibility criterion, a certification by an offeror that, if awarded a contract, either—

* * * * *

(2) * * *

(iv) Do not fall within the following Standard Industrial Classification (SIC) codes or their corresponding North American Industry Classification System sectors:

(A) Major group code 10 (except 1011, 1081, and 1094.

(B) Major group code 12 (except 1241).

(C) Major group codes 20 through 39.

(D) Industry code 4911, 4931, or 4939 (limited to facilities that combust coal

and/or oil for the purpose of generating power for distribution in commerce).

(E) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, *et seq.*), or 5169, or 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

* * * * *

■ 12. In the newly designated section 23.906, revise paragraph (a), and amend paragraph (b) by removing “(including all options)”. The revised text reads as follows:

23.906 Solicitation provision and contract clause.

* * * * *

(a) Insert the provision at 52.223-13, Certification of Toxic Chemical Release Reporting, in all solicitations for competitive contracts expected to exceed \$100,000 and competitive 8(a) contracts, unless it has been determined in accordance with 23.905(b) that to do so is not practicable; and

* * * * *

■ 13. Revise Subpart 23.10, consisting of sections 23.1000 through 23.1005, to read as follows:

Subpart 23.10—Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements

23.1000 Scope.

This subpart prescribes policies and procedures for obtaining information needed for Government—

(a) Compliance with right-to-know laws and pollution prevention requirements;

(b) Implementation of an environmental management system (EMS) at a Federal facility; and

(c) Completion of facility compliance audits (FCAs) at a Federal facility.

23.1001 Authorities.

(a) Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001-11050 (EPCRA).

(b) Pollution Prevention Act of 1990, 42 U.S.C. 13101-13109 (PPA).

(c) Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

23.1002 Applicability.

The requirements of this subpart apply to facilities owned or operated by an agency in the customs territory of the United States.

23.1003 Definitions.

As used in this subpart—

Federal agency means an executive agency (see 2.101).

Priority chemical means a chemical identified by the Interagency Environmental Leadership Workgroup or, alternatively, by an agency pursuant to section 503 of Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

23.1004 Requirements.

(a) E.O. 13148 requires Federal facilities to comply with the provisions of EPCRA and PPA.

(b) Pursuant to E.O. 13148, and any agency implementing procedures, every new contract that provides for performance on a Federal facility shall require the contractor to provide information necessary for the Federal agency to comply with the—

(1) Emergency planning and toxic release reporting requirements in EPCRA, PPA, and E.O. 13148;

(2) Toxic chemical, priority chemical, and hazardous substance release and use reduction goals of sections 502 and 503 of Executive Order 13148; and

(3) Requirements for EMSs and FCAs if the place of performance is at a Federal facility designated by the agency.

23.1005 Contract clause.

(a) Insert the clause at 52.223-5, Pollution Prevention and Right-to-Know Information, in solicitations and contracts that provide for performance, in whole or in part, on a Federal facility.

(b) Use the clause with its Alternate I if the contract provides for contractor—

(1) Operation or maintenance of a Federal facility at which the agency has implemented or plans to implement an EMS; or

(2) Activities and operations—

(i) To be performed at a Government-operated Federal facility that has implemented or plans to implement an EMS; and

(ii) That the agency has determined are covered within the EMS.

(c) Use the clause with its Alternate II if—

(1) The contract provides for contractor activities on a Federal facility; and

(2) The agency has determined that the contractor activities should be included within the FCA or an environmental management system audit.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

14. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(1)(vii) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other than Commercial Items) (Aug 2003)

* * * * *

(b) * * *

(1) * * *

(vii) 52.223-5, Pollution Prevention and Right-to-Know Information (Aug 2003) (E.O. 13148) (Applies to services performed on Federal facilities).

* * * * *

15. Revise section 52.223-5 to read as follows:

52.223-5 Pollution Prevention and Right-to-Know Information.

As prescribed in 23.1005, insert the following clause:

Pollution Prevention and Right-to-Know Information (Aug 2003)

(a) Definitions. As used in this clause— Priority chemical means a chemical identified by the Interagency Environmental Leadership Workgroup or, alternatively, by an agency pursuant to section 503 of Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

Toxic chemical means a chemical or chemical category listed in 40 CFR 372.65.

(b) Executive Order 13148 requires Federal facilities to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101-13109).

(c) The Contractor shall provide all information needed by the Federal facility to comply with the following:

(1) The emergency planning reporting requirements of section 302 of EPCRA.

(2) The emergency notice requirements of section 304 of EPCRA.

(3) The list of Material Safety Data Sheets, required by section 311 of EPCRA.

(4) The emergency and hazardous chemical inventory forms of section 312 of EPCRA.

(5) The toxic chemical release inventory of section 313 of EPCRA, which includes the reduction and recycling information required by section 6607 of PPA.

(6) The toxic chemical, priority chemical, and hazardous substance release and use reduction goals of sections 502 and 503 of Executive Order 13148.

(End of clause)

Alternate I (Aug 2003). As prescribed in 23.1005(b), add the following paragraph (c)(7) to the basic clause:

(c)(7) The environmental management system as described in section 401 of E.O. 13148.

Alternate II (Aug 2003). As prescribed in 23.1005(c), add the following paragraph (c)(7) to the basic clause. If Alternate I is also prescribed, renumber paragraph (c)(7) as paragraph (c)(8).

(c)(7) The facility compliance audits as described in section 402 of E.O. 13148.

16. Amend section 52.223-13 by revising the introductory text, the date of the provision, and paragraphs (a), (b)(2)(i) and (b)(2)(iv) to read as follows:

52.223-13 Certification of Toxic Chemical Release Reporting.

As prescribed in 23.906(a), insert the following provision:

Certification of Toxic Chemical Release Reporting (Aug 2003)

(a) Executive Order 13148, of April 21, 2000, Greening the Government through Leadership in Environmental Management, requires submission of this certification as a prerequisite for contract award.

(b) * * *

(2) * * *

[] (i) The facility does not manufacture, process, or otherwise use any toxic chemicals listed in 40 CFR 372.65;

* * * * *

[] (iv) The facility does not fall within the following Standard Industrial Classification (SIC) codes or their corresponding North American Industry Classification System sectors:

(A) Major group code 10 (except 1011, 1081, and 1094.

(B) Major group code 12 (except 1241).

(C) Major group codes 20 through 39.

(D) Industry code 4911, 4931, or 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce).

(E) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, et seq.), 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

* * * * *

17. Amend section 52.223-14 by revising the introductory text, the date of the clause, and paragraphs (b)(1) and (b)(4) to read as follows:

52.223-14 Toxic Chemical Release Reporting.

As prescribed in 23.906(b), insert the following clause:

Toxic Chemical Release Reporting (Aug 2003)

* * * * *

(b) * * *

(1) The facility does not manufacture, process, or otherwise use any toxic chemicals listed in 40 CFR 372.65;

* * * * *

(4) The facility does not fall within the following Standard Industrial Classification (SIC) codes or their corresponding North American Industry Classification System sectors:

(i) Major group code 10 (except 1011, 1081, and 1094.

(ii) Major group code 12 (except 1241).

(iii) Major group codes 20 through 39.

(iv) Industry code 4911, 4931, or 4939 (limited to facilities that combust coal and/

or oil for the purpose of generating power for distribution in commerce).

(v) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, *et seq.*)), 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

* * * * *

[FR Doc. 03-18537 Filed 7-23-03; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2001-15; FAR Case 2001-024; Item VI]

RIN 9000-AJ42

Federal Acquisition Regulation; Selling Cost Principle

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) "selling costs" cost principle by restructuring the paragraphs and removing unnecessary and duplicative language to increase clarity.

DATES: *Effective Date:* August 25, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb at (202) 501-0650. Please cite FAC 2001-15, FAR case 2001-024.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 55682, August 29, 2002, with request for comments. One respondent submitted comments; a discussion of the comments is provided below. Differences between the proposed rule and final rule are discussed in paragraph B.2. below.

B. Public Comments

Clarity of the Cost Principle

1. *Comment:* Revise proposed FAR 31.205-38(a). The cost principle's readability and clarity can be improved by changing the second sentence of the proposed paragraph (a) from "The cost of any selling efforts other than those addressed in this cost principle are unallowable" to "The costs of selling efforts are allowable unless expressly identified as unallowable in this or any other cost principle." The proposed wording will be difficult to apply in the field. The respondent is unaware of any selling costs that are not already included in the cost principle.

Councils' response: Nonconcur. The sentence in question was simply moved from the current paragraph (d) to the beginning of the cost principle. The sentence is not new; it was originally included to comply with the provisions of section 911 of the Defense Procurement Improvement Act of 1985 (codified at 10 U.S.C. 2324 (f)(1)(J)), which required that the allowability of selling and marketing costs be clarified. At that time, Congress and the General Accounting Office (GAO) were concerned about potential negotiation of 50/50 splits of the costs in this area due to unclear wording of the cost principle. The intent was to ensure that any gray areas of selling costs would be disallowed, particularly the costs of broadly targeted selling and marketing. The current wording continues this intent.

Cost Principle Consistency

2. *Comment:* Delete portion of proposed FAR 31.205-38(a). The last sentence in the proposed paragraph (a) is not needed as it reiterates what is already included in 31.204(c) (Application of principles and procedures).

Councils' response: Partially concur. Do not agree that the intent of the sentence in question is adequately covered by 31.204(c). However, the Councils concluded that the objective of this sentence is already adequately achieved by the operation of the proposed paragraph (b) which directs the reader to other specific cost principles governing the allowability of the identified categories of costs, and the second sentence of the proposed paragraph (a) which makes any selling efforts other than those addressed in the cost principle unallowable. Therefore, the last sentence of paragraph (a) is deleted.

Cost Principle Elimination

3. *Comment:* Delete proposed FAR 31.205-38. With the exception of its last paragraph, the proposed cost principle defines selling costs and expressly states they are allowable or refers the reader to other cost principles for the determination of allowability of related costs. Therefore, consideration should be given to completely eliminating the cost principle, after moving the proposed paragraph (c) to another cost principle, possibly 31.205-33(f) (Professional and consultant service costs).

Councils' response: Nonconcur. This cost principle has disallowed and should continue to disallow all selling costs not made specifically allowable by it or the other cited cost principles. In addition, this cost principle clarifying the allowability of selling and marketing costs is statutorily required by 10 U.S.C. 2324(f)(1)(J) and 41 U.S.C. 256(f)(1)(J).

General Reformatting of FAR Part 31.205

4. *Comment:* The respondent also recommended that the Councils consider a general reformatting of FAR Part 31, Contract Cost Principles and Procedures. Specifically, consideration should be given to establishing a uniform structure for the selected costs detailed in FAR Subpart 31.205, which the respondent believes will increase the clarity and understanding of the cost principles and thereby reduce misinterpretation.

Councils' response: Nonconcur. The Councils are unaware of any significant clarity problems with the current FAR cost principles and see no benefit in this recommendation. While it is true that the cost principles do not all share an identical format, it does not follow that this makes them difficult to understand. Moreover, such a comprehensive revision of the cost principles could actually increase disputes by substituting new wording for longstanding, court-tested language.

Of the 48 current FAR cost principles, 16 are only one paragraph long, and 11 more are only two or three paragraphs long. The Councils question the need to "force-fit" such short cost principles into a uniform format, particularly in the absence of any significant clarity problems. Not only would the recommended general reformatting of the cost principles be difficult to accomplish, but it would also offer no obvious benefit to either industry or the Government.

The Councils recommend instead that industry continue to identify those individual cost principles which it

views as problematic and to provide specific proposals for appropriate revisions. It should be noted that the continuing Defense Procurement and Acquisition Policy initiative to reduce accounting and administrative burdens in the cost principles, without jeopardizing the Government's interests, has resulted in significant changes or deletions involving more than 20 different cost principles to date, including the recent major revisions to the relocation cost principle (FAR 31.205-35) that made employee "tax gross-ups" and spouse employment assistance payments allowable for the first time, as well as increased the maximum allowable lump-sum amount for miscellaneous expenses from \$1,000 to \$5,000. In addition, cost principle streamlining cases are currently in process regarding compensation (FAR 31.205-6), training and education (FAR 31.205-44), depreciation (FAR 31.205-11), expanded relocation lump-sum (FAR 31.205-35), and travel (FAR 31.205-46) costs. The Councils continue to believe that such a case-by-case cooperative effort with industry offers the best opportunity for meaningful change in this often controversial area.

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.

C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principle discussed in this rule.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 31 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).

31.205-1 [Amended]

■ 2. Amend section 31.205-1 in paragraph (f)(1) by removing from the parenthetical "31.205-38(c)" and adding "31.205-38(b)(5)" in its place.

31.205-12 [Amended]

■ 3. Amend section 31.205-12 in paragraph (a) by removing the word "generalized" and adding "general" in its place.

■ 4. Amend section 31.205-33 by revising the first sentence of the introductory text of paragraph (f); and removing the parenthetical sentence. The revised text reads as follows:

31.205-33 Professional and consultant service costs.

* * * * *

(f) Fees for services rendered are allowable only when supported by evidence of the nature and scope of the service furnished (see also 31.205-38(c)). * * *

* * * * *

■ 5. Revise section 31.205-38 to read as follows:

31.205-38 Selling costs.

(a) "Selling" is a generic term encompassing all efforts to market the contractor's products or services, some of which are covered specifically in other subsections of 31.205. The costs of any selling efforts other than those addressed in this cost principle are unallowable.

(b) Selling activity includes the following broad categories:

(1) *Advertising.* Advertising is defined at 31.205-1(b), and advertising costs are subject to the allowability provisions of 31.205-1(d) and (f).

(2) *Corporate image enhancement.* Corporate image enhancement activities, including broadly targeted sales efforts, other than advertising, are included within the definition of public relations at 31.205-1(a), and the costs of such efforts are subject to the allowability provisions at 31.205-1(e) and (f).

(3) *Bid and proposal costs.* Bid and proposal costs are defined at 31.205-18

and are subject to the allowability provisions of that subsection.

(4) *Market planning.* Market planning involves market research and analysis and general management planning concerned with development of the contractor's business. Long-range market planning costs are subject to the allowability provisions of 31.205-12. Other market planning costs are allowable.

(5) *Direct selling.* Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such efforts as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting efforts, individual demonstrations, and any other efforts having as their purpose the application or adaptation of the contractor's products or services for a particular customer's use. The cost of direct selling efforts is allowable.

(c) Notwithstanding any other provision of this subsection, sellers' or agents' compensation, fees, commissions, percentages, retainer or brokerage fees, whether or not contingent upon the award of contracts, are allowable only when paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business.

[FR Doc. 03-18538 Filed 7-23-03; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 39

[FAC 2001-15; FAR Case 2002-012; Item VII]

RIN 9000-AJ53

Federal Acquisition Regulation; Section 508 Micropurchase Exception Sunset Provision

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to convert this FAR case from an interim rule to a final rule without change. The final rule amends the FAR to extend the Electronic and Information Technology (section 508) micropurchase exception to October 1, 2004.

DATES: *Effective Date:* July 24, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900, or Ms. Angelena Moy, Case Manager, at (703) 602-1302. The TTY Federal relay number for further information is 1-800-877-8973. Please cite FAC 2001-15, FAR case 2002-012.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 67 FR 80321, December 31, 2002, that amended FAR 39.204(a) to extend the Electronic and Information Technology (EIT) micropurchase exception until October 1, 2004.

The 60-day comment period for the interim rule ended March 3, 2003. Public comments were received from four commenters. One commenter submitted comments that are not relevant and outside the scope of the rule. Another commenter, the American Foundation for the Blind (AFB), believes that the Government is not doing enough to resolve the small purchase problem so that an exception is not needed. The AFB also believes that the Government should create tools with questions and measurements for the Federal purchaser to utilize in determining accessibility.

The remaining two commenters fully support the rule. They also submitted their views on labeling products for micropurchases made using the Government purchase card, and one of the commenter also addressed how it accomplished its internal 508 training. Summaries of these views follow:

1. Suggested that many firms in the information technology industry are unwilling to make blanket statements on a product label regarding section 508 because interpretations of the standards and product information may vary, exposing companies to litigation under the False Claims Act.

2. Stated that creating a label that would provide sufficient information to Federal buyers would be difficult and expensive.

3. Stated that the majority of the Governmentwide purchase card purchases are generally made using the Internet or by phone, and it is unlikely that the Government buyer would see the label until after the purchase.

4. Recommended that, as an alternative to labeling, the Government purchaser use the Voluntary Product Accessibility Template (VPAT) as a tool in making an informed decision regarding accessibility.

5. Suggested that the VPAT assists the Government in meeting the Acquisition Planning and Market Research requirements established in FAR parts 7 and 10, respectively.

6. One commenter described their intensive efforts to train their sales forces to assist purchasers in making their accessibility determinations and to put in place systems that ensure engineers include accessibility as a key design requirement.

The above views will be considered before the Government formulates its next step regarding acquisition of electronic and information technology products and services under micropurchase procedures.

We applaud industry's efforts to build accessibility features into their products and their participation in making information about product features available by completing the VPAT. We encourage industry to continue to work toward a solution that will assist the Government purchase cardholder, who may have little technical knowledge regarding section 508, in purchasing products and services that meet the applicable accessibility standards.

The Federal Government is in continual collaboration with the Accessibility Forum to focus on long-term solutions that will assist the Government in making informed decisions about section 508-related procurements. We are hopeful that a solution can be found that will be agreeable to both industry and the Government.

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. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final

rule will not 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 for purchases under \$2,500 (a "micropurchase"), no competitive quotations have to be obtained and micropurchases are no longer reserved exclusively for small firms.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 39

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR part 39, which was published in the **Federal Register** at 67 FR 80321, December 31, 2002, as a final rule without change.

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

[FR Doc. 03-18539 Filed 7-23-03; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2001-15; Item VIII]

Federal Acquisition Regulation; Technical Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to update references and make editorial changes.

DATES: *Effective Date:* July 24, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202)

501-4755, for information pertaining to status or publication schedules. Please cite FAC 2001-15, Technical Amendments.

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: July 16, 2003.
Laura Auletta,
Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 19 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19 and 52 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 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.1005 by revising paragraph (a) to read as follows:

19.1005 Applicability.
 (a) *Designated industry groups.*

NAICS code	NAICS description
1. Construction (Except Dredging) Subsector 236—Construction of Buildings	
236115	New Single-Family Housing Construction (except Operative Builders).
236116	New Multi-Family Housing Construction (except Operative Builders).
236117	New Housing Operative Builders.
236118	Residential Remodelers.
236210	Industrial Building Construction.
236220	Commercial and Institutional Building Construction.
Subsector 237—Heavy and Civil Engineering Construction	
237110	Water and Sewer Line and Related Structures Construction.
237120	Oil and Gas Pipeline and Related Structures Construction.
237130	Power and Communication Line and Related Structures Construction.
237210	Land Subdivision.
237310	Highway, Street, and Bridge Construction.
237990	Other Heavy and Civil Engineering Construction (except dredging).
Subsector 238—Specialty Trade Contractors	
238110	Poured Concrete Foundation and Structure Contractors.
238120	Structural Steel and Precast Concrete Contractors.
238130	Framing Contractors.
238140	Masonry Contractors.
238150	Glass and Glazing Contractors.
238160	Roofing Contractors.
238170	Siding Contractors.
238190	Other Foundation, Structure, and Building Exterior Contractors.
238210	Electrical Contractors.
238220	Plumbing, Heating, and Air-Conditioning Contractors.
238290	Other Building Equipment Contractors.
238310	Drywall and Insulation Contractors.
238320	Painting and Wall Covering Contractors.
238330	Flooring Contractors.
238340	Tile and Terrazzo Contractors.
238350	Finish Carpentry Contractors.
238390	Other Building Finishing Contractors.
238910	Site Preparation Contractors.
238990	All Other Specialty Trade Contractors.
2. Non-Nuclear Ship Repair	
336611	Ship Building and Repairing.
PSC J998	Non-nuclear Ship Repair (East) Ship Repair (including overhauls and conversions) performed on non-nuclear propelled and non-propelled ships east of the 108th meridian.
PSC J999	Non-nuclear Ship Repair (West) Ship Repair (including overhauls and conversions) performed on non-nuclear propelled and non-propelled ships west of the 108th meridian.
3. Architectural and Engineering Services (Including Surveying and Mapping)	
541310	Architectural Services or;
541330	Engineering Services.
PSC C111 ...	Administrative and Service Buildings.
PSC C112 ...	Airfield, Communication and Missile Facilities.
PSC C113 ...	Educational Buildings.
PSC C114 ...	Hospital Buildings.
PSC C115 ...	Industrial Buildings.
PSC C116 ...	Residential Buildings.
PSC C117 ...	Warehouse Buildings.
PSC C118 ...	Research and Development Facilities.
PSC C119 ...	Other Buildings.
PSC C121 ...	Conservation and Development.

NAICS code	NAICS description
PSC C122 ...	Highways, Roads, Streets, Bridges and Railways.
PSC C123 ...	Electric Power Generation (EPG).
PSC C124 ...	Utilities.
PSC C129 ...	Other Non-Building Structures.
PSC C130 ...	Restoration.
PSC C211 ...	Architect-Engineering Services (including landscaping, interior layout, and designing).
PSC C212 ...	Engineering Drafting Services.
PSC C213 ...	A&E Inspection Services (non-construction).
PSC C214 ...	A&E Management Engineering Services.
PSC C215 ...	A&E Production Engineering Services (including Design and Control, and Building Programming).
PSC C216 ...	Marine Architect and Engineering Services.
PSC C219 ...	Other Architect and Engineering Services.
541360	Geophysical Surveying and Mapping Services or;
541370	Surveying and Mapping (except Geophysical) Services.
PSC T002 ...	Cartography Services.
PSC T004 ...	Charting Services.
PSC T008 ...	Photogrammetry Services.
PSC T009 ...	Aerial Photographic Services.
PSC T014 ...	Topography Services.
PSC R404 ...	Land Surveys, Cadastral Services (non-construction).

4. Refuse Systems and Related Services

562111	Solid Waste Collection or;
562119	Other Waste Collection or;
562219	Other Nonhazardous Waste Treatment and Disposal.
PSC S205 ...	Trash/Garbage Collection Services—including Portable Sanitation Services.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.212–1 by revising the date of the provision and paragraph (i)(2)(ii)(B) to read as follows:

52.212–1 Instructions to Offerors—Commercial Items.

Instructions to Offerors—Commercial Items (July 2003)

* * * * *

- (i) * * *
- (2) * * *
- (ii) * * *

(B) Through the DoDSSP Internet site at <http://dodssp.daps.mil>.

* * * * *

[FR Doc. 03–18540 Filed 7–23–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small entity compliance guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National

Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–15 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–15 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–15

Item	Subject	FAR case	Analyst
I	Elimination of Standard Form 129, Solicitation Mailing List Application	2001–032	De Stefano.
II	Energy-Efficient Standby Power Devices	2001–028	Smith.
III	Electronic Listing of Acquisition Vehicles Available For Use By More Than One Agency	2001–030	Zaffos.
IV	Compensation Cost Principle	2001–008	Loeb.
V	Leadership in Environmental Management (E.O. 13148)	2000–005	Goral.
VI	Selling Cost Principle	2001–024	Loeb.
VII	Section 508 Micropurchase Exception Sunset Provision	2002–012	Nelson.
VIII	Technical Amendments.		

Item I—Elimination of Standard Form 129, Solicitation Mailing List Application (FAR Case 2001-032)

This final rule removes the requirement for contracting offices to establish and maintain manual solicitation mailing lists and the need to use the Standard Form (SF) 129, Solicitation Mailing List Application. The purpose of the rule is to broaden use and reliance on e-business applications. It is expected that this rule will eliminate, in part, the need for contracting offices to maintain paper-based sources of contractor information.

Item II—Energy-Efficient Standby Power Devices (FAR Case 2001-028)

This final rule implements Executive Order 13221, of July 31, 2001, Energy-Efficient Standby Power Devices, by providing guidance on energy-efficient standby power devices. The rule also clarifies requirements for the purchase of recovered material. The requirements of this rule apply to contracting officers that purchase products that use external standby power devices or that contain an internal standby power function, and products that are composed of recovered material. Government contracting and technical personnel will need to ensure that proposed acquisitions comply with the Government preference for energy-efficient products.

Item III—Electronic Listing of Acquisition Vehicles Available For Use By More Than One Agency (FAR Case 2001-030)

This final rule provides the regulatory underpinning for the operation and use of an online directory to facilitate greater awareness of contracts available for multiple agency use. The rule—

1. Adds a new Subpart 5.6, Publicizing Multi-Agency Use Contracts, that—

(a) Provides the Internet address to access the database;

(b) Requires agencies to enter information into the database within ten days of award of a Governmentwide acquisition contract (GWAC), multi-agency contract, Federal Supply Schedule contract, or other procurement instrument intended for use by multiple agencies including blanket purchase agreements under Federal Supply Schedule contracts; and

(c) Requires contracting activities to enter information into the database by October 31, 2003, on all existing contracts and other procurement instruments intended for use by multiple agencies, except for those expiring on or before June 1, 2004.

2. Adds language at FAR 7.105(b)(1) to consider the sources contained in the database as prospective sources of supplies and services.

3. Adds language at FAR 10.002(b)(2)(iv) to encourage querying the database during market research for information relevant to agency acquisitions.

Item IV—Compensation Cost Principle (FAR Case 2001-0)

This final rule amends the FAR to revise the “compensation for personal services” cost principle by removing unnecessary and duplicative language and restructuring it. This rule is of particular interest to contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, indirect cost rates.

Item V—Leadership in Environmental Management (E.O. 13148) (FAR Case 2000-005)

This final rule provides policies and procedures for obtaining contractor information so that agencies can implement environmental management systems and complete facility compliance audits. The rule implements

Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management. The requirements of this rule apply to facilities owned or operated by Federal agencies, except those facilities located outside the United States and its outlying areas.

Item VI—Selling Cost Principle (FAR Case 2001-024)

This final rule amends the FAR to revise the “selling costs” cost principle by restructuring the paragraphs and removing unnecessary and duplicative language to increase clarity. The rule does not change the allowability of selling costs. The case was initiated at the request of the Aerospace Industries Association (AIA). This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

Item VII—Section 5 Micropurchase Exception Sunset Provision (FAR Case 2002-012)

The interim rule published in the **Federal Register** at 67 FR 80321, December 31, 2002, is converted to a final rule, without change, to extend the Electronic and Information Technology (Section 5) micropurchase exception to October 1, 2004.

Item VIII—Technical Amendments

These amendments update references and make editorial changes at FAR 19.1005 and 52.212-1.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

[FR Doc. 03-18541 Filed 7-23-03; 8:45 am]

BILLING CODE 6820-EP-P