



# Federal Register

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**Tuesday,  
January 3, 2006**

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## **Part III**

**Department of Defense  
General Services  
Administration**

**National Aeronautics and  
Space Administration**

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**48 CFR Chapter 1 et al.  
Federal Acquisition Regulations; Final  
Rules and Interim Rules**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2005–07; Introduction**

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

**ACTION:** Summary presentation of final and interim rules, and technical amendments.

**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) 2005–07. 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.acqnet.gov/far>.

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

**FOR FURTHER INFORMATION CONTACT:** 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 2005–07 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.acqnet.gov/far>. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

Item	Subject	FAR case	FAR Analyst
I	Transportation: Standard Industry Practices	2002–005	Parnell.
II	Common Identification Standard for Contractors(Interim)	2005–015	Jackson.
III	Change to Performance–based Acquisition	2003–018	Jackson.
IV	Free Trade Agreements–Australia and Morocco	2004–027	Marshall.
V	Deletion of the Very Small Business Pilot Program	2005–013	Cundiff.
VI	Purchases From Federal Prison Industries–Requirement for MarketResearch	2003–023	Nelson.
VII	Exception from Buy American Act for CommercialInformation Technology (Interim)	2005–022	Marshall.
VIII	Removal of Sanctions Against Libya	2005–026	Marshall.
IX	Elimination of Certain Subcontract NotificationRequirements	2003–024	Cundiff.
X	Annual Representations and Certifications–NAICSCCode/Size	2005–006	Zaffos.
XI	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 2005–07 amends the FAR as specified below:

**Item I—Transportation: Standard Industry Practices (FAR Case 2002–005)**

This final rule amends FAR Parts 1, 42, 46, 47, 52, and 53 to clarify and update the FAR coverage to reflect the latest changes to the Federal Management Regulation and statutes that require use of commercial bills of lading for domestic shipments. This final rule amends the FAR to—

- Move FAR Subpart 42.14, Traffic and Transportation Management, to FAR Part 47, Transportation;
- Delete the clauses at FAR 52.242–10 and FAR 52.242–11 and revise and relocate FAR clause 52.242–12 to FAR 52.247–68;
- Add definitions of “bill of lading,” “commercial bill of lading,” and “Government bill of lading” and clarify the usage of each term throughout FAR Part 47;
- Add definitions of “Government rate tenders,” “household goods,” “noncontiguous domestic trade,” and “released or declared value”;

- Require the use of commercial bills of lading for domestic shipments;
- Revise the references to “49 U.S.C. 10721” to read “49 U.S.C. 10721 and 13712” throughout FAR Part 47 to make it clear that Government rate tenders can be used in certain situations for the transportation of household goods by rail carrier (authorized by 49 U.S.C. 10721), as well as by motor carrier, water carrier, and freight forwarder (authorized by 49 U.S.C. 13712 and the definition of “carrier” at 49 U.S.C. 13102); and
- Update the fact that the Federal Motor Carrier Safety Administration prescribes commercial zones at 49 CFR 372 Subpart B.

**Item II—Common Identification Standard for Contractors (FAR Case 2005–015)**

This interim rule amends the FAR by addressing the contractor personal identification requirements in Homeland Security Presidential Directive (HSPD–12), “Policy for a Common Identification Standard for Federal Employees and Contractors,” and Federal Information Processing Standards Publication (FIPS PUB) Number 201, “Personal Identity Verification (PIV) of Federal Employees and Contractors.” The primary objectives of HSPD–12 are to establish a

process to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, Governmentwide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors.

**Item III—Change to Performance-based Acquisition (FAR Case 2003–018)**

This final rule amends the FAR by changing the terms “performance-based contracting (PBC)” and “performance-based service contracting (PBSC)” to “performance-based acquisition (PBA)” throughout the FAR; adding applicable PBA definitions of “Performance Work Statement (PWS)” and “Statement of Objectives (SOO)”, and describing their uses; clarifying the order of precedence for requirements; eliminating redundancy where found; modifying the regulation to broaden the scope of PBA and give agencies more flexibility in applying PBA methods to contracts and orders of varying complexity; and reducing the burden of force-fitting contracts and orders into PBA, when it is not appropriate.

**Item IV—Free Trade Agreements—Australia and Morocco (FAR Case 2004–027)**

This final rule converts the interim rule published at 69 FR 77870,

December 28, 2004, to a final rule with changes. It allows contracting officers to purchase the products of Australia without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements. The U.S. Trade Representative negotiated Free Trade Agreements with Australia and Morocco, which were scheduled to go into effect on or after January 1, 2005, according to Public Laws 108-286 and 108-302. However, the Morocco Free Trade Agreement has not yet entered into force and, therefore, the implementation of the Morocco Free Trade Agreement has been removed from the final rule. The Australian Free Trade Agreement joins the North American Free Trade Agreement (NAFTA) and the Chile and Singapore Free Trade Agreements which are already in the FAR. The threshold for applicability of the Australian Free Trade Agreement is \$58,550 (the same as other Free Trade Agreements to date).

**Item V—Deletion of the Very Small Business Pilot Program (FAR Case 2005-013)**

This final rule amends the FAR to delete the Very Small Business Pilot Program. Under the pilot program, contracting officers were required to set aside for very small business concerns certain acquisitions with an anticipated dollar value between \$2,500 and \$50,000. The Councils are removing the FAR coverage because the legislative authority for the program terminated on September 30, 2003. Acquisitions previously set aside for pilot program vendors will now be open to other small businesses.

**Item VI—Purchases From Federal Prison Industries—Requirement for Market Research (FAR Case 2003-023)**

This final rule converts the interim rule published in FAC 2001-21 at 69 FR 16148, March 26, 2004, and the interim rule published as Item I of FAC 2005-03 at 70 FR 18954, April 11, 2005, to a final rule with amendments at FAR 8.602 to clarify the applicability of the rule. The rule implements Section 637 of Division H of the Consolidated Appropriations Act, 2005. Section 637 provides that no funds made available under the Consolidated Appropriations Act for fiscal year 2005, or under any other Act for fiscal year 2005 and each fiscal year thereafter, shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency, pursuant to Governmentwide procurement

regulations issued pursuant to 41 U.S.C. 421(c)(1) that impose procedures, standards, and limitations of 10 U.S.C. 2410n.

**Item VII—Exception from Buy American Act for Commercial Information Technology (FAR Case 2005-022)**

This interim rule amends FAR 25.103 and FAR Subpart 25.11 to implement Section 517 of Division H, Title V of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447). Section 517 authorizes exemption from the Buy American Act for acquisitions of information technology that are commercial items. This applies only to the use of FY 2005 funds. This same exemption appeared last year in section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004 (Pub. L. 108-199). The FY 04 exemption was implemented through deviations by the individual agencies.

The interim rule is based on the estimation that the exemption of commercial information technology is likely to continue. If the exception does not appear in a future appropriations act, a prompt change to the FAR will be made to limit applicability of the exemption to the fiscal years to which it applies. The effect of this exemption is that the following clauses are no longer applicable in acquisition of commercial information technology:

- FAR 52.225-1, Buy American Act—Supplies.
- FAR 52.225-2, Buy American Act Certificate.
- FAR 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act.
- FAR 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Certificate.

This is because the Buy American Act no longer applies; and the Free Trade Agreement non-discriminatory provisions are no longer necessary, since all products now are treated without the restrictions of the Buy American Act.

**Item VIII—Removal of Sanctions Against Libya (FAR Case 2005-026)**

This final rule removes Libya from the list of prohibited sources at FAR Subpart 25.7 and the associated clause at 52.225-13, Restriction on Certain Foreign Purchases. Acquisitions of products from Libya may still be subject to restrictions of the Buy American Act, trade agreements, or other domestic source restrictions. The Department of State has not yet removed Libya from the list of state sponsors of terrorism.

**Item IX—Elimination of Certain Subcontract Notification Requirements (FAR Case 2003-024)**

This final rule converts, with minor changes, the Federal Acquisition Regulation (FAR) interim rule published in the **Federal Register** at 70 FR 11761, March 9, 2005. The rule impacts contractors with Department of Defense (DoD), National Aeronautics and Space Administration (NASA), or Coast Guard cost-reimbursement contracts and Government personnel who award and administer those contracts. The interim rule amended FAR 44.201-2, Advance Notification Requirements, and 52.244-2, Subcontracts, to implement Section 842 of the National Defense Authorization Act for Fiscal Year 2004, in Public Law 108-136. Section 842 removed the requirement under cost-reimbursement contracts with DoD, Coast Guard, and NASA for contractors to notify the agency before the award of any cost-plus-fixed-fee subcontract or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract if the contractor maintains a purchasing system approved by the contracting officer for the contract. The final rule makes two changes that resulted from one of the public comments. The final rule deletes Alternate I from FAR 44.204, Contract clauses for the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, and deletes the current Alternate I from 52.244-2, Subcontracts.

**Item X—Annual Representations and Certifications—NAICS Code/Size (FAR Case 2005-006)**

This final rule amends the FAR provision at 52.204-8 to provide a place for contracting officers to inform prospective offerors of the NAICS code and small business size standard applicable to the procurement.

**Item XI—Technical Amendments**

Editorial changes are made at FAR 9.203(b)(2), 11.102, 11.201(a), 11.201(b), 11.201(d)(2), 11.201(d)(3), 11.201(d)(4), 11.204(b), 25.1101(e)(2), and the provisions at 52.211-2 and 52.212-1 in order to update references.

The authority citation for FAR parts 27, 34, 38, 39, 43, 46, 48, and 50 is revised.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-07 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 FAC 2005-07 is effective February 2, 2006 except for Items II, IV, V, VI, VII, IX, X and XI which are effective January 3, 2006

Dated: December 21, 2005.

**Domenic C. Cipicchio,**

*Acting Director, Defense Procurement and Acquisition Policy.*

Dated: December 16, 2005.

**Roger D. Waldron,**

*Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.*

Dated: December 14, 2005.

**Tom Luedtke,**

*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*

[FR Doc. 05-24545 Filed 12-30-05; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 1, 42, 46, 47, 52, and 53

[FAC 2005-07; FAR Case 2002-005; Item I]

RIN 9000-AJ84

#### Federal Acquisition Regulation; Transportation: Standard Industry Practices

**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 changes to the Interstate Commerce Act, which abolished tariff-filing requirements for motor carriers of freight and the Interstate Commerce Commission (ICC). Also, the rule implements changes to the Federal Management Regulation that require use of commercial bills of lading for domestic shipments.

**DATES:** *Effective Date:* February 2, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501-4082. Please cite FAC 2005-07, FAR case 2002-005. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 4004, January 27, 2004, with request for comments. Thirteen comments from five respondents were received. A discussion of the comments is provided below. Consideration of these comments resulted in minor changes to the rule. In addition, editorial changes were made in the rule.

This final rule amends the FAR to implement changes to the Interstate Commerce Act. The Act has been substantially amended in recent years, most notably by the Trucking Industry Regulatory Reform Act of 1994 (Title II of Public Law 103-311), which abolished tariff-filing requirements for motor carriers of freight, and by the Interstate Commerce Commission (ICC) Termination Act of 1995 (Pub. L. 104-88), which abolished the ICC. Also, the rule implements changes to the Federal Management Regulation that require use of commercial bills of lading for domestic shipments. This rule amends the FAR to—

- Move FAR Subpart 42.14, Traffic and Transportation Management, to FAR Part 47, Transportation;
- Delete the clauses at FAR 52.242-10 and FAR 52.242-11 and revise and relocate FAR clause 52.242-12 to FAR 52.247-68;
- Add definitions of “bill of lading,” “commercial bill of lading,” and “Government bill of lading” and clarify the usage of each term throughout FAR Part 47;
- Add definitions of “Government rate tenders,” “household goods,” “noncontiguous domestic trade,” and “released or declared value”;
- Require the use of commercial bills of lading for domestic shipments;
- Revise the references to “49 U.S.C. 10721” to read “49 U.S.C. 10721 and 13712” throughout FAR Part 47 to make it clear that Government rate tenders can be used in certain situations for the transportation of household goods by rail carrier (authorized by 49 U.S.C. 10721), as well as by motor carrier, water carrier, and freight forwarder (authorized by 49 U.S.C. 13712 and the definition of “carrier” at 49 U.S.C. 13102);

- Update the fact that the Federal Motor Carrier Safety Administration prescribes commercial zones at 49 CFR Part 372, Subpart B; and

- Make other conforming and editorial changes to FAR Part 47 and related clauses.

##### B. Summary and Discussion of Public Comments

*Comment 1:* In reading the existing and proposed text of the clause at FAR 52.247-67 it is not clear that after the commercial bill of lading (CBL) is audited and the CBL is forwarded to the paying office for payment, who the paying office makes the check out to. Is it the shipper or is it the contractor for the supply contract that contains the clause at FAR 52.247-1, F.O.B. Origin?

*Councils’ response:* The Councils recommend no action in response to this comment. The intent of the FAR 52.247-67 revision was to change the title and include mandatory use of prepayment audits for transportation billings in respect to cost-reimbursable contracts. FAR 52.247-67 is not meant to address issues of payment. The intent of this clause is for contractors to submit CBLs to the contracting officer for a prepayment audit in excess of \$100 (threshold raised from \$50 to \$100) for cost-reimbursement. In this scenario, the “contractor” has already paid the “carrier.” The contractor submits the paid CBL to the contracting activity (fill-in completed by the contracting officer.) The agency makes a determination the transportation charges are valid, proper, and conform to related services with tariffs, quotations, agreements or tenders prior to contractor reimbursement. Previously, contractors were responsible for forwarding copies of freight bills/invoices, CBL’s passenger coupons, and supporting documents along with a statement to General Services Administration (GSA). The new process places the responsibility with the contracting activity to conduct CBL prepayment audit and forward original copies of paid freight bills/invoices, bills of lading, passenger coupons, and supporting documents as soon as possible following the end of the month in one package, for postpayment audit to GSA.

In response to the question “who is the check made out to?” It will always be the contractor, since the carrier is already paid; however, the mechanics of the check process is outside the scope of this clause. Also note the commentor’s reference to FAR clause 52.247-1, F.O.B. Origin. The clause title should read “Commercial Bill of Lading Notations.”

*Comment 2:* FAR clause 52.247-67 (GSA Commercial Transportation Bills of Lading) requires that all cost-type contractors compile and submit to the General Services Administration each month copies of all vouchers for travel (air and train coupons), freight charges, and even air express and local courier bills from primes and first-tier subcontracts. Commenter suggests deleting the clause or increasing the thresholds to avoid burdensome requirements on small business.

*Councils' response:* Nonconcur. The proposed change should alleviate some of the burden referred to by the commenter. The contractor no longer submits supporting documents to GSA but to the activity designated in the FAR clause at 52.247-67(a)(3). The passage of the Travel and Transportation Reform Act of 1998, Public Law 105-264, incorporated changes to the payment process of all transportation and related services invoices. By amending Title 31, United States Code, it establishes the requirements for prepayment audits of Federal agency transportation expenses. The FAR threshold is now raised for bills of lading with freight shipment charges exceeding \$100 from \$50. The Administrator of General Services has responsibility for exemptions as authorized by Public Law 105-264 and GSA will continue to monitor the established threshold, as appropriate. Paragraphs (b), (c) and (d) of the clause at 52.247-67, now called Submission of Transportation Documents for Audit, have been relocated to FAR 47.103-1, paragraphs (c), (d) and (e), with minor adjustments. The reason for this relocation is that the focus of responsibility for submission of these documents to GSA has changed from the contractor to the appropriate government agency.

*Comment 3:* FAR 47.101, Policies, paragraph (h), the Military Traffic Management Command had a name change. New name is Surface Deployment and Distribution Command (SDDC).

*Councils' response:* Concur. A change to the rule was made to show Military Surface Deployment and Distribution Command.

*Comment 4:* FAR 47.001, Definitions. Could you consider the term, Transportation Service Provider (TSP)? Since this is a term that GSA uses when referring to a "carrier".

*Councils' response:* Non-concur with using the term TSP for carrier. In the Federal Management Regulations, the term TSP was defined as "any party, person, agent or carrier that provides freight or passenger transportation, and related services to an agency." For a

freight shipment this would include packers, truckers, and storers. For passenger transportation this would include airlines, travel agents and travel management centers. The Councils took exception to this proposed change because they felt the terms were not synonymous. The term "carrier" when referring to a provider of air, land, or sea transportation has a specific legal connotation attached to it when used together, *i.e.*, "air carrier" or "common carrier." Although using the term "transportation service provider," may appear to simplify the term, it actually distorts and increases confusion to the real purpose associated with the term "carrier."

*Comment 5:* Commenter opposes the proposed amendments that (i) they give the impression that federal agencies must use bills of lading and rate tenders in procuring household goods transportation and related services instead of FAR-based procedures; and (ii) they fail to state a preference for utilizing FAR-based procurements in the acquisition of household goods transportation and related services. Commenter suggests the following change in the first paragraph of this Background statement, line 14, change "that require" to "regarding the" after amendments.

*Councils' Response:* Non-Concur. The Councils are not prepared to state an opinion that one method of obtaining transportation services is preferable over another. Discretion on which method is most advantageous is left to the judgment of the contracting officer.

*Comment 6:* Commenter suggests the following in the fifth bullet of this Background statement:

"insert the following after shipments 'where transportation services are acquired through the use of bills of ladings, tariffs and rate tenders as opposed to FAR-based contracting methods.'"

*Councils' Response:* Non-Concur. The Councils are not prepared to state an opinion that one method of obtaining transportation services is preferable over another. Discretion on which method is most advantageous is left to the judgment of the contracting officer.

*Comment 7:* Commenter suggests the following in the sixth bullet of the Background statement in the preamble, line 3, insert "while" before "government rate tenders" and insert after "49 U.S.C 12102", "the use of FAR-based contracting methods and procedures is preferred."

*Councils' Response:* Non-concur. The Councils are not prepared to state an opinion that one method of obtaining transportation services is preferable over another. Discretion on which method is

most advantageous is left to the judgment of the contracting officer.

*Comment 8:* Commenter suggests the following change to 47.000 Scope of Subpart (a)(2), (1) Line 10: insert the following after "49 U.S.C. 13712". "However, acquisition of transportation for household goods and related services should be accomplished through the FAR because of the benefits FAR-based procurements provide agencies over the use of "bills of lading."

*Councils' Response:* Non-concur. The Councils are not prepared to state an opinion that one method of obtaining transportation services is preferable over another. Discretion on which method is most advantageous is left to the judgment of the contracting officer.

*Comment 9:* Commenter suggests the following change to 47.000 Scope of Subpart (a)(2) Line 14: delete "this contract method is widely used and, therefore,"

*Councils' Response:* Non-concur. The Councils are not prepared to state an opinion that one method of obtaining transportation services is preferable over another. Discretion on which method is most advantageous is left to the judgment of the contracting officer.

*Comment 10:* 47.101 Policies paragraph (a) Line 1. Insert the following after domestic shipments, "where transportation services are acquired through the use of bills of ladings, tariffs and rate tenders as opposed to FAR-based contracting methods,"

*Councils' Response:* Non-Concur. No clarity added and is an incorrect/incomplete statement. Please note the CBL is the ordering document and can be used as such against any method, FAR or FAR-Exempt.

*Comment 11:* 47.101 Policies (b) Line 1. Insert the following before the "Where transportation services are acquired through the use of bills of ladings, tariffs and rate tenders as opposed to FAR-based contracting methods".

*Councils' Response:* Non-Concur. The Councils are not prepared to state an opinion that one method of obtaining transportation services is preferable over another. Discretion on which method is most advantageous is left to the judgment of the contracting officer.

*Comment 12:* The proposed rule says at 47.101 (a): "For domestic shipments, the contracting officer shall authorize shipments on commercial bills of lading (CBLs). Government bills of lading (GBLs) may be used for international or noncontiguous domestic trade shipments or when otherwise authorized." This requirement

continues throughout the coverage. DOD was mandated to use a data processing system called Power Track for transportations movements. Power Track is an automated system that provides all the necessary checks and balances occurring during a domestic transportation movement. Power Track does not provide or require the use of Commercial or Government Bills of Lading except for containerized and overseas shipments which in concurrence with Power Track utilize the Electronic Transportation Acquisition System (ETA). ETA produces a commercial Bill of Lading (BOL).

Commenter objects to the requirement to use BOLs for bulk domestic shipments. The documents have historically served three principal purposes: They are the carrier payment instrument, they document the shipment in terms of weight hauled by each carrier, and they satisfy the Hazardous Rules of the Department of Transportation (DOT) by carrying the Hazard Class and nomenclature. Commenter achieves all three purposes by using Power Track in concert with the Fuels Automated System (FAS). Additionally, commenter continues to use the required DD250 or DD1348 as is required.

At 47.103-1, the proposed coverage discusses the requirement to audit transportations services. Pre audit seems to be one of the objectives of the rule. Under Power Track, the issuing office and receiving office confirm matching deliveries prior to the request for any type of payment for all deliveries over \$1600.00. This pre audit could be extended to lower value deliveries if necessary.

As discussed above, there are instances when Commercial Bills of Lading are used by the commenter. Containerized and overseas shipments utilize the Electronic Transportation Acquisition (ETA) systems which generates a CBL and forwards it to the contractor. This system will not be expanded to include the greatest portion of CONUS transportation requirements. Eventually, a COTS system will replace ETA and at that time, it is expected that it will become commenter's policy to issue CBLs for all shipments.

*Councils' Response:* The Councils recommend no action for this comment. The respondent objects to the requirement to use the Bill of Lading (BOL) for bulk domestic shipments, suggesting that Power Track is their preferred vehicle and that DoD has mandated the use of Power Track. There is no inconsistency between the proposed FAR language and the DoD

mandate to employ Power Track. Specifically, Power Track is a financial system and does not negate the ability to use a BOL as the ordering document.

*Comment 13:* Clause 52.247-68 refers to explosives and poisons, classes A and B. In accordance with 49 CFR part 173 Transportation of Hazardous Materials: Paragraph 173.2, Subpart A, they are changed to Zones A, B, C or D based on their toxicity.

*Councils' Response:* Partially Concur. The Councils obtained further clarification from the Defense Energy Support Center (DESC) regarding the proposed change to the FAR clause at 52.247-68 that refers to explosives and poisons, classes A and B. In accordance with the CFR references noted above, classes A and B are replaced with classes 1, 2, and 6. Classes A and B are replaced with class 1, division 1.1, 1.2 and 1.3; class 2, division 2.3 and class 6, division 6.1. Previous classes A, B, and C refer to explosives and ammunition. Class A is 1.1 or 1.2; Class B is 1.2 or 1.3, Class C is 1.4. Poisons are Class 6 but also overlap with Class 2 gasses that can be explosive or poisonous. The gasses and poisons are limited to poisonous-by-inhalation (PIH) type.

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 rule only clarifies and updates the FAR coverage to reflect the latest changes of the referenced Federal Management Regulation and statutes that require use of commercial bills of lading for domestic shipments. Therefore, this rule will allow small businesses to use commercial practices in shipments thus eliminating the need for Government bills of lading on most transactions. Increasing the threshold for the submission of Transportation documents on cost reimbursement contracts to the agencies for audit from \$50 to \$100 decreases burden and offsets the increased burden of submission to agencies rather than a monthly submission to GSA.

### 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 1, 42, 46, 47, 52, and 53

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 42, 46, 47, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 42, 46, 47, 52, and 53 continues 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—

- a. Removing FAR segment “42.14” and its corresponding OMB Control Number “9000-0056”;
- b. Adding, in numerical order, FAR segment “47.208” and its corresponding OMB Control Number “9000-0056”;
- c. Removing FAR segment “52.242-12” and its corresponding OMB Control Number “9000-0056”; and
- d. Adding, in numerical order, FAR segment “52.247-68” and its corresponding OMB Control Number “9000-0056”.

### PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

#### Subpart 42.14—[Removed]

- 3. Remove and reserve Subpart 42.14.

### PART 46—QUALITY ASSURANCE

#### 46.314 [Amended]

■ 4. Amend section 46.314 by removing “49 U.S.C. 10721(b)(1)” and adding “49 U.S.C. 10721 or 13712” in its place.

### PART 47—TRANSPORTATION

■ 5. Amend section 47.000 by revising paragraph (a)(2) to read as follows:

#### 47.000 Scope of subpart.

- (a) \* \* \*
- (2) Acquiring transportation or transportation-related services by contract methods other than bills of

lading, transportation requests, transportation warrants, and similar transportation forms. Transportation and transportation services can be obtained by acquisition subject to the FAR or by acquisition under 49 U.S.C. 10721 or 49 U.S.C. 13712. Even though the FAR does not regulate the acquisition of transportation or transportation-related services when the bill of lading is the contract, this contract method is widely used and, therefore, relevant guidance on the use of the bill of lading is provided in this part (see 47.104).

\* \* \* \* \*

■ 6. Amend section 47.001 by adding, in alphabetical order, the definitions “Bill of lading”, “Government rate tender”, “Household goods”, “Noncontiguous domestic trade”, and “Released or declared value” to read as follows:

**47.001 Definitions.**

\* \* \* \* \*

*Bill of lading* means a transportation document, used as a receipt of goods, as documentary evidence of title, for clearing customs, and generally used as a contract of carriage.

(1) *Commercial bill of lading (CBL)*, unlike the Government bill of lading, is not an accountable transportation document.

(2) *Government bill of lading (GBL)* is an accountable transportation document, authorized and prepared by a Government official.

\* \* \* \* \*

*Government rate tender* under 49 U.S.C. 10721 and 13712 means an offer by a common carrier to the United States at a rate below the regulated rate offered to the general public.

*Household goods* in accordance with 49 U.S.C. 13102 means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is arranged and paid for by—

(1) The householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(2) Another party.

*Noncontiguous domestic trade* means transportation (except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste) subject to regulation by the Surface Transportation Board involving

traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States (see 49 U.S.C. 13102(15) and 13702).

*Released or declared value* means the assigned value of the cargo for reimbursement purposes, not necessarily the actual value of the cargo. Released value may be more or less than the actual value of the cargo. The released value is the maximum amount that could be recovered by the agency in the event of loss or damage for the shipments of freight and household goods.

■ 7. Revise section 47.002 to read as follows:

**47.002 Applicability.**

All Government personnel concerned with the following activities shall follow the regulations in Part 47 as applicable:

(a) Acquisition of supplies.

(b) Acquisition of transportation and transportation-related services.

(c) Transportation assistance and traffic management.

(d) Administration of transportation contracts, transportation-related services, and other contracts that involve transportation.

(e) The making and administration of contracts under which payments are made from Government funds for—

(1) The transportation of supplies;

(2) Transportation-related services; or

(3) Transportation of contractor personnel and their personal belongings.

■ 8. Amend section 47.101 by—

■ a. Redesignating paragraphs (a), (b), (c), (d), and (e) as (c), (d), (e), (f), and (g), respectively; and adding new paragraphs (a), (b), and (h); and

■ b. Amending newly designated paragraph (d)(2) introductory text by removing “subparagraph (b)(1) above” and adding “paragraph (d)(1) of this section” in its place.

■ The added text reads as follows:

**47.101 Policies.**

(a) For domestic shipments, the contracting officer shall authorize shipments on commercial bills of lading (CBL’s). Government bills of lading (GBL’s) may be used for international or noncontiguous domestic trade shipments or when otherwise authorized.

(b) The contract administration office (CAO) shall ensure that instructions to contractors result in the most efficient and economical use of transportation services and equipment. Transportation personnel will assist and provide transportation management expertise to the CAO. Specific responsibilities and details on transportation management

are located in the Federal Management Regulation at 41 CFR parts 102–117 and 102–118. (For the Department of Defense, DoD 4500.9–R, Defense Transportation Regulation.)

\* \* \* \* \*

(h) When a contract specifies delivery of supplies f.o.b. origin with transportation costs to be paid by the Government, the contractor shall make shipments on bills of lading, or on other shipping documents prescribed by Military Surface Deployment and Distribution Command (SDDC) in the case of seavan containers, either at the direction of or furnished by the CAO or the appropriate agency transportation office.

**47.102 [Amended]**

■ 9. Amend section 47.102 in paragraph (b) by removing “31 CFR parts 261 and 262” and adding “31 CFR parts 361 and 362” in its place.

■ 10. Revise section 47.103 and add sections 47.103–1 and 47.103–2 to read as follows:

**47.103 Transportation Payment and Audit Regulation.**

**47.103–1 General.**

(a)(1) Regulations and procedures governing the bill of lading, documentation, payment, and audit of transportation services acquired by the United States Government are prescribed in 41 CFR part 102–118, Transportation Payment and Audit.

(2) For DoD shipments, corresponding guidance is in DoD 4500.9–R, Defense Transportation Regulation, Part II.

(b) Under 31 U.S.C. 3726, all agencies are required to establish a prepayment audit program. For details on the establishment of a prepayment audit, see 41 CFR part 102–118.

(c) The agency designated in paragraph (a)(3) of the clause at 52.247–67 shall forward original copies of paid freight bills/invoices, bills of lading, passenger coupons, and supporting documents as soon as possible following the end of the month, in one package for postpayment audit to the General Services Administration, ATTN: FBA, 1800 F Street, NW., Washington, DC 20405. The specified agency shall include the paid freight bills/invoices, bills of lading, passenger coupons, and supporting documents for first-tier subcontractors under a cost-reimbursement contract. If the inclusion of the paid freight bills/invoices, bills of lading, passenger coupons, and supporting documents for any subcontractor in the shipment is not practicable, the documents may be forwarded to GSA in a separate package.

(d) Any original transportation bills or other documents requested by GSA shall be forwarded promptly. The specified agency shall ensure that the name of the contracting agency is stamped or written on the face of the bill before sending it to GSA.

(e) A statement prepared in duplicate by the specified agency shall accompany each shipment of transportation documents. GSA will acknowledge receipt of the shipment by signing and returning the copy of the statement. The statement shall show—

- (1) The name and address of the specified agency;
- (2) The contract number, including any alpha-numeric prefix identifying the contracting office;
- (3) The name and address of the contracting office;
- (4) The total number of bills submitted with the statement; and
- (5) A listing of the respective amounts paid or, in lieu of such listing, an adding machine tape of the amounts paid showing the Contractor's voucher or check numbers.

#### 47.103-2 Contract clause.

Complete and insert the clause at 52.247-67, Submission of Transportation Documents for Audit, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract or a first-tier cost-reimbursement subcontract thereunder will authorize reimbursement of transportation as a direct charge to the contract or subcontract.

■ 11. Revise sections 47.104 through 47.104-5 to read as follows:

#### 47.104 Government rate tenders under sections 10721 and 13712 of the Interstate Commerce Act (49 U.S.C. 10721 and 13712).

(a) This section explains statutory authority for common carriers subject to the jurisdiction of the Surface Transportation Board (motor carrier, water carrier, freight forwarder, rail carrier) to offer to transport persons or property for the account of the United States without charge or at "a rate reduced from the applicable commercial rate." Reduced rates are offered in a Government rate tender. Additional information for civilian agencies is available in the Federal Management Regulation (41 CFR parts 102-117 and 102-118) and for DoD in the Defense Transportation Regulation (DoD 4500.9-R).

(b) Reduced rates offered in a Government rate tender are authorized for transportation provided by a rail carrier, for the movement of household goods, and for movement by or with a water carrier in noncontiguous domestic trade.

(1) For Government rate tenders submitted by a rail carrier, a rate reduced from the applicable commercial rate is a rate reduced from a rate regulated by the Surface Transportation Board.

(2) For Government rate tenders submitted for the movement of household goods, "a rate reduced from the applicable commercial rate" is a rate reduced from a rate contained in a published tariff subject to regulation by the Surface Transportation Board.

(3) For Government rate tenders submitted for movement by or with a water carrier in noncontiguous domestic trade, "a rate reduced from the applicable commercial rate" is a rate reduced from a rate contained in a published tariff required to be filed with the Surface Transportation Board.

#### 47.104-1 Government rate tender procedures.

(a) 49 U.S.C. 10721 and 13712 rates are published in Government rate tenders and apply to shipments moving for the account of the Government on—

(1) Commercial bills of lading endorsed to show that total transportation charges are assignable to, and will be reimbursed by, the Government (see the clause at 52.247-1, Commercial Bill of Lading Notations); and

(2) Government bills of lading.

(b) Agencies may negotiate with carriers for additional or revised 49 U.S.C. 10721 and 13712 rates in appropriate situations. Only personnel authorized in agency procedures may carry out these negotiations. The following are examples of situations in which negotiations for additional or revised 49 U.S.C. 10721 and 13712 rates may be appropriate:

(1) Volume movements are expected.

(2) Shipments will be made on a recurring basis between designated places, and substantial savings in transportation costs appear possible even though a volume movement is not involved.

(3) Transit arrangements are feasible and advantageous to the Government.

#### 47.104-2 Fixed-price contracts.

(a) *F.o.b. destination.* 49 U.S.C. 10721 and 13712 rates do not apply to shipments under fixed-price *f.o.b.* destination contracts (delivered price).

(b) *F.o.b. origin.* If it is advantageous to the Government, the contracting officer may occasionally require the contractor to prepay the freight charges to a specific destination. In such cases, the contractor shall use a commercial bill of lading and be reimbursed for the direct and actual transportation cost as

a separate item in the invoice. The clause at 52.247-1, Commercial Bill of Lading Notations, will ensure that the Government in this type of arrangement obtains the benefit of 49 U.S.C. 10721 and 13712 rates.

#### 47.104-3 Cost-reimbursement contracts.

(a) 49 U.S.C. 10721 and 13712 rates may be applied to shipments other than those made by the Government if the total benefit accrues to the Government, *i.e.*, the Government shall pay the charges or directly and completely reimburse the party that initially bears the freight charges. Therefore, 49 U.S.C. 10721 and 13712 rates may be used for shipments moving on commercial bills of lading in cost reimbursement contracts under which the transportation costs are direct and allowable costs under the cost principles of Part 31.

(b) 49 U.S.C. 10721 and 13712 rates may be applied to the movement of household goods and personal effects of contractor employees who are relocated for the convenience and at the direction of the Government and whose total transportation costs are reimbursed by the Government.

(c) The clause at 52.247-1, Commercial Bill of Lading Notations, will ensure that the Government receives the benefit of lower 49 U.S.C. 10721 and 13712 rates in cost-reimbursement contracts as described in paragraphs (a) and (b) of this section.

(d) Contracting officers shall—

(1) Include in contracts a statement requiring the contractor to use carriers that offer acceptable service at reduced rates if available; and

(2) Ensure that contractors receive the name and location of the transportation officer designated to furnish support and guidance when using Government rate tenders.

(e) The transportation office shall—

(1) Advise and assist contracting officers and contractors; and

(2) Make available to contractors the names of carriers that provide service under 49 U.S.C. 10721 and 13712 rates, cite applicable rate tenders, and advise contractors of the statement that must be shown on the carrier's commercial bill of lading (see the clause at 52.247-1, Commercial Bill of Lading Notations).

#### 47.104-4 Contract clause.

(a) In order to ensure the application of 49 U.S.C. 10721 and 13712 rates, where authorized (see 47.104(b)), insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts when the contracts will be—

(1) Cost-reimbursement contracts, including those that may involve the



movement of household goods (see 47.104-3(b)); or

(2) Fixed-price f.o.b. origin contracts (other than contracts at or below the simplified acquisition threshold) (see 47.104-2(b) and 47.104-3).

(b) The contracting officer may insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts made at or below the simplified acquisition threshold when it is contemplated that the delivery terms will be f.o.b. origin.

#### 47.104-5 Citation of Government rate tenders.

When 49 U.S.C. 10721 and 13712 rates apply, transportation offices or contractors, as appropriate, shall identify the applicable Government rate tender by endorsement on bills of lading.

■ 12. Amend section 47.105 by revising the last sentence of paragraph (b) to read as follows:

#### 47.105 Transportation assistance.

\* \* \* \* \*

(b) \* \* \* Military transportation offices shall request needed additional aid from the Military Surface Deployment and Distribution Command (SDDC).

■ 13. Amend section 47.200 by revising paragraphs (b)(3), (d), and (e) to read as follows:

#### 47.200 Scope of subpart.

\* \* \* \* \*

(b) \* \* \*

(3) Household goods for which rates are negotiated under 49 U.S.C. 10721 and 13712. (These statutes do not apply in intrastate moves); or

\* \* \* \* \*

(d) The procedures in this subpart are applicable to the transportation of household goods of persons being relocated at Government expense except when acquired—

(1) Under the commuted rate schedules as required in the Federal Travel Regulation (41 CFR Chapter 302);

(2) By DoD under the DoD 4500.9-R, Defense Transportation Regulation; or

(3) Under 49 U.S.C. 10721 and 13712 rates. (These statutes do not apply in intrastate moves.)

(e) Additional guidance for DoD acquisition of freight and passenger transportation is in the Defense Transportation Regulation.

#### 47.201 [Amended]

■ 14. Amend section 47.201 by removing the definition “Household goods”.

#### 47.203 [Removed]

■ 15. Remove and reserve section 47.203.

#### 47.207-7 [Amended]

■ 16. Amend section 47.207-7 by removing from paragraph (b) “11707” (twice) and adding “11706” in its place.

■ 17. Amend section 47.207-9 by revising the last sentence of paragraph (a) to read as follows:

#### 47.207-9 Annotation and distribution of shipping and billing documents.

(a) \* \* \* See 41 CFR part 102-118, Transportation Payment and Audit.

\* \* \* \* \*

■ 18. Add sections 47.207-10 and 47.207-11 to read as follows:

#### 47.207-10 Discrepancies incident to shipments.

Discrepancies incident to shipment include overage, shortage, loss, damage, and other discrepancies between the quantity and/or condition of supplies received from commercial carrier and the quantity and/or condition of these supplies as shown on the covering bill of lading or other transportation document. Regulations and procedures for reporting and adjusting discrepancies in Government shipments are in 41 CFR parts 102-117 and 118. (For the Department of Defense (DoD), see DoD 4500.9-R, Defense Transportation Regulation, Part II, Chapter 210).

#### 47.207-11 Volume movements within the contiguous United States.

(a) For purposes of contract administration, a volume movement is—

(1) In DoD, the aggregate of freight shipments amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, to move during the contract period from one origin point for delivery to one destination point or area; and

(2) In civilian agencies, 50 short tons (100,000 pounds) in the aggregate to move during the contract period from one origin point for delivery to one destination point or area.

(b) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, shall report planned and actual volume movements in accordance with agency regulations. DoD activities report to the Military Surface Deployment and Distribution Command (SDDC) under DoD 4500.9-R, Defense Transportation Regulation. Civilian agencies report to the local office of GSA’s Office of Transportation (see [www.gsa.gov/](http://www.gsa.gov/)

*transportation* (click on Transportation Management Zone Offices in left-hand column, then click on Transportation Management Zones under Contacts on right-hand column).

■ 19. Add sections 47.208 through 47.208-2 to read as follows:

#### 47.208 Report of shipment (REPSHIP).

##### 47.208-1 Advance notice.

Military (and as required, civilian agency) storage and distribution points, depots, and other receiving activities require advance notice of shipments en route from contractors’ plants. Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. It facilitates arrangements for transportation control, labor, space, and use of materials handling equipment at destination. Also, timely receipt of notices by the consignee transportation office precludes the incurring of demurrage and vehicle detention charges.

##### 47.208-2 Contract clause.

The contracting officer shall insert the clause at 52.247-68, Report of Shipment (REPSHIP), in solicitations and contracts when advance notice of shipment is required for safety or security reasons, or where carload or truckload shipments will be made to DoD installations or, as required, to civilian agency facilities.

■ 20. Amend section 47.301-3 by—

■ a. Revising paragraph (a);

■ b. Removing from paragraph (b) “MILSTAMP” and adding “DoD 4500.9-R, Defense Transportation Regulation Part II” in its place; and

■ c. Revising paragraph (c)(1) to read as follows:

#### 47.301-3 Using the Defense Transportation System (DTS).

(a) All military and civilian agencies shipping, or arranging for the acquisition and shipment by Government contractors, through the use of military-controlled transport or through military transshipment facilities shall follow Department of Defense (DoD) Regulation DoD 4500.9-R, Defense Transportation Regulation Part II. This establishes uniform procedures and documents for the generation, documentation, communication, and use of transportation information, thus providing the capability for control of shipments moving in the DTS. DoD 4500.9-R, Defense Transportation

Regulation Part II has been implemented on a world-wide basis.

\* \* \* \* \*

(c) \* \* \*

(1) Effect DoD 4500.9-R, Defense Transportation Regulation Part II documentation and movement control, including air or water terminal shipment clearances; and

\* \* \* \* \*

■ 21. Amend section 47.303-1 by revising paragraphs (a)(4) and (b)(5)(v) to read as follows:

**47.303-1 F.o.b. origin.**

(a) \* \* \*

(4) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372).

(b) \* \* \*

(5) \* \* \*

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

\* \* \* \* \*

■ 22. Amend section 47.303-3 by revising paragraph (a)(1)(iv) to read as follows:

**47.303-3 F.o.b. origin, freight allowed.**

(a) \* \* \*

(1) \* \* \*

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

\* \* \* \* \*

■ 23. Amend section 47.303-4 by revising paragraph (a)(1)(iv) to read as follows:

**47.303-4 F.o.b. origin, freight prepaid.**

(a) \* \* \*

(1) \* \* \*

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

\* \* \* \* \*

■ 24. Amend section 47.303-5 by revising paragraph (a)(1)(iv); and in

paragraph (c) by removing "The contracting officer shall insert" and adding "Insert" in its place. The revised text reads as follows:

**47.303-5 F.o.b. origin, with differentials.**

(a) \* \* \*

(1) \* \* \*

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

\* \* \* \* \*

**47.303-13 [Amended]**

■ 25. Amend section 47.303-13 in paragraph (a) by removing "*C.&f. destination*" and adding "*C.&f. (cost & freight) destination*" in its place; and by removing from paragraph (c) "is c.&f. destination" and adding "is c.&f. (Cost & freight) destination" in its place.

**47.303-14 [Amended]**

■ 26. Amend section 47.303-14 in paragraph (a) by removing "*C.i.f. destination*" and adding "*C.i.f. (Cost, insurance, freight) destination*" in its place; and removing from paragraph (c) "C.i.f. Destination" and adding "C.i.f. (Cost, insurance, freight) Destination" in its place.

**47.303-15 [Amended]**

■ 27. Amend section 47.303-15 in paragraph (b)(3) by removing the word "Government".

**47.305-3 [Amended]**

■ 28. Amend section 47.305-3 in the first sentence of the introductory paragraph by removing ", and to 42.1404-2, where the use of bills of lading, parcel post, and indicia mail is prescribed".

**47.305-6 [Amended]**

■ 29. Amend section 47.305-6 by—  
 ■ a. Removing from the introductory text of paragraph (a)(3) "*c.&f. destination*" and adding "*c.&f. (cost & freight) destination*" in its place;  
 ■ b. Removing from the introductory text of paragraph (a)(4) "*c.i.f. destination*" and adding "*c.i.f. (cost, insurance, freight) destination*" in its place;  
 ■ c. Removing from paragraph (f)(1)(i) "MILSTAMP" and adding "DoD 4500.9-R, Defense Transportation Regulation, Part II," in its place;  
 ■ d. In paragraph (f)(1)(ii), revising the parenthetical to read "(see DoD 4500.9-R, Defense Transportation Regulation, Part II)"; and

■ e. Removing from paragraph (g) "(see MILSTAMP at 47.301-3)".

**47.305-9 [Amended]**

■ 30. Amend section 47.305-9 by removing from the first sentence of paragraph (a) "tariffs" and adding "the National Motor Freight Classification (NMFC) (for carriers) and the Uniform Freight Classification (UFC) (for rail)" in its place.

**47.305-13 [Amended]**

■ 31. Amend section 47.305-13 in paragraph (b)(3) by removing the last sentence.

**47.504 [Amended]**

■ 32. Amend section 47.504 in paragraph (a) by removing "of the Panama Canal Commission or".

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**52.212-5 [Amended]**

■ 33. Amend section 52.212-5 by revising the date of clause to read "(FEB 2006)" and removing from paragraphs (b)(35)(i) and (e)(1)(vii) of the clause "(APR 2003)" and "46 U.S.C. Appx 1241" and adding "(FEB 2006)" and "46 U.S.C. Appx 1241(b)", respectively, in its place.

**52.213-4 [Amended]**

■ 34. Amend section 52.213-4 by—  
 ■ a. By revising the date of clause to read "(FEB 2006)";  
 ■ b. Removing from paragraph (a)(2)(vi) of the clause "(DEC 2004)" and adding "(FEB 2006)" in its place;  
 ■ c. Removing from paragraph (b)(1)(xi) of the clause "(APR 2003)" and adding "(FEB 2006)" in its place; and  
 ■ d. Removing from paragraph (b)(2)(iii) of the clause "(JUNE 1988)" and adding "(FEB 2006)" in its place.

**52.242-10 [Removed]**

**52.242-11 [Removed]**

**52.242-12 [Removed]**

■ 35. Remove and reserve sections 52.242-10, 52.242-11, and 52.242-12.

**52.244-6 [Amended]**

■ 36. Amend section 52.244-6 by—  
 ■ a. By revising the date of clause to read "(FEB 2006)"; and  
 ■ b. Removing from paragraph (c)(1)(vi) of the clause "(APR 2003)" and adding "(FEB 2006)" in its place.

**52.246-14 [Amended]**

■ 37. Amend section 52.246-14 by removing from the prescription "49 U.S.C. 1072(b)(1)" and adding "49 U.S.C. 10721 or 13712" in its place.

**52.247-1 [Amended]**

■ 38. Amend section 52.247-1 by revising the date of the clause to read "(FEB 2006)"; and by removing the word "If" from the introductory paragraph of the clause and adding "When" in its place.

**52.247-3 [Amended]**

■ 39. Amend section 52.247-3 by—  
 ■ a. Revising the date of the clause to read "(FEB 2006)";  
 ■ b. Removing from the end of paragraph (a) of the clause "Interstate Commerce Commission" and adding "Federal Motor Carrier Safety Administration" in its place; and  
 ■ c. Removing from the second sentence of paragraph (b)(2) of the clause "(see 49 CFR 1048)" and adding "(see Subpart B of 49 CFR part 372)" in its place.  
 ■ 40. Amend section 52.247-29 by revising the date of the clause and paragraphs (a)(4) and (b)(5)(v) to read as follows:

**52.247-29 F.o.b. Origin.**

\* \* \* \* \*  
 F.O.B. ORIGIN (FEB 2006)  
 (a) \* \* \*

(4) If stated in the solicitation, to any Government designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372).

(b) \* \* \*  
 (5) \* \* \*

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

(End of clause)

■ 41. Amend section 52.247-30 by revising the date of the clause and paragraph (b)(5)(v) to read as follows:

**52.247-30 F.o.b. Origin, Contractor's Facility.**

\* \* \* \* \*  
 F.O.B. ORIGIN, CONTRACTOR'S FACILITY (FEB 2006)  
 \* \* \* \* \*

(b) \* \* \*  
 (5) \* \* \*

(v) Special instructions or annotations requested by the ordering agency for bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

(End of clause)

■ 42. Amend section 52.247-31 by revising the date of the clause and

paragraphs (a)(1)(iv) and (b)(5)(v) to read as follows:

**52.247-31 F.o.b. Origin, Freight Allowed.**

\* \* \* \* \*  
 F.O.B. ORIGIN, FREIGHT ALLOWED (FEB 2006)

(a) \* \* \*  
 (1) \* \* \*

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372; and

\* \* \* \* \*

(b) \* \* \*  
 (5) \* \* \*

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

\* \* \* \* \*

(End of clause)

■ 43. Amend section 52.247-32 by revising the date of the clause and paragraph (a)(1)(iv); removing the word "commercial" from the first sentence of the introductory text of paragraph (b)(5); and revising paragraph (b)(5)(v) to read as follows:

**52.247-32 F.o.b. Origin, Freight Prepaid.**

\* \* \* \* \*  
 F.O.B. ORIGIN, FREIGHT PREPAID (FEB 2006)

(a) \* \* \*  
 (1) \* \* \*

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

\* \* \* \* \*

(b) \* \* \*  
 (5) \* \* \*

(v) Special instructions or annotations requested by the ordering agency for bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government"; and

\* \* \* \* \*

(End of clause)

■ 44. Amend section 52.247-33 by revising the date of the clause and paragraphs (a)(1)(iv), (b)(5)(v), and the second sentence of (c)(2) to read as follows:

**52.247-33 F.o.b. Origin, with Differentials.**

\* \* \* \* \*

F.O.B. ORIGIN, WITH DIFFERENTIALS (FEB 2006)

(a) \* \* \*  
 (1) \* \* \*

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (the Federal Motor Carrier Safety Administration prescribes commercial zones at Subpart B of 49 CFR part 372); and

\* \* \* \* \*

(b) \* \* \*  
 (5) \* \* \*

(v) Special instructions or annotations requested by the ordering agency for bills of lading; e.g., "This shipment is the property of, and the freight charges paid to the carrier will be reimbursed by, the Government"; and

\* \* \* \* \*

(c)(1) \* \* \*

(2) \* \* \* If, at the time of shipment, the Government specifies a mode of transportation, type of vehicle, or place of delivery for which the offeror has set forth a differential, the Contractor shall include the total of such differential costs (the applicable differential multiplied by the actual weight) as a separate reimbursable item on the Contractor's invoice for the supplies.

\* \* \* \* \*

(End of clause)

**52.247-38 [Amended]**

■ 45. Amend section 52.247-38 by revising the date of the clause to read "(FEB 2006)"; and in paragraph (b)(2) of the clause by adding "or other transportation receipt" after the word "lading".

**52.247-43 [Amended]**

■ 46. Amend section 52.247-43 by revising the date of the clause to read "(FEB 2006)"; and removing from paragraph (b)(3) of the clause the word "Government".

**52.247-51 [Amended]**

■ 47. Amend section 52.247-51 by revising the date of Alternate I to read "(FEB 2006)"; and by removing from paragraph (a) "Military Traffic Management Command" and adding "Military Surface Deployment and Distribution Command (SDDC)" in its place.

■ 48. Amend section 52.247-52 by—  
 ■ a. Revising the date of the clause;  
 ■ b. Revising paragraphs (a)(3)(iv) and (a)(3)(v); and removing paragraph (a)(3)(vi);  
 ■ c. Removing "MILSTAMP" from paragraph (f)(1) of the clause and adding "transportation responsibilities under DoD 4500.9-R, Defense Transportation Regulation," in its place; and

■ d. Removing the word "commercial" from paragraphs (h)(1) and (h)(2) of the clause.

■ The revised and added text reads as follows:

**52.247-52 Clearance and Documentation Requirements—Shipments to DoD Air or Water Terminal Transshipment Points.**

\* \* \* \* \*  
CLEARANCE AND DOCUMENTATION REQUIREMENTS—SHIPMENTS TO DOD AIR OR WATER TERMINAL TRANSSHIPMENT POINTS (FEB 2006)

- (a) \* \* \*
- (3) \* \* \*
- (iv) Explosives, ammunition, poisons or other dangerous articles classified as class 1, division 1.1, 1.2, 1.3, 1.4; class 2, division 2.3; and class 6, division 6.1; or
- (v) Radioactive material, as defined in 49 CFR 173.403, class 7.

\* \* \* \* \*  
**52.247-64 [Amended]**

- 49. Amend section 52.247-64 by—
- a. Revising the date of the clause to read "(FEB 2006)";
- b. Removing from paragraph (e)(1) of the clause "of the Panama Canal Commission or";
- c. Revising the date of Alternate II to read "(FEB 2006)"; and
- d. Removing from paragraph (e)(1) of Alternate II "of the Panama Canal Commission or".
- 50. Revise section 52.247-67 to read as follows:

**52.247-67 Submission of Transportation Documents for Audit.**

As prescribed in 47.103-2, insert the following clause:

SUBMISSION OF TRANSPORTATION DOCUMENTS FOR AUDIT (FEB 2006)

(a) The Contractor shall submit to the address identified below, for prepayment audit, transportation documents on which the United States will assume freight charges that were paid—

- (1) By the Contractor under a cost-reimbursement contract; and
- (2) By a first-tier subcontractor under a cost-reimbursement subcontract thereunder.

(b) Cost-reimbursement Contractors shall only submit for audit those bills of lading with freight shipment charges exceeding \$100. Bills under \$100 shall be retained on-site by the Contractor and made available for on-site audits. This exception only applies to freight shipment bills and is not intended to apply to bills and invoices for any other transportation services.

(c) Contractors shall submit the above referenced transportation documents to—

\_\_\_\_\_  
\_\_\_\_\_  
*[To be filled in by Contracting Officer]*  
(End of clause)

■ 51. Section 52.247-68 is added to read as follows:

**52.247-68 Report of Shipment (REPSHIP).**

As prescribed in 47.208-2, insert the following clause:

REPORT OF SHIPMENT (REPSHIP) (FEB 2006)

- (a) *Definition. Domestic destination*, as used in this clause, means—
  - (1) A destination within the contiguous United States; or
  - (2) If shipment originates in Alaska or Hawaii, a destination in Alaska or Hawaii, respectively.
- (b) Unless otherwise directed by the Contracting Officer, the Contractor shall—

(1) Send a prepaid notice of shipment to the consignee transportation officer—

- (i) For all shipments of—
  - (A) Classified material, protected sensitive, and protected controlled material;
  - (B) Explosives and poisons, class 1, division 1.1, 1.2 and 1.3; class 2, division 2.3 and class 6, division 6.1;
  - (C) Radioactive materials requiring the use of a III bar label; or
- (ii) When a truckload/carload shipment of supplies weighing 20,000 pounds or more, or a shipment of less weight that occupies the full visible capacity of a railway car or motor vehicle, is given to any carrier (common, contract, or private) for transportation to a domestic destination (other than a port for export);

(2) Transmits the notice by rapid means to be received by the consignee transportation officer at least 24 hours before the arrival of the shipment; and

(3) Send, to the receiving transportation officer, the bill of lading or letter or other document containing the following information and prominently identified as a "Report of Shipment" or "REPSHIP FOR T.O."

REPSHIP FOR T.O. 81 JUN 01  
TRANSPORTATION OFFICER  
DEFENSE DEPOT, MEMPHIS, TN.

SHIPPED YOUR DEPOT 1981 JUN 1 540  
CTNS MENS COTTON TROUSERS, 30,240  
LB, 1782 CUBE, VIA XX-YY\*

IN CAR NO. XX 123456\*-BL\*\*\*-  
C98000031\*\*\*CONTRACT  
DLA ETA\*\*\*\*-JUNE 5 JONES &  
CO., JERSEY CITY, N.J.

\*Name of rail carrier, trucker, or other carrier.

\*\*Vehicle identification.

\*\*\*Bill of lading.

\*\*\*\*If not shipped by BL, identify lading document and state whether paid by contractor.

\*\*\*\*\*Estimated time of arrival.

(End of clause)

**PART 53—FORMS**

■ 52. Revise section 53.247 to read as follows:

**53.247 Transportation (U.S. Commercial Bill of Lading).**

The commercial bill of lading is the preferred document for the transportation of property, as specified in 47.101.

[FR Doc. 05-24546 Filed 12-30-05; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 4, 7, and 52**

[FAC 2005-07; FAR Case 2005-015; Item II]

RIN 9000-AK35

**Federal Acquisition Regulation; Common Identification Standard for Contractors**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to address the contractor personal identification requirements in Homeland Security Presidential Directive (HSPD-12), "Policy for a Common Identification Standard for Federal Employees and Contractors," and Federal Information Processing Standards Publication (FIPS PUB) Number 201, "Personal Identity Verification (PIV) of Federal Employees and Contractors."

**DATES:** *Effective Date:* January 3, 2006.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before March 6, 2006 to be considered in the formulation of a final rule.

*Applicability Date:* This rule applies to solicitations and contracts issued or awarded on or after October 27, 2005. Contracts awarded before that date requiring contractors to have access to a Federally controlled facility or a Federal

information system must be modified by October 27, 2007, pursuant to FAR subpart 4.13 in accordance with agency implementation of FIPS PUB 201 and OMB guidance M-05-24.

**ADDRESSES:** Submit comments identified by FAC 2005-07, FAR case 2005-015, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2005-015@gsa.gov](mailto:farcase.2005-015@gsa.gov). Include FAC 2005-07, FAR case 2005-015 in the subject line of the message.

- Fax: 202-501-4067.
- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAC 2005-07, FAR case 2005-015, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Michael Jackson, Procurement Analyst, at (202) 208-4949. Please cite FAC 2005-07, FAR case 2005-015. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Increasingly, contractors are required to have physical access to federally-controlled facilities and information systems in the performance of Government contracts. On August 27, 2004, in response to the general threat of unauthorized access to physical facilities and information systems, the President issued Homeland Security Presidential Directive (HSPD-12). The primary objectives of HSPD-12 are to establish a process to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, Governmentwide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors. In accordance with HSPD-12, the Secretary of Commerce issued on February 25, 2005, Federal Information Processing Standards Publication (FIPS

PUB) 201, Personal Identity Verification of Federal Employees and Contractors, to establish a Governmentwide standard for secure and reliable forms of identification for Federal and contractor employees. FIPS PUB 201 is available at <http://www.csrc.nist.gov/publications/fips/fips201/FIPS-201-022505.pdf>. The associated Office of Management and Budget (OMB) guidance, M-05-24, dated August 5, 2005, can be found at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-24.pdf>.

In accordance with requirements in HSPD-12, by October 27, 2005, agencies must—

(a) Adopt and accredit a registration process consistent with the identity proofing, registration and accreditation requirements in section 2.2 of FIPS PUB 201 and associated guidance issued by the National Institute for Standards and Technology. This registration process applies to all new identity credentials issued to contractors;

(b) Begin the required identity proofing requirements for all current contractors that do not have a successfully adjudicated investigation (*i.e.*, completed National Agency Check with Written Inquires (NACI) or other Office of Personnel Management or National Security community investigation) on record. (By October 27, 2007, identity proofing should be verified and completed for all current contractors);

(c) Complete and receive notification of results of the FBI National Criminal History Check prior to credential issuance;

(d) Include language implementing the Standard in applicable solicitations and contracts that require contractors to have access to a federally-controlled facility or access to a Federal information system; and

(e) Complete the applicable privacy requirements listed in section 2.4 of FIPS PUB 201 and the OMB guidance M-05-24.

The rule amends the FAR by—

- Adding the definitions “Federal information system” and “Federally-controlled facilities” at FAR 2.101;
- Adding Subpart 4.13, Personal Identity Verification of Contractor Personnel, to implement FIPS PUB 201 and the associated OMB guidance;
- Modifying the security considerations in FAR 7.105(b)(17) to require the acquisition plan to address the agency’s personal identity verification requirements for contractors when applicable;

- Adding FAR clause 52.204-9, Personal Identity Verification of Contractor Personnel, to require the contractor to comply with the personal

identity verification process for all affected employees in accordance with agency procedures identified in the contract.

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 changes may 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 all entities that hold contracts or wish to hold contracts that require their personnel to have access to Federally controlled facilities or information systems will be required to employ on Government contracts only employees who meet the standards for being credentialed and expend resources necessary to help employees fill out the forms for credentialing. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

#### INITIAL REGULATORY FLEXIBILITY ANALYSIS

##### FAR Case 2005-015

##### Common Identification Standard for Contractors

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603.

##### 1. Description of the reasons why the action is being taken.

This proposed rule implements Homeland Security Presidential Directive (HSPD-12), “Policy for a Common Identification Standard for Federal Employees and Contractors.” This directive requires agencies to adopt a Governmentwide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors. As required by the Directive, the Department of Commerce issued Federal Information Processing Standard Publication (FIPS PUB) 201. Consequently, the FAR must be revised to require solicitations and contracts include requirements that contractors who have access to federally-controlled facilities and information systems comply with the agency’s personal identify verification process. Failure to take action would expose the Government to unacceptable risk of harm to employees and assets.

##### 2. Succinct statement of the objectives of, and legal basis for, the rule.

This rule is being promulgated to ensure that Federal agencies consistently apply the requirements of HSPD-12 to Federal contracts. Consistency in an identification standard is cost effective and will improve the security of Government employees and assets.

FIPS PUB 201 states that the Personal Identity Verification (PIV) Registrar shall initiate a National Agency Check with Inquiries (NACI) on the applicant as required by Executive Order 10450. Any unfavorable results of the investigation shall be adjudicated to determine the suitability of the applicant for obtaining a PIV credential. When all of the requirements have been completed, the PIV Registrar notifies the sponsor and the designated PIV issuer that the applicant has been approved for the issuance of a PIV credential. Conversely, if any of the required steps are unsuccessful, the PIV Registrar shall send appropriate notifications to the same authorities.

**3. Description of and, where feasible, estimate of the number of small entities to which the rule will apply.**

This rule will apply to any contractor whose employees will have access to Federal facilities or information systems. A precise estimate of the number of small entities that fall within the rule is not currently feasible because it would include both contractors who perform in Government-owned space as well as those who perform in Government-leased space (including employees of the lessor and its contractors.)

**4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.**

The rule does not directly require reporting, recordkeeping or other compliance requirements within the meaning of the Paperwork Reduction Act (PRA). The rule does require that any entity, including small businesses that will be performing a contract that requires its employees to have access to Federal facilities or information systems, submit information on their employees. Such information will include a personnel history for each employee having access to a Federal facility or information system for a period exceeding 6 months. Although the forms involved are similar to a standard application for employment that is used by many companies, it is envisioned that some employers, especially those using non-skilled or semi-skilled laborers, will need to help their employees complete the form. It is estimated that each applicant will spend approximately 30 minutes completing the form.

**5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the rule.**

The Councils are unaware of any duplicative, overlapping or conflicting Federal rule. To the extent that there may be a duplicative, overlapping or conflicting Federal rule, the purpose of this rule is to establish a Federal standard that would eliminate such duplication, overlap or conflict.

**6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes**

**and which minimize any significant economic impact of the rule on small entities.**

There are no practical alternatives that will accomplish the objectives of HSPD-12.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 4, 7, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005-07, FAR case 2005-015), in correspondence.

**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.* Further, the OMB guidance, M-05-24, advises to collect information using only forms approved by OMB under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. ch. 35), where applicable. Departments and agencies are encouraged to use Standard Form 85, Office of Personnel Management Questionnaire for Non-Sensitive Positions (OMB No. 3206-0005), or the Standard Form 85P, Office of Personnel Management Questionnaire for Positions of Public Trust (OMB No. 3206-0005), when collecting information.

**D. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services Administration (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without opportunity for public comment. This action is necessary to implement HSPD-12 which directs agencies to require the use of identification by Federal employees and contractors that meets the Standard in gaining physical access to federally-controlled facilities and access to federally-controlled information systems no later than October 27, 2005. The issuance of this interim rule will not be the first time the public has seen and had a chance to comment on FIPS PUB 201 and HSPD-12. The Department of Commerce, National Institute of Standards and Technology, issued a

draft of FIPS PUB 201 on November 23, 2004, with comments due by December 23, 2004. Also, OMB issued a notice of Draft Agency Implementation Guidance for HSPD-12 on April 8, 2005, with comments due by May 9, 2005. HSPD-12 requires the development and agency implementation of a mandatory Governmentwide standard for secure and reliable forms of identification for both Federal employees and contractors. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 2, 4, 7, and 52**

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 7, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, and 52 continues 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 in paragraph (b)(2) by adding, in alphabetical order, the definitions "Federal information system" and "Federally-controlled facilities" to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

*Federal information system* means an information system (44 U.S.C. 3502(8)) used or operated by a Federal agency, or a contractor or other organization on behalf of the agency.

*Federally-controlled facilities* means—

(1)(i) Federally-owned buildings or leased space, whether for single or multi-tenant occupancy, and its grounds and approaches, all or any portion of which is under the jurisdiction, custody or control of a department or agency;

(ii) Federally-controlled commercial space shared with non-government tenants. For example, if a department or agency leased the 10<sup>th</sup> floor of a commercial building, the Directive applies to the 10<sup>th</sup> floor only; and

(iii) Government-owned, contractor-operated facilities, including laboratories engaged in national defense research and production activities.

(2) The term does not apply to educational institutions that conduct activities on behalf of departments or agencies or at which Federal employees are hosted unless specifically designated as such by the sponsoring department or agency.

\* \* \* \* \*

#### PART 4—ADMINISTRATIVE MATTERS

■ 3. Add Subpart 4.13, consisting of sections 4.1300 and 4.1301, to read as follows:

##### Subpart 4.13—Personal Identity Verification of Contractor Personnel

Sec.  
4.1300 Policy.  
4.1301 Contract clause.

##### 4.1300 Policy.

(a) Agencies must follow Federal Information Processing Standards Publication (FIPS PUB) Number 201, “Personal Identity Verification of Federal Employees and Contractors,” and the associated Office of Management and Budget (OMB) implementation guidance for personal identity verification for all affected contractor and subcontractor personnel when contract performance requires contractors to have physical access to a federally-controlled facility or access to a Federal information system.

(b) Agencies must include their implementation of FIPS PUB 201 and OMB guidance M–05–24, dated August 5, 2005, in solicitations and contracts that require the contractor to have physical access to a federally-controlled facility or access to a Federal information system.

(c) Agencies shall designate an official responsible for verifying contractor employee personal identity.

##### 4.1301 Contract clause.

The contracting officer shall insert the clause at 52.204–9, Personal Identity Verification of Contractor Personnel, in solicitations and contracts when contract performance requires contractors to have physical access to a federally-controlled facility or access to a Federal information system.

#### PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.105 by revising paragraph (b)(17) to read as follows:

##### 7.105 Contents of written acquisition plans.

\* \* \* \* \*

(b) \* \* \*

(17) *Security considerations.* For acquisitions dealing with classified matters, discuss how adequate security

will be established, maintained, and monitored (see Subpart 4.4). For information technology acquisitions, discuss how agency information security requirements will be met. For acquisitions requiring contractor physical access to a federally-controlled facility or access to a Federal information system, discuss how agency requirements for personal identity verification of contractors will be met (see Subpart 4.13).

\* \* \* \* \*

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 52.204–9 to read as follows:

##### 52.204–9 Personal Identity Verification of Contractor Personnel.

As prescribed in 4.1301, insert the following clause:

##### PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (JAN 2006)

(a) The Contractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive–12 (HSPD–12), Office of Management and Budget (OMB) guidance M–05–24, and Federal Information Processing Standards Publication (FIPS PUB) Number 201.

(b) The Contractor shall insert this clause in all subcontracts when the subcontractor is required to have physical access to a federally-controlled facility or access to a Federal information system.

(End of clause)

[FR Doc. 05–24547 Filed 12–30–05; 8:45 am]

BILLING CODE 6820–EP–S

#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

##### 48 CFR Parts 2, 7, 11, 12, 16, 37, and 39

[FAC 2005–07; FAR Case 2003–018; Item III]

RIN 9000–AK00

##### Federal Acquisition Regulation; Change to Performance-based Acquisition

**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) by changing the terms “performance-based contracting (PBC)” and “performance-based service contracting (PBSC)” to “performance-based acquisition (PBA)” throughout the FAR; adding applicable PBA definitions of “Performance Work Statement (PWS)” and “Statement of Objectives (SOO)” and describing their uses; clarifying the order of precedence for requirements; eliminating redundancy where found; modifying the regulation to broaden the scope of PBA and give agencies more flexibility in applying PBA methods to contracts and orders of varying complexity; and reducing the burden of force-fitting contracts and orders into PBA, when it is not appropriate. The title of the rule has also been changed to reflect the deletion of “service.”

**DATES:** *Effective Date:* February 2, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949. Please cite FAC 2005–07, FAR case 2003–018. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

##### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 43712 on July 21, 2004, to which 15 commenters responded. In addition, three respondents submitted comments in response to FAR Case 2004–004, Incentive for Use of Performance-Based Contracting for Services, that the Councils determined are more relevant to this FAR case. The major changes to the proposed rule that resulted from the public comments and Council deliberations are:

(1) *FAR 2.101 Definitions.* REVISED the definition of PBA to clarify its meaning.

(2) *FAR 2.101 Definitions.* REVISED the definition of PWS to clarify its meaning.

(3) *FAR 2.101 Definitions.* REVISED the definition of SOO to clarify its meaning.

(4) *FAR 7.103(r) Agency-head responsibilities.* DELETED “and, therefore, fixed-price contracts” from the statement “For services, greater use of performance-based acquisition methods and, therefore, fixed-price contracts \* \* \* should occur for follow-on acquisitions” because the Councils

believe the appropriate contract type is based on the level of risk and not the acquisition method.

(5) *FAR 11.101(a)(2) Order of precedence for requirements documents.* DELETED “or function” because the Councils concluded that the term “function” could be confused with “detailed design-oriented documents” at 11.101(a)(3) thus confusing the order of precedence for requirements documents.

(6) *FAR 16.505(a)(3) Ordering (IDIQ).* CHANGED “performance work statements must be used to the maximum extent practicable” to “performance-based acquisition methods must be used to the maximum extent practicable” since either a SOO or PWS can be used in the solicitation.

(7) *FAR 37.000 Scope of subpart.* ADDED “or orders” after “contracts” to clarify the Subpart applies to contracts and orders.

(8) *Various Subparts in Part 37.* CHANGED the terminology from “performance-based service acquisitions” to “performance-based acquisitions” since Part 37 only relates to service acquisitions.

(9) *FAR 37.102(e), Agency program officialsresponsibility.* ADDED a requirement that the agency program officials describe the need to be filled using performance-based acquisition methods to the maximum extent practicable to facilitate performance-based acquisitions.

(10) *FAR 37.601, Performance-based acquisitions.* General provisions as follows:

(a) REBASELINED the rule to the current baseline. Updated baseline used in the proposed rule to reflect the current FAR baseline.

(b) DELETED 37.601(a) of the proposed rule which stated the principal objectives of PBAs since the principal objectives are addressed in the definition.

(c) RELOCATED and revised the detailed provisions for performance standards to a new FAR section, 37.603, to permit expanded coverage. The Councils clarified the language to indicate that performance standards must be measurable and ADDED “method of assessing contractor performance” to the required elements of a PBA since the quality assurance surveillance plan is not a mandatory element and contractors should know how they will be assessed during contract performance.

(d) REVISED the performance incentives coverage to simply refer to the provisions at 16.402–2 since the only unique requirement for PBAs is the requirement that performance

incentives correspond to the performance standards.

(11) *FAR 37.602, Performance work statements:*

(a) In paragraph (b) REVERTED back to the existing FAR coverage with minor modifications because the Councils believe the prior coverage correctly detailed the requirements.

(b) In paragraph (c), REVISED SOO coverage to clarify that the SOO is a solicitation document and that performance objectives are the required results.

(12) *FAR 37.603, Performance standards.* ADDED coverage to clarify that performance standards must be measurable and structured to permit assessment of the contractor’s performance.

(13) *FAR 37.604, Quality Assurance:* (a) RETITLED the section to Quality Assurance Surveillance Plans to be consistent with FAR terminology.

(b) REVISED the coverage to simply refer to Subpart 46.4 since the same requirements apply for PBAs.

(c) ADDED coverage to clarify that the Government prepares the quality assurance surveillance plan when the solicitation uses a PWS and that contractors may be required to submit a quality assurance surveillance plan when the solicitation uses a SOO.

(14) *FAR 37.602–3, Selection procedures.* DELETED the coverage since there are no unique requirements for PBAs.

(15) *FAR 37.602–4, Contract type.* DELETED the coverage since there are no unique requirements for selecting contract type for PBAs.

(16) *FAR 37.602–5, Follow-on and repetitive requirements.* DELETED the coverage since there are no unique requirements for PBAs.

The Councils made changes based on the belief that performance-based acquisitions share many of the features of non-performance-based acquisitions. Only those features that are unique to PBA are set forth in subpart 37.6. Features that are similar, such as the Government’s ability to take deductions for poor performance or non-performance of contract requirements under the Inspections clause, were not included. Therefore, the absence of a specific authority in subpart 37.6 should not be construed as meaning that the authority does not exist under another part of the FAR.

#### Disposition of Public Comments

##### a. Definitions FAR 2.101.

*Comment(s):* Performance-Based Acquisition. One commenter said the definition of performance-based acquisitions is unclear, wordy and

obscure and that the demand for “clear, specific, and objective terms with measurable outcomes” was especially troublesome. The same commenter also said the definition appears to encompass both supplies and services and asked if “structuring all aspects” means “describing service requirements.” Another commenter said a performance-based service acquisition is a subset of performance-based acquisitions and recommended developing a separate definition for performance-based service acquisitions and deleting the last sentence from the definition of performance-based acquisitions. Another commenter recommended revising the definition to permit “objective or subjective terms” since 37.601(c)(2) clearly permits the use of subjective standards.

*Disposition:* The Councils revised the definition to state performance-based acquisition “means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.”

The Councils note the performance-based acquisition definition does encompass both supplies and services; however, the Councils do not believe a separate definition for performance-based service acquisitions is needed and believe adding a definition for performance-based service acquisition would necessitate a new definition for performance-based supply acquisition with the only difference being one definition would say “service” and the other would say “supply.”

*Comment(s):* Performance Work Statement (PWS). (a) One commenter recommended defining a PWS as “a statement of work that describes service requirements in terms of the results that the contractor must produce instead of the processes that it must use when performing.” The same commenter also questioned the difference between technical, functional, and performance characteristics and said it will be hard to implement the requirement for “clarity, specificity, and objectivity” at the working level “especially for long term contracts (one year or longer).” Another commenter recommended defining a PWS as “a statement that identifies the agency’s requirements in clear, specific, measurable, and objective terms that describe technical, functional, and performance characteristics” because many PWSs are vague and impossible to measure and the lack of measurable outcomes allows the Government to apply subjective judgment that may lead to unfair contractor penalties. Another commenter recommended changing the definition to specifically state that the



PWS is a type of SOW so that readers would understand that they are essentially the same type of document and replacing “objective terms that describe” with “that identifies the agency requirements in clear specific, outcome or results-based terms, and with specific deliverables and tasks identified”. The same commenter also questioned how to “describe a requirement objectively.”

*Disposition:* The Councils revised the definition to say “a statement of work for performance-based acquisitions that describes the required results in clear, specific, and objective terms with measurable outcomes.” The Councils believe the results must be described in “clear, specific, and objective terms” to ensure both parties understand the requirements. The Councils also agree that the outcomes must be measurable and revised the rule at FAR 37.602–2 (now 37.603) to require that performance standards be measurable and structured in a way to permit assessment of the contractor’s performance.

(b) One commenter said the “desired outcome and/or performance objectives” terminology at 37.601(d) for performance incentives was inconsistent with the definition of a performance work statement at 2.101.

*Disposition:* The Councils agree the terminology was inconsistent. Instead of revising the language, the Councils deleted that part of the coverage since performance incentives are covered at FAR 16.402–2. When performance incentives are used, the rule at 37.601(b)(3) requires that the performance incentives correspond to the performance standards set forth in the contract.

*Comment(s):* Statement of Objectives (SOO). One commenter said the proposed definition could lead requirements and contracting personnel to think that a contract need contain only a SOO instead of a PWS. Another commenter said the definition is so broad that it is meaningless. The same commenter questioned the meaning of “high-level” and recommended adding “as they relate to the instant procurement” after “key agency objectives.”

*Disposition:* The Councils revised 37.602 to clarify that the SOO is a Government prepared document for use in a solicitation that will form the basis for a PWS.

*Comment(s):* Quality Assurance Surveillance Plans. One commenter recommended adding a definition for quality assurance surveillance plan to be consistent with the July 2003

Interagency Task Force on Performance-Based Service Acquisition.

*Disposition:* Quality assurance surveillance plans are clearly addressed in FAR 46.401. The Councils are not aware of any issues related to the requirements in FAR 46.401. As these same requirements apply to Part 37, the Councils do not believe a new definition is necessary.

**b. Agency-head responsibilities, FAR 7.103(r).**

*Comment(s):* Three commenters said the assumption at 7.103(r) that greater use of performance-based service acquisitions methods and, therefore, fixed-price contracts should occur for follow-on acquisition was incorrect since the determination of appropriate contract type is based on level of risk and not the acquisition method, *i.e.*, performance-based service acquisitions.

*Disposition:* The Councils agree the appropriate contract type is based on the level of risk and not the acquisition method and revised the rule accordingly.

*Comment(s):* One commenter asked what checks are in place to ensure that agency heads actually prescribe procedures for ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies.

*Disposition:* Issues of compliance with the FAR are beyond the scope of this rulemaking. The Councils note that the Government Accountability Office and other agency auditing functions (*e.g.*, DoD Inspector General) have responsibility for assessing agency compliance with the established regulations.

**c. Content of written acquisition plans, FAR 7.105.**

*Comment(s):* One commenter recommended revising the rule at FAR 7.105 to require an explanation of the agency’s compliance with the order of precedence for requirement documents at Part 11.101(a).

*Disposition:* Contracting officers are required to document the choice of product or services description types used in the acquisition plan - see FAR 7.105(b)(6). Therefore, additional coverage is not needed.

*Comment(s):* One commenter said the requirement at FAR 7.105(b)(4)(i) to “provide rationale if a performance-based service acquisitions will not be used or if a performance-based service acquisitions is contemplated on other than a firm-fixed price basis” should be changed since determining the appropriate contract type is independent of the acquisition approach used.

*Disposition:* The Councils agree that determining contract type is independent of the acquisition method used; however, the Councils believe it is appropriate to document why performance-based acquisition methods and firm-fixed prices were not used given the statutory order of precedence reflected in FAR 37.102(a)(2). The Councils note that these provisions were not changed by this rule.

**d. Describing agency needs, FAR 11.101.** One commenter said the rule revised the order of precedence for requirements documents by elevating function-oriented documents above detailed design-oriented documents and other standards or specifications. The commenter also recommended adding example of PWS or SOO to clarify the performance and function-oriented documents.

*Disposition:* The Councils did not intend to change the order of precedence at FAR 11.101. The Councils added “function-oriented” to “performance-oriented” documents to attempt to differentiate between a PWS and a SOO. Based on this comment, and after further deliberation, the Councils concluded that the term “function” could be confused with “detailed design-oriented documents” thus potentially changing the order of precedence for requirements documents. To avoid further confusion, the Councils deleted the term “function-oriented.” The Councils also added examples of what is meant by a “performance-oriented document.”

**e. Types of contracts, FAR 16.505.**

One commenter said the rule at FAR 16.505(a)(3) that requires performance work statements to be used to the maximum extent practicable contradicts the reason for defining the SOO in the FAR. Another commenter said the provision should say performance-based service acquisitions must be used to the maximum extent possible instead of PWS since both PWS and SOO are acceptable alternative methods for solicitations.

*Disposition:* The Councils agree “performance-based acquisitions” not “performance work statements” should be used to the maximum extent practical and the rule was revised accordingly.

**f. Scope of Part 37.** One commenter recommended revising the rule at FAR 37.000 to reflect a “preference” instead of a “requirement” for the use of performance-based service acquisitions to be consistent with the statutory provisions.

*Disposition:* The Councils believe “requiring” performance-based acquisition methods to the maximum

extent practicable has the same meaning as the statutory "preference" for performance-based acquisition. The Councils note the provisions discussed above were not changed by this rule.

**g. Service contracts policy, FAR 37.102.** One commenter recommended revising the rule at FAR 37.102(a)(1) to say "performance work statements and quality assurance surveillance plans" instead of "performance-based service acquisition methods" because the term "performance-based service acquisitions methods" is needlessly vague.

*Disposition:* While performance work statements and quality assurance surveillance plans are important elements of performance-based acquisitions, they are not the only elements, e.g. SOO, performance standards. The Councils believe it would be redundant to list all of the elements of performance-based acquisition each time the term is used.

**h. Contracting officer responsibility**

**FAR 37.102.** One commenter recommended revising the rule at FAR 37.103(c) to clarify that the technical/program personnel initiating the procurement must provide input to the contracting officer to enable the contracting officer to ensure performance-based contracting is used to the maximum extent possible.

*Disposition:* DoD, GSA, and NASA agree that the program personnel initiating the procurement need to describe the need to be filled using performance-based acquisition methods and revised the rule accordingly. However, the Councils revised FAR 37.102(e) instead of FAR 37.103(c) as suggested by the commenter since agency program official responsibilities are described in FAR 37.102(e).

**i. Scope of subpart for performance-based service acquisition, FAR 37.600.**

One commenter recommended revising the rule at FAR 37.600 to specify that the subpart is applicable to "delivery" orders as well as "task" orders since performance-based service acquisitions are not limited to service acquisitions.

*Disposition:* While performance-based acquisitions encompass both supplies and services, the provisions in Part 37 only relate to contracts for services. Therefore, a reference to "delivery" orders in Part 37 is inappropriate because "delivery" orders are used to acquire supplies see FAR 16.501-1. The rule at FAR 37.000 has been revised to indicate that FAR Part 37 applies to orders for services, as well as contracts.

**j. General provisions for performance-based service acquisition, FAR 37.601.**

*Comment(s):* One commenter recommended revising the language at

FAR 37.601(a) of the proposed rule to say "describing the Government's requirements in terms of the results that the contractor must produce instead of the processes that it must use when performing" instead of "expressing the Government's needs in terms of required performance objectives and/or desired outcomes, rather than the method of performance."

*Disposition:* The Councils agree the requirements should be expressed in terms of the results the contractor is expected to achieve and revised the terminology throughout the rule.

*Comment(s):* One commenter said the rule ignores the provisions the Councils recently added to FAR 37.601(a) to implement Section 1431 of the Services Acquisition Reform Act of 2003 (SARA) which provided governmentwide authority to treat certain performance-based contracts or task orders for services as commercial items under certain circumstances.

*Disposition:* The commenter is addressing provisions the Councils added in FAR case 2004-004, Incentives for Use of Performance-Based Contracting for Services, which implemented sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004. That rule reorganized the existing provision at FAR 37.601 into a new paragraph (a) and added a new paragraph (b) which references FAR 12.102(g) for the use of Part 12 procedures for performance-based contracting. The Councils acknowledge the proposed rule did not properly reflect the changes made by FAR case 2004-004. The Councils have revised the rule to reflect the provisions added in FAR case 2004-004 modified to reflect the revised terminology, i.e., change performance-based contracting to performance-based acquisitions.

*Comment(s):* One commenter recommended changing the proposed rule at FAR 37.601(c)(1) to say a PBSA contract or order shall include "PWS or SOO."

*Disposition:* While solicitations can include either a PWS or a SOO, the resulting contract or order must include only a PWS. Therefore, the Councils did not revise the rule as recommended.

*Comment(s):* One commenter recommended replacing "measurable performance standards" with "clear performance standards." Another commenter recommended revising the rule to require use of commercial language and practices when establishing performance standards and measuring performance against standards. Another commenter suggested using the terms "quantitative" and "qualitative" in lieu of "objective"

and "subjective" because the terms are more appropriate and less open to misinterpretation. Another commenter said the rule addressed the critical element of measurable performance standards but recommended additional provisions to require the standards to be practicable, reliable, and valid and where feasible, use customary commercial language and practices.

*Disposition:* Performance standards must be measurable to enable assessment of the services performed. The Councils agree the performance standards can be quantitative or qualitative but believes it is not necessary to say so. As to using customary commercial language and practices, the Councils believe customary commercial language and practices may not always fully satisfy the Government's needs. Therefore, the Councils did not mandate their use; however, the Councils note nothing in the rule precludes their use.

*Comment(s):* Performance incentives, FAR 37.601.(a) One commenter said the rule eliminates the link between performance and payment since incentives and disincentives are now optional which means contractors can be paid in full when performance is less than acceptable as long as the Government describes its requirements objectively. Another commenter said that "to have a PBSC without incentives is to render the whole concept of measuring performance meaningless - especially if by default the only available remedy for sub par performance is termination for default." The same commenter also said the rule should use "damages" instead of "negative incentives" because the term "negative incentives" implies penalties that are not necessarily proportionate to the damage done to the Government. Another commenter said the "Inspections of Services" clauses dating from 1984 and 1993 mandate negative incentives and the proposed rule suggests that negative incentives are optional.

*Disposition:* The requirements for using performance incentives for performance-based acquisitions are no different than those for any other acquisition method, i.e., performance incentives should be used when the quality of performance is critical and the incentives will likely motivate the contractor's performance. As stated in FAR 16.402-2(a), the performance incentives should relate profit or fee to the results achieved by the contractor compared with the specified targets, i.e., the performance standards in the contract. The Councils note that performance incentives relate the

amount of profit or fee payable under the contract to the contractor's performance, not the Government's actual "damages", and that the term "negative incentives" is used in the provisions at FAR 16.402-2(b). Performance incentives, when included in a contract, are in addition to the Government's rights under the Inspection of Services clause. The Councils revised the rule to clarify that performance incentives for performance-based service acquisitions are the same as performance incentives for non-performance-based contracts.

(b) One commenter said the rule should refer to FAR Subpart 16.4 if other types of incentive such as cost incentives apply and recommended clarifying that performance incentives are not always needed for performance-based service acquisitions contracts.

*Disposition:* Incentives other than performance incentives may be appropriate for performance-based service acquisitions and the rule does not preclude the use of those other incentives. The rule addresses performance incentives because the Councils believe it is necessary to ensure that, when used, the performance incentives are tied to the performance standards specified in the performance work statement. The Councils agree that performance incentives are not always appropriate for performance-based service acquisitions and notes that the rule does not mandate their use, *i.e.*, the rule says "if used."

*Comment(s):* One commenter applauded the change to remove the requirement for price or fee reduction since the "Inspection of Services" clause gives the Government adequate recourse.

*Disposition:* The Councils agree that price or fee reduction flows from the inspection, warranty, and other clauses and that additional coverage is not needed in Part 37.

#### **k. Performance work statements and statements of objectives, FAR 37.602.**

*Comment(s):* One commenter recommended a more complete description of the SOO to clarify that the resulting PWS is included in the contract. Another commenter recommended using the language in the proposed rule at FAR 37.602-1(c) as the definition of a SOO in FAR 2.101 because the language at FAR 37.602-1(c) is clearer and more detailed and meaningful.

*Disposition:* The Councils revised the rule to clarify that a SOO is only used in the solicitation and that the resulting contract must include a PWS. The Councils also revised the definition of

SOO to clarify its meaning; however, the revised definition does not identify the elements of a SOO as suggested by the commenter because the Councils believe simply listing the elements would not adequately define the meaning of a SOO.

*Comment(s):* Another commenter recommended making the proposed coverage for performance work statements consistent with the definition at FAR 2.101 to avoid confusion.

*Disposition:* The final rule revises the wording of FAR 37.602(b) to emphasize that the purpose of the performance work statement is to express the results the Government desires.

*Comment(s):* One commenter said the Government is writing performance work statements with "100% of the time" as the target performance and the rule should address when 100 percent is appropriate, *e.g.*, for mission critical systems.

*Disposition:* Contracting officers and program personnel must have the flexibility to decide the appropriate level of performance based on the specifics of the acquisition. The Councils do not believe it is feasible or necessary to define when "100%" is the appropriate performance level.

*Comment(s):* One commenter said that while implied in the proposed rule at FAR 37.601(b) and 37.601(c), the rule does not specifically state that a PWS must be developed and incorporated into the contract or order when the solicitation includes a SOO.

*Disposition:* The Councils note that the proposed rule at FAR 37.601(c) and the final rule at FAR 37.601(b)(1) both require performance-based contracts, including orders, include a PWS; however, the final rule at FAR 37.602 clearly states that the SOO does not become part of the contract.

#### **l. Quality assurance surveillance plans, FAR 37.604**

*Comment(s):* One commenter recommended revising the rule to say quality assurance surveillance plans are internal government documents that should not be incorporated into contracts because the Government should not make its quality assurance plan contractually binding or disclose the plan to the contractor since unannounced inspections are often essential to sound quality assurance.

Two other commenters recommended making quality assurance surveillance plans mandatory elements of performance-based acquisition. One of the commenters also said the rule does not clearly state whether or not quality assurance surveillance plans are required and questioned whether the

quality assurance surveillance plans were required for non-performance-based acquisitions procurement.

*Disposition:* The Councils agree the FAR should not require inclusion of quality assurance surveillance plans in all performance-based acquisitions; however, the Councils believe there may be circumstances when it could be appropriate to include the quality assurance surveillance plans in the contract, *e.g.*, the quality assurance surveillance plans outlines the method of assessing contractor performance against the performance standards. The Councils note that nothing in the rule requires that the QASP be incorporated in the contract. While the Councils believe the FAR should not mandate inclusion of a quality assurance surveillance plans in all performance-based acquisitions, the Councils do believe all performance-based acquisitions should contain the method of assessing contractor performance against performance standards and the Councils revised the rule accordingly. Lastly, the Councils believe the quality assurance coverage in FAR Subpart 37.6 has led to significant confusion and notes that much of the quality assurance coverage in FAR Subpart 37.6 duplicates coverage in FAR Subpart 46.4, Government Contract Quality Assurance. As the same requirements apply to performance-based acquisitions, the Councils eliminated the duplicative coverage from FAR Subpart 37.6.

*Comment(s):* One commenter recommended replacing the term "desired outcomes" with "requirements" to be consistent with the definition of a performance work statement at FAR 2.101.

*Disposition:* The Councils agree the terminology was inconsistent with the performance work statement definition and the rule no longer uses the terminology.

*Comment(s):* One commenter recommended adding the responsibilities of the Government, including the responsibility to provide performance feedback to the contractor on a regular basis and in an objective fashion, to the rule.

*Disposition:* The Councils believe Government personnel notify contractors when they believe the contractors are not meeting the contract quality requirements in the contract; however, the contractor, not the Government, is responsible for meeting the contract quality requirements. As with any acquisition, the level of contract quality requirements and Government contract quality assurance surveillance will vary based on the

particular acquisition. In some cases, the quality assurance surveillance may be limited to inspection at time of acceptance.

*Comment(s):* One commenter recommended changing the title of FAR 37.602-2 from "Quality Assurance" to "Quality Assurance Surveillance Plan" (QASP) to be consistent with the "Seven Steps Guide" or changing the title to "Performance Management Plan" or "Performance-Based Management Plan" to ensure the plans do not become checklists to measure performance.

*Disposition:* The Councils renamed the section of the rule to "Quality Assurance Surveillance Plan" to be consistent with FAR terminology. The Councils do not understand how changing the title would ensure that the plans were not used as checklists.

#### **m. Selection procedures, FAR**

**37.602-3.** One commenter said requiring agencies to use competitive negotiations when appropriate suggests that competitive negotiations is better than other contracting methods when it comes to obtaining best value which seems to be inconsistent with the definition of best value in FAR 2.101 and 6.401(b).

*Disposition:* The Councils agree the rule was inconsistent with the definition of best value and the provisions at FAR 6.401 that permit use of competitive proposals when sealed bids are not appropriate. The Councils deleted the provisions at FAR 37.602-3 because they believe the competition requirements and best value are adequately addressed in FAR 6.401(b) and 2.101, respectively.

#### **n. Contract type and follow-on and repetitive requirements, FAR 37.602-4 and 37.602-5.**

One commenter said assuming that services that can be "defined objectively" lend themselves more readily to fixed pricing than other services, has no basis in contracting fact or theory. Another commenter recommended deleting the first sentence of the proposed FAR 37.602-4 because it is critical to continue to stress the importance of selecting a contract type that motivates a contractor to perform at optimal levels while complying with the order of precedence. Another commenter said contract type should not limit performance-based service acquisitions use. Another commenter said the proposed language at FAR 37.602-4 (Contract Type) and 37.602-5 (Follow-on and repetitive requirements) adds to the general misconception that fixed-price contracts or task orders go hand-in-hand with performance-based service acquisitions. The commenter recommended changing both references to say the type of contract or order

issued should be appropriate for the type of work to be performed.

*Disposition:* The Councils agree that the rationale for selecting the appropriate contract type for performance-based acquisitions is no different than the rationale for selecting the appropriate contract type for non-performance-based acquisitions. Fixed-price contracts are appropriate when the risk involved is minimal or can be predicted with an acceptable degree of certainty and a reasonable basis for firm pricing exists. While recognizing the statutory order of precedence at FAR 37.102(a)(2), nothing in the statutory order of precedence changes the rationale for selecting contract type. To avoid further confusion, the Councils eliminated the coverage from Subpart 37.6.

#### **o. General.**

*Comment(s):* One commenter expressed concern that the September 7, 2004, Office of Federal Procurement Policy (OFPP) memorandum, entitled "Increasing the Use of Performance-Based Service Acquisition," rescinded the 1998 OFPP "Guide to Best Practices for Performance-Based Service Contracting" without any suitable replacement. The commenter said the Seven Steps to PBSA Guide does not provide sufficient guidance to meet the demonstrated needs of the agencies and entire acquisition community. The commenter hopes the Services Contracting Center of Excellence required by the SARA will provide meaningful information to assist Federal agencies with their performance-based service acquisitions efforts.

*Disposition:* The OFPP memorandum, guide, and Acquisition Center of Excellence for Service Contracting are beyond the scope of the Councils. They note OFPP is working with an interagency team to incorporate current policy, regulations, and vetted samples into the Government-wide PBSA guide, Seven Steps to PBSA. The Councils sent this recommendation to OFPP for its consideration.

*Comment(s):* One commenter recommended repealing the term "performance-based contracting" because the rule does not clearly override the current FAR terminology.

*Disposition:* As detailed in the summary of the proposed rule in the **Federal Register**, the Councils are changing the term from "performance-based contracting" to "performance-based acquisition." Additionally, once the final rule is published, the FAR will no longer have a definition for performance-based contracting.

*Comment(s):* One commenter said that performance-based acquisitions is

broader than PBSC and could be used for more innovative ways of procurement but just changing the name will not get people to do more performance-based work. Another commenter said the proposed rule is a strong and needed step toward clarifying actions and responsibilities, especially in addressing definitions and acquisition planning. Another commenter commends the Councils on this proposed guidance particularly on the encouragement of fixed-price contracts.

*Disposition:* The Councils agree that simply changing the name will not increase the use of performance-based acquisition; however, the rule also clarifies performance-based terms and elements. The Councils intend these clarifications to help increase the use of performance-based acquisition. Also, they revised the rule to clarify that the rationale for determining contract type is no different for performance-based acquisition than any other acquisition. While the Councils encourage the use of fixed-price contracts whenever appropriate, the Councils do not encourage the use of fixed-price contracts when it is not appropriate (*i.e.*, too much risk or no reasonable basis for firm pricing).

*Comment(s):* One commenter said the rule should contain a strong statement to emphasize that performance-based contracting requires an end product or service that can be measured and that labor hour instruments are level-of-effort contracts with no definite deliverable.

*Disposition:* By definition, all contracts require delivery of supplies or performance of services. The deciding factor for performance-based acquisitions is whether or not the contract has measurable performance standards. The Councils believe that T&M/LH contracts can have measurable performance standards. Therefore, the rule does not preclude the use of T&M/LH contracts for performance-based acquisitions.

*Comment(s):* Two commenters recommended consistent use of "contract or order" throughout the entire proposed rule.

*Disposition:* The Councils do not believe it is necessary to state "or order" after each use of "contract," and to simplify the rule, the Councils identified orders in the Scope of part.

*Comment(s):* One commenter said use of the term "to the maximum extent practicable" is vague and will provide an easy way to avoid performance-based acquisitions.

*Disposition:* The Councils believe the term "to the maximum extent

practicable” provides Contracting Officers the appropriate flexibility to determine when performance-based acquisition methods should be used to fulfill the agency’s requirements.

*Comment(s):* One commenter said the rule does not address performance plans which are highlighted in AFI 63–124. The commenter also said the rule addresses contractor assessment but fails to address contract assessment and oversight which is required in Public Law 107–107. The Air Force uses a performance plan to document both contract and contractor assessment. Suggest you address contract oversight in this section.

*Disposition:* The requirements of Section 801 of Public Law 107–107 are unique to DoD. DoD unique requirements are addressed in the Defense Federal Acquisition Regulations and are beyond the scope of this rule.

*Comment(s):* One commenter stated “low-bid contracting” is valuable for purchasing services in the context of fair pre-qualification requirements and that the rule does not clearly provide for the two-step process. The commenter requested the Councils clarify when low-bid would be appropriate for performance-based acquisitions.

*Disposition:* The Councils assume the commenter is referring to sealed bidding procedures. Under those procedures, “low-bid” is only appropriate when the award will be based on price and price-related factors.

**p. The following comments were submitted under FAR case 2004–004, but pertain to this FAR case.**

*Comment(s):* One commenter recommended changing the term “quality assurance” with “performance assessment” in FAR 37.601(a)(2) to be consistent with DoD’s “Guidebook for Performance-Based Services Acquisitions.”

*Disposition:* Quality assurance is the term consistently used throughout the FAR to monitor contractor performance and to ensure compliance with contract requirements. The instructions contained in the referenced Guidebook pertain only to the Department of Defense.

*Comment(s):* One commenter suggested that the Councils move the reference to quality assurance surveillance plans from FAR 37.601(a)(2) and make it a new subparagraph (5) to emphasize the importance of quality assurance surveillance plans.

*Disposition:* See paragraph l for the discussion of changes to the rule for quality assurance surveillance plans.

*Comment(s):* One commenter recommended changing the language in

FAR 12.102(g)(1)(iv) to: “Includes appropriate quality assurance provisions (see 12.208)” instead of “includes a quality assurance surveillance plan.”

*Disposition:* The Councils deleted the requirement to include a quality assurance surveillance plan in the contract to be consistent with provisions in Part 37.

*Comment(s):* One commenter recommended revisions to FAR 37.601(a) to provide for additional flexibility when using performance-based contracts for services.

*Disposition:* FAR 37.601(a) was revised to provide clarification to agencies and the acquisition community on the use of performance-based service acquisitions techniques.

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 does not impose any costs on either small or large businesses.

## 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, 7, 11, 12, 16, 37, and 39

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 11, 12, 16, 37, and 39 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 11, 12, 16, 37, and 39 continues 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 in paragraph (b)(2) by removing the definition “Performance-based contracting” and adding, in alphabetical order, the definitions “Performance-based acquisition (PBA)”, “Performance Work Statement”, and “Statement of Objectives (SOO)” to read as follows:

### 2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

*Performance-based acquisition (PBA)* means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.

*Performance Work Statement (PWS)* means a statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes.

\* \* \* \* \*

*Statement of Objectives (SOO)* means a Government-prepared document incorporated into the solicitation that states the overall performance objectives. It is used in solicitations when the Government intends to provide the maximum flexibility to each offeror to propose an innovative approach.

\* \* \* \* \*

## PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.103 by revising paragraph (r) to read as follows:

### 7.103 Agency-head responsibilities.

\* \* \* \* \*

(r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based acquisition methods should occur for follow-on acquisitions.

\* \* \* \* \*

■ 4. Amend section 7.105 by—

■ a. Removing from the last sentence of the introductory text “contracting” and adding “acquisition” in its place;

■ b. Revising the last sentence in paragraph (b)(4)(i); and

■ c. Removing from paragraph (b)(6) “contracting” and adding “acquisition” in its place.

The revised text reads as follows:

### 7.105 Contents of written acquisition plans.

\* \* \* \* \*

(b) \* \* \*

(4) *Acquisition considerations.*

(i) \* \* \* Provide rationale if a performance-based acquisition

will not be used or if a performance-based acquisition for services is contemplated on other than a firm-fixed-price basis (see 37.102(a), 16.103(d), and 16.505(a)(3)).

\* \* \* \* \*

**PART 11—DESCRIBING AGENCY NEEDS**

■ 5. Amend section 11.101 by revising paragraph (a)(2) to read as follows:

**11.101 Order of precedence for requirements documents.**

(a) \* \* \*

(2) Performance-oriented documents (e.g., a PWS or SOO). (See 2.101.)

\* \* \* \* \*

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

**12.102 [Amended]**

■ 6. Amend section 12.102 in paragraph (g)(1)(iii) by removing “contracting” and adding “acquisition” in its place.

**PART 16—TYPES OF CONTRACTS**

■ 7. Amend section 16.505 by revising paragraph (a)(3) to read as follows:

**16.505 Ordering.**

(a) \* \* \*

(3) Performance-based acquisition methods must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a) and Subpart 37.6).

\* \* \* \* \*

**PART 37—SERVICE CONTRACTING**

■ 8. Amend section 37.000 by revising the second and third sentences to read as follows:

**37.000 Scope of part.**

\* \* \* This part applies to all contracts and orders for services regardless of the contract type or kind of service being acquired. This part requires the use of performance-based acquisitions for services to the maximum extent practicable and prescribes policies and procedures for use of performance-based acquisition methods (see Subpart 37.6). \* \* \*

■ 9. Amend section 37.102 by—

■ a. Removing from the first sentence of the introductory text of paragraph (a) “contracting” and adding “acquisition” in its place; and removing from the second sentence “contracts,” and adding “contracts or orders,” in its place;

■ b. Removing from paragraph (a)(1) “contracting” and adding “acquisition” in its place; and  
■ c. Adding a sentence to the end of paragraph (e) to read as follows:

**37.102 Policy.**

\* \* \* \* \*

(e) \* \* \* To the maximum extent practicable, the program officials shall describe the need to be filled using performance-based acquisition methods.

\* \* \* \* \*

**37.103 [Amended]**

■ 10. Amend section 37.103 by removing from paragraph (c) “contracting” and adding “acquisition” in its place.

■ 11. Revise Subpart 37.6 to read as follows:

**Subpart 37.6—Performance-Based Acquisition**

Sec.

37.600 Scope of subpart.

37.601 General.

37.602 Performance work statement.

37.603 Performance standards.

37.604 Quality assurance surveillance plans.

**37.600 Scope of subpart.**

This subpart prescribes policies and procedures for acquiring services using performance-based acquisition methods.

**37.601 General.**

(a) Solicitations may use either a performance work statement or a statement of objectives (see 37.602).

(b) Performance-based contracts for services shall include—

(1) A performance work statement (PWS);

(2) Measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and the method of assessing contractor performance against performance standards; and

(3) Performance incentives where appropriate. When used, the performance incentives shall correspond to the performance standards set forth in the contract (see 16.402–2).

(c) See 12.102(g) for the use of Part 12 procedures for performance-based acquisitions.

**37.602 Performance work statement.**

(a) A Performance work statement (PWS) may be prepared by the Government or result from a Statement of objectives (SOO) prepared by the Government where the offeror proposes the PWS.

(b) Agencies shall, to the maximum extent practicable—

(1) Describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101);

(2) Enable assessment of work performance against measurable performance standards;

(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

(c) Offerors use the SOO to develop the PWS; however, the SOO does not become part of the contract. The SOO shall, at a minimum, include—

(1) Purpose;

(2) Scope or mission;

(3) Period and place of performance;

(4) Background;

(5) Performance objectives, i.e., required results; and

(6) Any operating constraints.

**37.603 Performance standards.**

(a) Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable and structured to permit an assessment of the contractor’s performance.

(b) When offerors propose performance standards in response to a SOO, agencies shall evaluate the proposed standards to determine if they meet agency needs.

**37.604 Quality assurance surveillance plans.**

Requirements for quality assurance and quality assurance surveillance plans are in Subpart 46.4. The Government may either prepare the quality assurance surveillance plan or require the offerors to submit a proposed quality assurance surveillance plan for the Government’s consideration in development of the Government’s plan.

**PART 39—ACQUISITION OF INFORMATION TECHNOLOGY**

**39.104 [Amended]**

■ 12. Amend section 39.104 by removing from paragraph (b) “contract” and adding “acquisition” in its place.

[FR Doc. 05–24548 Filed 12–30–05; 8:45 am]

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 5, 6, 9, 12, 14, 17, 22, 25,  
and 52**

[FAC 2005-07; FAR Case 2004-027; Item IV]

RIN 9000-AK09

**Federal Acquisition Regulation; Free  
Trade Agreements—Australia and  
Morocco**

**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 to convert the interim rule published in the **Federal Register** at 69 FR 77870, December 28, 2004, to a final rule with changes. This rule implemented new Free Trade Agreements with Australia and Morocco as approved by Congress (Public Laws 108-286 and 108-302). These Free Trade Agreements were scheduled to become effective on or after January 1, 2005. However, the Moroccan Free Trade Agreement has not yet been implemented and is therefore removed from this final rule.

The rule also established a table of services excluded from the coverage of the various trade agreements, corrected the threshold for Canadian services, revised the list of Least Developed Countries, revised FAR terminology relating to international trade agreements and the Trade Agreements Act (TAA), and revised the FAR clauses that implement application of the Buy American Act (41 U.S.C. 10a, 10b, 10b-1, and 10c) and trade agreements to construction material.

**DATES:** *Effective Date:* January 3, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Kimberly A. Marshall, Procurement Analyst, at (202) 219-0986. Please cite FAC 2005-07, FAR case 2004-027. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**SUPPLEMENTARY INFORMATION:****A. Background**

The 60-day comment period on the interim rule ended February 28, 2005.

The Councils did not receive any public comments. However, the United States Trade Representative has informed the Councils that the Morocco Free Trade Agreement has not yet entered into force. Although the United States–Morocco Free Trade Agreement (Pub. L. 108-302) was enacted on August 17, 2004, entry into force on or after January 1, 2005, was conditioned on determination by the President that Morocco has taken certain measures necessary to bring it into compliance with certain provisions of the agreement. This determination has not been made, and implementation of the Morocco Free Trade Agreement is removed from 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.* Although the rule opens up Government procurement to the products of Australia and Caribbean Basin country construction material, this will not have any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401-70, and acquisitions that are set aside for small businesses are exempt. The Councils did not receive any comments relating to the Regulatory Flexibility Act.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000-0025, 9000-0130, and 9000-0141.

**List of Subjects in 48 CFR Parts 5, 6, 9,  
12, 14, 17, 22, 25, and 52**

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Accordingly, the interim rule amending 48 CFR parts 5, 6, 9, 12, 14, 17, 22, 25, and 52 which was published

at 69 FR 77870 on December 28, 2004, is adopted as a final rule with changes:

■ 1. The authority citation for 48 CFR parts 5, 6, 9, 12, 14, 17, 22, 25, and 52 continues 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 25—FOREIGN ACQUISITION****25.003 [Amended]**

■ 2. Amend section 25.003, in paragraph (2) of the definition “Designated country” and “Free Trade Agreement country” by removing “Morocco,”.

**25.400 [Amended]**

■ 3. Amend section 25.400 by—  
■ a. Adding in paragraph (a)(2)(iii) the word “and” at the end of the paragraph;  
■ b. Removing from the end of paragraph (a)(2)(iv) the word “and”; and  
■ c. Removing paragraph (a)(2)(v).

**25.401 [Amended]**

■ 4. Amend section 25.401 in paragraph (b), in the table, in the sixth column, in the heading, by removing the text “and Morocco”.

**25.402 [Amended]**

■ 5. Amend section 25.402 in paragraph (b), in the table, in the third row, by removing the entry “Morocco FTA” and its corresponding line items “175,000”, “175,000”, and “6,725,000”.

**25.1102 [Amended]**

■ 6. Amend section 25.1102 by removing from paragraph (c)(3) “, Chilean, or Moroccan” and adding “or Chilean” in its place.

**PART 52—SOLICITATION PROVISIONS  
AND CONTRACT CLAUSES****52.212-5 [Amended]**

■ 7. Amend section 52.212-5 by revising the date of the clause to read “(JAN 2006)”; and by removing from paragraphs (b)(24)(i) and (b)(25) “(JAN 2005)” and adding “(JAN 2006)” in its place.

**52.225-3 [Amended]**

■ 8. Amend section 52.225-3 by revising the date of the clause to read “(JAN 2006)”; and in paragraph (c) by removing “(except the Morocco FTA)”.

**52.225-5 [Amended]**

■ 9. Amend section 52.225-5 by revising the date of the clause to read “(JAN 2006)”; and in paragraph (a), in the definition “Designated country” by removing from paragraph (2) “Morocco,”.

**52.225-11 [Amended]**

■ 10. Amend section 52.225-11 by—

- a. Revising the date of the clause to read “(JAN 2006)”;
- b. In paragraph (a), in the definition “Designated country” by removing from paragraph (2) “Morocco,”; and
- c. In Alternate I by—
- 1. Revising the date of Alternate I to read “(JAN 2006)”;
- 2. Removing from the introductory paragraph “, Chilean, or Moroccan” and adding “or Chilean” in its place;
- 3. Removing from the definition “Australian, Chilean, or Moroccan construction material” “, Chilean, or Moroccan” and adding “or Chilean” in its place; and in paragraphs (1) and (2) by removing “, Chile, or Morocco” and adding “or Chile” in its place; and
- 4. Removing from paragraph (b)(1) “and Australian, Chilean, and Moroccan” and adding “, Australian or Chilean” in its place; and by removing from paragraph (b)(2) “, Chilean, or Moroccan” and adding “or Chilean” in its place.

#### 52.225–12 [Amended]

- 11. Amend section 52.225–12 by revising the date of Alternate II to read “(JAN 2006)”;
- and by removing from paragraphs (a), (d)(1) twice, and (d)(3) twice “, Chilean, or Moroccan” and adding “or Chilean” in its place.

[FR Doc. 05–24549 Filed 12–30–05; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 5, 12, 19, and 52

[FAC 2005–07; FAR Case 2005–013; Item V]

RIN 9000–AK36

#### Federal Acquisition Regulation; Deletion of the Very Small Business Pilot Program

**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 delete the Very Small Business Pilot Program. Under the pilot program, contracting officers were required to set-aside for very small

business concerns certain acquisitions with an anticipated dollar value between \$2,500 and \$50,000. The Councils removed the FAR provisions because the legislative authority for the program terminated on September 30, 2003.

**DATES:** *Effective Date:* January 3, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2005–07, FAR case 2005–013. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Very Small Business Pilot Program was established by Section 304 of the Small Business Administration Reauthorization and Amendments Act of 1994 (Public Law 103–403). Very small business concern means a small business concern whose headquarters is located within the geographic area served by a designated SBA district and which, together with its affiliates, has no more than 15 employees and has average annual receipts that do not exceed \$1 million. The purpose of the program was to improve access to Government contract opportunities for concerns that were substantially below the Small Business Administration’s size standards by reserving certain acquisitions for competition among such concerns. The Councils are removing the FAR provisions because the legislative authority for the program terminated on September 30, 2003.

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 Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

The Very Small Business Pilot Program was established by section 304 of Public Law 103–403, codified as a Note to the Small Business Act, “15 USC 644 Note” and was extended by Section 503 of Public Law 106–554 until September 30, 2003. The program has expired. Therefore, the Federal Acquisition Regulation is amended to reserve Subpart 19.9, Very Small Business Pilot Program, and delete other references to the program throughout the FAR. The changes will have an economic impact on a small number of small entities within the meaning

of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the law required contracting officers to set-aside for very small business concerns acquisitions with an anticipated dollar value exceeding \$2,500 but not greater than \$50,000 if the contracting office is located within the geographical area served by a designated SBA district (for supplies), or in the case of an acquisition for services, the contract will be performed within the geographical area served by a designated SBA district; and there is a reasonable expectation of obtaining offers from two or more responsible very small business concerns in the designated areas.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

##### 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 5, 12, 19, and 52

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 12, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 12, 19, and 52 continues 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

##### 5.207 [Amended]

■ 2. Amend section 5.207 by removing paragraph (c)(18) and redesignating paragraph (c)(19) as (c)(18); and by removing from paragraph (d) “very small business set-aside,”.

#### PART 12—ACQUISITION OF COMMERCIAL ITEMS

##### 12.303 [Amended]

■ 3. Amend section 12.303 by removing from paragraph (b)(1) “, or set-aside for very small business concerns”.

#### PART 19—SMALL BUSINESS PROGRAMS

##### 19.000 [Amended]

■ 4. Amend section 19.000 by removing from paragraph (a)(10) “The Very Small



Business Pilot Program;" and adding "[Reserved]" in its place.

#### 19.001 [Amended]

■ 5. Amend section 19.001 by removing the definition "Very small business concern".

#### 19.102 [Amended]

■ 6. Amend section 19.102 by removing paragraph (g) and redesignating paragraph (h) as paragraph (g).

#### 19.502-2 [Amended]

■ 7. Amend section 19.502-2 by removing from the first sentence of paragraph (a) "Except for those acquisitions set aside for very small business concerns (see Subpart 19.9), each" and adding "Each" in its place.

#### Subpart 19.9—[Removed]

■ 8. Subpart 19.9 is removed and reserved.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(4) of the clause to read as follows:

#### 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS  
REQUIRED TO IMPLEMENT STATUTES OR  
EXECUTIVE ORDERS—COMMERCIAL  
ITEMS (JAN 2006)

\* \* \* \* \*

(b) \* \* \*

(4) [Removed]

\* \* \* \* \*

#### 52.219-5 [Removed]

■ 10. Section 52.219-5 is removed and reserved.  
[FR Doc. 05-24550 Filed 12-30-05; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8, 19, 25, 42, and 52

[FAC 2005-07; FAR Case 2003-023; Item VI]

RIN 9000-AJ91

#### Federal Acquisition Regulation; Purchases From Federal Prison Industries—Requirement for Market Research

**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 Section 637 of Division H of the Consolidated Appropriations Act, 2005. Section 637 provides that no funds made available under the Consolidated Appropriations Act for fiscal year 2005, or under any other Act for fiscal year 2005 and each fiscal year thereafter, shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

**DATES:** *Effective Date:* January 3, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. The TTY Federal Relay Number for further information is 1-800-877-8973. Please cite FAC 2005-07, FAR case 2003-023. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 637 of Division H of the Consolidated Appropriations Act, 2005 (Public Law 108-447) provides that none of the funds made available under that or any other Act for fiscal year 2005 and each fiscal year thereafter shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc. (FPI), unless the agency making the purchase determines that the offered product or service provides

the best value to the buying agency pursuant to Governmentwide procurement regulations issued pursuant to 41 U.S.C. 421(c)(1) that impose procedures, standards, and limitations of 10 U.S.C. 2410n. Section 637 of Division F of the Consolidated Appropriations Act, 2004 (Public Law 108-199), contained a similar requirement that applied only to fiscal year 2004 funds.

DoD, GSA, and NASA published an interim rule in the *Federal Register* at 70 FR 18954, April 11, 2005, with a request for comments. Five respondents submitted comments. A discussion of the comments is provided below. As a result of comment 1 below, the final rule contains changes at FAR 8.602 to clarify that the requirements of the rule do not apply to items for which FPI has eliminated its mandatory source status.

1. *Comment:* In the preamble to the interim rule published on April 11, 2005, the response to Comment 3 states that, if an agency chooses to make a purchase at or below \$2,500 from FPI, the agency must first conduct market research to comply with Section 637 of Public Law 108-447. This is inconsistent with the statement under SUPPLEMENTARY INFORMATION that FAR 8.602(b) (market research) does not apply to the purchase of any service or item of supply that FPI has been authorized by its Board of Directors to offer exclusively on a competitive (non-mandatory) basis. Since the FPI Board of Directors has eliminated its mandatory source status for purchases of \$2,500 or less, it would logically follow that purchases from FPI up to \$2,500 should also be exempt from market research requirements.

*Councils' response:* The Councils agree that the rule should provide equal treatment for all items for which FPI has eliminated its mandatory source status. The final rule amends FAR 8.602 to state that its procedures do not apply to the "non-mandatory" items identified in FAR 8.605(b)-(g). These items, therefore, will be acquired using the policies and procedures otherwise specified in the FAR.

2. *Comment:* There appears to be confusion as to whether the requirement for market research applies to services as well as supplies provided by FPI. This confusion stems from the inclusion of FPI as a mandatory source at FAR 8.002(a), which applies to both supplies and services.

*Councils' response:* FPI is not a mandatory source for services and, therefore, market research in accordance with FAR 8.602(b) is not required for services, as indicated at FAR 8.602(c). This is consistent with the order of

priorities at FAR 8.002(a)(2), which places FPI on an equal footing with commercial sources with regard to services. The policy at FAR 8.002(a)(1), which lists FPI as a mandatory source, applies only to supplies.

3. *Comment:* There may be a need in the future to provide more clarification of the definition of the term “comparability” and to further emphasize that the competitive solicitation process must occur after completion of the required comparability determination; and only in cases where FPI is deemed to be not comparable. FPI is still seeing instances where agencies are inappropriately combining comparability determinations with competitive procedures.

*Councils’ response:* Further clarification of these issues is considered unnecessary at this time. However, as suggested by the respondent, the Councils will re-evaluate the need for clarification in the future if implementation problems persist.

4. *Comment:* While FAR 8.607 prohibits agencies from requiring a contractor to use FPI as a subcontractor, this language cannot be interpreted to circumvent an agency’s obligation where a product made by FPI could be used in a project if it is deemed to be comparable. Regardless of whether the product is provided to the agency directly or indirectly, the same comparability determination and competitive procedures are required any time products offered for sale by FPI are purchased by or for Government agencies.

*Councils’ response:* Do not agree that the comparability determination and competitive procedures of FAR 8.602(b) are required any time products offered for sale by FPI are purchased for the Government. 10 U.S.C. 2410n (e) specifically prohibits the Government from requiring a contractor to use FPI as a subcontractor or supplier. The rule is clear with regard to an agency’s obligation when purchasing FPI products directly. Purchasing items through a prime contractor merely to circumvent the requirements of the rule clearly would be inappropriate. Therefore, it is the responsibility of the acquiring agency to ensure compliance with the requirements of the rule if the acquisition involves items of supply on FPI’s Schedule.

5. *Comment:* FPI should not be permitted to participate in small business set-asides.

*Councils’ response:* FPI may participate in small business set-asides in only those situations where an FPI

“mandatory” item has been found to be non-comparable to private sector items and the subsequent competition is limited to FPI and small business concerns. This policy is actually intended to *increase* opportunities for small business concerns since (1) prior to this policy, FPI was the sole source provider of items that are now being acquired competitively; and (2) given the current statutory requirement to include FPI in the competition if an FPI item is determined to be non-comparable to private sector items, the alternative to FPI’s participation in a small business set-aside would be an unrestricted (non-set-aside) competition that includes FPI.

6. *Comment:* In FAR 8.601(e), remove “and services” from the statement “Agencies are encouraged to purchase FPI supplies and services to the maximum extent practicable.” FPI does not have mandatory source status for services, nor has it ever been given the statutory right to branch out into services.

*Councils’ response:* The rule makes it clear that FPI is not a mandatory source for services. The statement at 8.601(e) is consistent with the policy previously included at FAR 8.602(b), which encouraged agencies to use the facilities of FPI to the maximum extent practicable in purchasing both supplies and services. This text was inadvertently excluded from the revision to FAR Subpart 8.6 published at 69 FR 16147 on March 26, 2004, and was reinstated in the interim rule published on April 11, 2005.

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 Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

The rule implements the Consolidated Appropriations Act, 2005, Division H, Section 637 (Public Law No: 108-447). The Act imposes the procedures, standards, and limitation of 10 U.S.C. 2410n on all federal agencies. 10 U.S.C. 2410n requires market research before purchasing a product listed in the Federal Prison Industries catalog, to determine whether the FPI product is comparable to products available from the private sector that best meet the agency’s needs in terms of price, quality, and time of delivery. If the FPI product is not comparable, the agency must use competitive procedures to acquire the product or must

make an individual purchase under a multiple award contract. In conducting such a competition or making such a purchase, the agency must consider a timely offer from FPI.

The rule is expected to benefit small business concerns that offer products comparable to those listed in the FPI catalog, by permitting those concerns to compete for federal contract awards. However, the rule could also have a negative impact on those small business concerns that supply goods or services to FPI.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## 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 8, 19, 25, 42, and 52

Government procurement.

Dated: December 22, 2005.

Gerald Zaffos,

Director, Contract Policy Division.

■ Interim Rule Adopted as Final with Changes

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 8, 19, 42, and 52, which was published in the **Federal Register** at 69 FR 16148, March 26, 2004, and the interim rule amending 48 CFR parts 8 and 25, which was published in the **Federal Register** at 70 FR 18954, April 11, 2005, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 8, 19, 25, 42, and 52 continues 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 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Amend section 8.602 by—

- a. Removing paragraph (a);
- b. Redesignating paragraphs (b), (c), (d), and (e) as (a), (b), (c), and (d) respectively;
- c. Revising the introductory text of the newly designated paragraph (a);
- d. Revising the newly designated paragraph (b);
- e. Removing from the newly designated paragraph (c)(2) “paragraph (b)” and adding “paragraph (a)” in its place; and
- f. Removing from the newly designated paragraph (d) “paragraph

(b)(1)” and adding “paragraph (a)(1)” in its place.

■ The revised text reads as follows:

#### 8.602 Policy.

(a) In accordance with 10 U.S.C. 2410n and Section 637 of Division H of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447), and except as provided in paragraph (b) of this section, agencies shall—

\* \* \* \* \*

(b) The procedures in paragraph (a) of this section do not apply if an exception in 8.605(b) through (g) applies.

\* \* \* \* \*

#### 8.605 [Amended]

■ 3. Amend section 8.605 by removing from paragraph (a)(2) “8.602(b)(4)” and adding “8.602(a)(4)” in its place.

### PART 19—SMALL BUSINESS PROGRAMS

#### 19.504 [Amended]

■ 4. Amend section 19.504 by removing “8.602(b)(4)” and adding “8.602(a)(4)” in its place.

[FR Doc. 05–24551 Filed 12–30–05; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 25

[FAC 2005–07; FAR Case 2005–022; Item VII]

RIN 9000–AK34

### Federal Acquisition Regulation; Exception from Buy American Act for Commercial Information Technology

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule to implement Section 517 of Division H, Title V of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447). Section 517 authorizes exemption from the Buy American Act for acquisitions of information technology that are commercial items.

**DATES:** *Effective Date:* January 3, 2006.

**Comment Date:** Interested parties should submit written comments to the FAR Secretariat on or before March 6, 2006 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–07, FAR case 2005–022, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2005-022@gsa.gov](mailto:farcase.2005-022@gsa.gov). Include FAC 2005–07, FAR case 2005–022, in the subject line of the message.

- Fax: 202–501–4067.

- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAC 2005–07, FAR case 2005–022, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Kimberly Marshall, Procurement Analyst, at (202) 219–0986. Please cite FAC 2005–07, FAR case 2005–022.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule amends FAR 25.103 and FAR Subpart 25.11 to implement Section 517 of Division H, Title V of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447). Section 517 authorizes exemption from the Buy American Act for acquisitions of information technology that are commercial items. This applies only to the use of FY 2005 funds.

This same exemption appeared last year in section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004 (Pub. L. 108–199). The FY 04 exemption was implemented through deviations by the individual agencies.

The interim rule is based on the estimation that the exemption of commercial information technology is likely to continue. If the exception does not appear in a future appropriations act, a prompt change to the FAR will be made to limit applicability of the

exemption to the fiscal years to which it applies.

The effect of this exemption is that the following clauses are no longer applicable in acquisition of commercial information technology:

- FAR 52.225–1, Buy American Act—Supplies.

- FAR 52.225–2, Buy American Act Certificate.

- FAR 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act.

- FAR 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

This is because the Buy American Act no longer applies; and the Free Trade Agreement non-discriminatory provisions are no longer necessary, since all products now are treated without the restrictions of the Buy American Act.

The Trade Agreements provision and clause at FAR 52.225–5 and FAR 52.225–6 are still necessary when the Trade Agreements Act applies (acquisitions above \$175,000). The Trade Agreements provision and clause already waive applicability of the Buy American Act for eligible products, and are needed to implement the restrictions on procurement of noneligible end products. Section 535 and subsequent similar sections waived only the Buy American Act, not all restrictions on the purchase of foreign information technology.

“Information technology” and “Commercial item” are already defined in FAR Part 2.

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 changes may 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 increases the exceptions to the Buy American Act to include the acquisitions of information technology that are commercial items. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The objective of the interim rule is to add the exemption to the Buy American Act for acquisitions of commercial information technology. As a result of the additional exception, the Buy American Act will no longer apply to those acquisitions and the Free Trade Agreement non-discriminatory

provisions are no longer necessary, since all products will be treated without the restrictions of the Buy American Act. The interim rule applies to all offerors responding to solicitations for commercial information technology where the Buy American Act previously applied (generally, acquisitions between \$2,500 and \$175,000). This rule does not apply to the Department of Defense, which uses DFARS clauses to implement the Buy American Act. This exception will allow small entities to compete without meeting the Buy American Act domestic end product requirements.

- It is anticipated that small business concerns will continue to receive the same number of awards in the range of \$2,500 to \$100,000, because these awards are generally set-aside for small business concerns.

- It is also expected that small business concerns will continue to receive awards in the range of \$100,000 to \$175,000, but in this range they will face competition from foreign end products.

- This rule will not have an effect on small businesses affected by the "non-manufacturer rule" which means that a contractor under a small business set-aside or 8(a) contract shall be a small business under the applicable size standard and shall provide either its own product or that of another domestic small business manufacturing or processing concern. If there is a small business set-aside, and there is no SBA waiver of the nonmanufacturer rule, then FAR 52.219-6(c) and/or FAR 52.219-18(d) require that a domestic product must be furnished. In this case, the rule will have no effect on small businesses because the nonmanufacturer rule is not changed.

- If SBA did waive the nonmanufacturer rule, then there is no requirement to purchase a domestic product but an evaluation preference would apply.

- The rule could have an impact on small businesses when there is no small business set-aside because small businesses may lose the evaluation preference for acquisitions between \$25,000 and \$175,000.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. We invite comments from small business concerns and other interested parties on this issue. The Councils will also consider comments from small entities concerning the affected FAR Part 25 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005-07, FAR case 2005-022), in correspondence.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does apply because the changes to the FAR will slightly reduce the information collection requirements currently approved by the Office of Management and Budget OMB Clearances 9000-0024 and 9000-0130.

We estimate a reduction of approximately 5 percent (300 hours) for OMB Clearance 9000-0024 and a reduction of 50 hours to 9000-0130.

### D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement the changes resulting from the enactment of Section 517 of Division H, Title V of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447), effective December 8, 2004. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

#### List of Subjects in 48 CFR Part 25

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 25 as set forth below:

#### PART 25—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR part 25 continues to read as follows:

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

■ 2. Amend section 25.103 by adding paragraph (e) to read as follows:

##### 25.103 Exceptions.

\* \* \* \* \*

(e) *Information technology that is a commercial item.* The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds (Section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

■ 3. Amend section 25.1101 by—

■ a. Revising paragraph (a)(1)(ii);

■ b. Amending paragraph (b)(1)(i)(A) by removing "and" from the end of the sentence;

■ c. Redesignating paragraph (b)(1)(i)(B) as (b)(1)(i)(C) and adding a new paragraph (b)(1)(i)(B) to read as follows:

##### 25.1101 Acquisition of supplies.

\* \* \* \* \*

(a)(1) \* \* \*

(ii) The acquisition is for supplies for use within the United States and an exception to the Buy American Act applies (e.g., nonavailability, public interest, or information technology that is a commercial item); or

\* \* \* \* \*

(b)(1)(i) \* \* \*

(B) The acquisition is not for information technology that is a commercial item, using fiscal year 2004 or subsequent fiscal year funds; and

\* \* \* \* \*

[FR Doc. 05-24552 Filed 12-30-05; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 25 and 52

[FAC 2005-07; FAR Case 2005-026; Item VIII]

RIN 9000-AK37

### Federal Acquisition Regulation; Removal of Sanctions Against Libya

**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 13357, which removed sanctions against Libya.

**DATES:** *Effective Date:* February 2, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Kimberly Marshall, Procurement Analyst, at (202) 219-0986. Please cite FAC 2005-07, FAR case 2005-026. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends FAR Subpart 25.7, Prohibited Sources, and the clause at 52.225-13, Restrictions on Certain Foreign Purchases, by removing Libya from the list of countries sanctioned by

the Department of the Treasury, Office of Foreign Assets Control (OFAC).

On September 20, 2004, the President signed Executive Order 13357 terminating the national emergency declared in Executive Order 12543 of January 7, 1986, with respect to the policies and actions of the Government of Libya and revoking that Order, as well as revoking Executive Order 12544 of January 8, 1986, and Executive Order 12801 of April 15, 1992, all of which imposed sanctions against Libya in response to the national emergency. This Executive Order 13357 also revoked Executive Order 12538 of November 15, 1985, which prohibited the importation into the United States of petroleum products refined in Libya. Upon issuance of Executive Order 13357, OFAC issued notice that the prohibitions of the Libyan Sanctions Regulations, 31 CFR part 550, would be lifted as of September 21, 2004. OFAC has confirmed that there are no more sanctions against Libya. At a later date, OFAC will add a note to the Libya Sanction Regulations (LSR) to notify the public that those regulations are no longer in effect. In their view, Executive Order 13357, their issuance of a press release, and a statement on their official website that the regulations lifted are sufficient authorization until they publish a notice in the **Federal Register**.

This final rule also makes conforming changes to the clause dates in the clauses at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and 52.213–4, Terms and Conditions—Simplified Acquisition (Other than Commercial Items), and updates the OFAC websites.

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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Parts 25 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–07, FAR case 2005–026), in correspondence.

## 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 25 and 52

Government procurement.

Dated: December 22, 2005.

Gerald Zaffos,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 25 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 25 and 52 continues 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 25—FOREIGN ACQUISITION

#### 25.701 [Amended]

■ 2. Amend section 25.701 by removing from the first sentence of paragraph (b) “Libya,”; removing from the second sentence “<http://www.epls.gov/TerList1.html>” and adding “<http://www.treas.gov/offices/enforcement/ofac/sdn>” in its place; and removing from the third sentence “<http://www.treas.gov/ofac>” and adding “<http://www.treas.gov/offices/enforcement/ofac>” in its place.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

#### 52.212–5 [Amended]

■ 3. Amend section 52.212–5 by removing from the heading of the clause “(SEP 2005)” and adding “(FEB 2006)” in its place; and removing from paragraph (b)(26) of the clause “(MAR 2005)” and adding “(FEB 2006)” in its place.

#### 52.213–4 [Amended]

■ 4. Amend section 52.213–4 by—  
 ■ a. Removing from the heading of the clause “(JUL 2005)” and adding “(FEB 2006)” in its place; and  
 ■ b. Removing from paragraph (a)(1)(iv) of the clause “(MAR 2005)” and adding “(FEB 2006)” in its place.

#### 52.225–13 [Amended]

■ 5. Amend section 52.225–13 by—  
 ■ a. Removing from the heading of the clause “(MAR 2005)” and adding “(FEB 2006)” in its place; and  
 ■ b. Removing from the first sentence of paragraph (b) of the clause “Libya,”; removing from the second sentence “<http://epls.arnet.gov/News.html>” and

adding “<http://www.treas.gov/offices/enforcement/ofac/sdn>” in its place; and removing from the third sentence “<http://www.treas.gov/ofac>” and adding “<http://www.treas.gov/offices/enforcement/ofac>” in its place.

[FR Doc. 05–24553 Filed 12–30–05; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 44 and 52

[FAC 2005–07 FAR Case 2003–024, Item IX]

RIN 9000–AK39

### Federal Acquisition Regulation; Elimination of Certain Subcontract Notification Requirements

**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 modify the language regarding advance notification requirements. This change is required to implement Section 842 of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108–136, which resulted in revisions to 10 U.S.C. 2306(e).

**DATES:** *Effective Date:* January 3, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2005–07, FAR case 2003–024. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 70 FR 11761, March 9, 2005, with a request for comments by May 9, 2005. The interim rule revised FAR 44.201–2, Advance notification requirements, and amended Alternate I of FAR clause 52.244–2, Subcontracts. The change is required in order to implement Section 842 of the National Defense Authorization Act for Fiscal Year 2004,

Public Law 108–136. Section 842 removes the requirement for contractors under cost-reimbursement contracts with the Department of Defense (DoD), Coast Guard, and National Aeronautics and Space Administration (NASA) to notify the agency before the award of any cost-plus-fixed-fee subcontract or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract if the contractor maintains a purchasing system approved by the contracting officer for the contract.

The final rule differs from the interim rule in that it deletes Alternate I in its entirety. The Councils adopted the suggestion in a public comment that deletion of Alternate I would be a less confusing means of implementing the statute than amending Alternate I. Renumbering has occurred in FAR 44.204 and 52.244–2 as a result of the deletion of Alternate I.

In addition, the interim rule made a technical amendment to Alternate II of the FAR clause at 52.244–2, Subcontracts. The interim rule deleted the reference to paragraph (c) from paragraph (f)(2) of Alternate II (now renumbered Alternate I in the final rule) because paragraph (c) applies to fixed-price type contracts, whereas Alternate II (now renumbered Alternate I in the final rule) applies to cost-reimbursement contracts.

Two comments were received from one respondent.

*Comment:* The respondent noted that the purpose of the FAR change is, in the case of DoD, the Coast Guard, and NASA, to eliminate the requirement for the contractor to notify the agency before award of certain subcontracts when the contractor has an approved purchasing system. The respondent stated that the language in the interim rule is confusing and suggested eliminating Alternate I of 52.244–2 instead.

*Response:* Concur. The final rule deletes Alternate I.

*Comment:* The respondent suggested rewriting Alternate II of the FAR clause at 52.244–2 and FAR 44.201–2 to have the language match what is in 52.244–2(d)(1).

*Response:* Nonconcur. Paragraph (d)(1) of the FAR clause at 52.244–2 specifies the contract types—cost-reimbursement, time-and-materials, and labor-hour—subject to subcontract consent requirements. Alternate II specifies the contract types—cost-plus-fixed-fee and fixed-price—subject to advance notification requirements even when subcontract consent is not required. These two procedures are

separate statutory requirements and apply to different contract types.

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 it will have a small positive effect. Small businesses do not usually hold prime contracts which are cost-reimbursement contracts, so this section would not apply to them, and any change would not apply.

## 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 44 and 52

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 44 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 44 and 52 continues 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 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 2. Amend section 44.204 by revising paragraph (a)(2) to read as follows:

### 44.204 Contract clauses.

(a)(1) \* \* \*

(2) If a cost-reimbursement contract is contemplated, for civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, the contracting officer shall use the clause with its Alternate I.

\* \* \* \* \*

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.244–2 by—  
 ■ a. Removing Alternate I; and  
 ■ b. Redesignating Alternate II as Alternate I; and revising the introductory paragraph to read as follows:

### 52.244–2 Subcontracts.

\* \* \* \* \*

*Alternate I (JAN 2006).* As prescribed in 44.204(a)(2), substitute the following paragraph (f)(2) for paragraph (f)(2) of the basic clause:

\* \* \* \* \*

[FR Doc. 05–24554 Filed 12–30–05; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Part 52

[FAC 2005–07; FAR Case 2005–006; Item X]

RIN 9000–AK38

### Federal Acquisition Regulation; Annual Representations and Certifications – NAICS Code/Size

**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 modify the provision regarding Annual Representations and Certifications to include a section whereby the contracting officer can insert the appropriate North American Industry Classification System (NAICS) code and small business size standard for the procurement. Its exclusion in the original drafting of the subject provision was an oversight. When the FAR provision is included in a solicitation, the provision regarding Small Business Program Representations, where this information is normally placed, is not included. Without this change, there is no standard way in which the NAICS code and small business size standard can be communicated to the vendor.

**DATES:** *Effective Date:* January 3, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Gerald Zaffos at (202) 208-6091. The TTY Federal Relay Number for further information is 1-800-877-8973. Please cite FAC 2005-07, FAR case 2005-006. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The final rule amends the Federal Acquisition Regulation by modifying the provision at FAR 52.204-8 to include a new paragraph (a) that replicates the same paragraph of the provision at FAR 52.219-1(a).

Federal Acquisition Circular (FAC) 2001-026 made effective the use of the provision at FAR 52.204-8 for most procurements. The prescription for its use also directs that the provision at FAR 52.219-1(a) not be included in solicitations, as it is now included in the Online Representations and Certifications Application (ORCA). The FAR provision at 52.219-1(a), when it is included in solicitations, is the place wherein the contracting officer includes the NAICS code and small business size standard applicable to the procurement. There needs to be a similar paragraph available in FAR 52.204-8, the exclusion of which was an oversight in FAC 2001-026.

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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005-07, FAR case 2005-006), in correspondence.

**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 52**

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

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

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 1. The authority citation for 48 CFR part 52 continues to read as follows:

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

■ 2. Amend section 52.204-8 by—

■ a. Revising the date of the provision;

■ b. Redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively;

■ c. Adding a new paragraph (a); and

■ d. Removing from newly designated paragraph (b)(1) and the introductory text of paragraph (b)(2) “paragraph (b)” and adding “paragraph (c)” in its place; and removing from newly redesignated (b)(2)(i) and (b)(2)(ii) “Paragraph (b)” and adding “Paragraph (c)” in its place.

■ The revised and added text reads as follows:

**52.204-8 Annual Representations and Certifications.**

\* \* \* \* \*

**ANNUAL REPRESENTATIONS AND CERTIFICATIONS (JAN 2006)**

(a)(1) The North American Industry Classification System (NAICS) code for this acquisition is \_\_\_\_\_ [*insert NAICS code*].

(2) The small business size standard is \_\_\_\_\_ [*insert size standard*].

(3) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is 500 employees.

\* \* \* \* \*

[FR Doc. 05-24556 Filed 12-30-05; 8:45 am]

**BILLING CODE 6820-EP-S**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 9, 11, 25, 27, 34, 38, 39, 43, 46, 48, 50, and 52**

[FAC 2005-07; Item XI]

**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 make editorial corrections and updates the Federal Acquisition Regulation's authority citation.

**DATES:** *Effective Date:* January 3, 2006.

**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 2005-07, Technical Amendments.

**List of Subjects in 48 CFR Parts 9, 11, 25, 27, 34, 38, 39, 43, 46, 48, 50, and 52**

Government procurement.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 9, 11, 25, 27, 34, 38, 39, 43, 46, 48, 50, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 9, 11, 25, and 52 continues to read as follows:

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

■ 2. The authority citation for 48 CFR parts 27, 34, 38, 39, 43, 46, 48, and 50 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 9—CONTRACTOR QUALIFICATIONS**

■ 3. Amend section 9.203 by revising paragraph (b)(2) to read as follows:

**9.203 QPL's, QML's, and QBL's.**

\* \* \* \* \*

(b) \* \* \*

(2) Department of Defense Acquisition Streamlining and Standardization

Information System (ASSIST) at (<http://assist.daps.dla.mil>).

\* \* \* \* \*

**PART 11—DESCRIBING AGENCY NEEDS**

■ 4. Amend section 11.102 by revising the third and fourth sentences to read as follows:

**11.102 Standardization program.**

\* \* \* DoD 4120.24–M may be obtained from DoD (see 11.201(d)(2) or 11.201(d)(3)). FIPS PUBS may be obtained from the Government Printing Office (GPO), or the Department of Commerce’s National Technical Information Service (NTIS) (see address in 11.201(d)(4)).

■ 5. Amend section 11.201 by—

■ a. Removing from the first sentence of the introductory text of paragraph (a) “DoD Index of Specifications and Standards (DoDISS)” and adding “DoD Acquisition Streamlining and Standardization Information System (ASSIST)” in its place;

■ b. Removing from the first sentence of paragraph (b) “DoDISS” and adding “ASSIST” in its place; and

■ c. Revising paragraph (d)(2); redesignating paragraph (d)(3) as paragraph (d)(4), and adding a new paragraph (d)(3) to read as follows:

**11.201 Identification and availability of specifications.**

\* \* \* \* \*

(d)(1) \* \* \*

(2) Most unclassified Defense specifications and standards may be downloaded from the following ASSIST websites:

(i) ASSIST (<http://assist.daps.dla.mil>).

(ii) Quick Search (<http://assist.daps.dla.mil/quicksearch>).

(iii) ASSISTdocs.com (<http://assistdocs.com>).

(3) Documents not available from ASSIST may be ordered from the Department of Defense Single Stock Point (DoDSSP) by—

(i) Using the ASSIST Shopping Wizard (<http://assist.daps.dla.mil/wizard>);

(ii) Phoning the DoDSSP Customer Service Desk, (215) 697–2179, Mon-Fri, 0730 to 1600 EST; or

(iii) Ordering from DoDSSP, Building 4, Section D, 700 Robbins Avenue, Philadelphia, PA 19111–5094, Telephone (215) 697–2667/2179, Facsimile (215) 697–1462.

\* \* \* \* \*

■ 6. Amend section 11.204 by revising paragraph (b) to read as follows:

**11.204 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(b) The contracting officer shall insert the provision at 52.211–2, Availability of Specifications, Standards, and Data Item Descriptions Listed in the Acquisition Streamlining and Standardization Information System (ASSIST), in solicitations that cite specifications listed in the ASSIST that are not furnished with the solicitation.

\* \* \* \* \*

**PART 25—FOREIGN ACQUISITION**

**25.1101 [Amended]**

■ 7. Amend section 25.1101 in the second sentence of paragraph (e)(2) by removing “paragraphs (b)(1) and (i)(2)” and adding “paragraphs (c)(1) and (j)(2)” in its place.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 8. Revise section 52.211–2 to read as follows:

**52.211–2 Availability of Specifications, Standards, and Data Item Descriptions Listed in the Acquisition Streamlining and Standardization Information System (ASSIST).**

As prescribed in 11.204(b), insert the following provision:

**AVAILABILITY OF SPECIFICATIONS, STANDARDS, AND DATA ITEM DESCRIPTIONS LISTED IN THE ACQUISITION STREAMLINING AND STANDARDIZATION INFORMATION SYSTEM (ASSIST) (JAN 2006)**

(a) Most unclassified Defense specifications and standards may be downloaded from the following ASSIST websites:

(1) ASSIST (<http://assist.daps.dla.mil>);

(2) Quick Search (<http://assist.daps.dla.mil/quicksearch>);

(3) ASSISTdocs.com (<http://assistdocs.com>).

(b) Documents not available from ASSIST may be ordered from the Department of Defense Single Stock Point (DoDSSP) by—

(1) Using the ASSIST Shopping Wizard (<http://assist.daps.dla.mil/wizard>);

(2) Phoning the DoDSSP Customer Service Desk (215) 697–2179, Mon-Fri, 0730 to 1600 EST; or

(3) Ordering from DoDSSP, Building 4, Section D, 700 Robbins Avenue, Philadelphia, PA 19111–5094, Telephone (215) 697–2667/2179, Facsimile (215) 697–1462.

(End of provision)

■ 9. Amend section 52.212–1 by revising the date and paragraph (i)(2) of the provision; redesignating paragraph (i)(3) as paragraph (i)(4); and adding a new paragraph (i)(3) to read as follows:

**52.212–1 Instructions to Offerors—Commercial Items.**

\* \* \* \* \*

**INSTRUCTIONS TO OFFERORS—COMMERCIAL ITEMS (JAN 2006)**

\* \* \* \* \*

(i) \* \* \*

(2) Most unclassified Defense specifications and standards may be downloaded from the following ASSIST websites:

(i) ASSIST (<http://assist.daps.dla.mil>).

(ii) Quick Search (<http://assist.daps.dla.mil/quicksearch>).

(iii) ASSISTdocs.com (<http://assistdocs.com>).

(3) Documents not available from ASSIST may be ordered from the Department of Defense Single Stock Point (DoDSSP) by—

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(iii) Ordering from DoDSSP, Building 4, Section D, 700 Robbins Avenue, Philadelphia, PA 19111–5094, Telephone (215) 697–2667/2179, Facsimile (215) 697–1462.

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[FR Doc. 05–24557 Filed 12–30–05; 8:45 am]

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**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. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–07 which amend the FAR. An asterisk (\*) next to a rule

indicates that a Regulatory Flexibility Analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005–07 which precedes this document. These documents are also available via the Internet at <http://www.acqnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:** Laurieann 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 2005–07**

Item	Subject	FAR case	FAR Analyst
I	Transportation: Standard Industry Practices	2002–005	Parnell.
*II	Common Identification Standard for Contractors(Interim)	2005–015	Jackson.
III	Change to Performance–based Acquisition	2003–018	Jackson.
IV	Free Trade Agreements–Australia and Morocco	2004–027	Marshall.
*V	Deletion of the Very Small Business Pilot Program	2005–013	Cundiff.
*VI	Purchases From Federal Prison Industries–Requirement for MarketResearch	2003–023	Nelson.
*VII	Exception from Buy American Act for CommercialInformation Technology (Interim)	2005–022	Marshall.
VIII	Removal of Sanctions Against Libya	2005–026	Marshall.
IX	Elimination of Certain Subcontract NotificationRequirements	2003–024	Cundiff.
X	Annual Representations and Certifications–NAICSCode/Size	2005–006	Zaffos.
XI	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 2005–07 amends the FAR as specified below:

**Item I—Transportation: Standard Industry Practices (FAR Case 2002–005)**

This final rule amends FAR Parts 1, 42, 46, 47, 52, and 53 to clarify and update the FAR coverage to reflect the latest changes to the Federal Management Regulation and statutes that require use of commercial bills of lading for domestic shipments. This final rule amends the FAR to—

- Move FAR Subpart 42.14, Traffic and Transportation Management, to FAR Part 47, Transportation;
- Delete the clauses at FAR 52.242–10 and FAR 52.242–11 and revise and relocate FAR clause 52.242–12 to FAR 52.247–68;
- Add definitions of “bill of lading,” “commercial bill of lading,” and “Government bill of lading” and clarify the usage of each term throughout FAR Part 47;
- Add definitions of “Government rate tenders,” “household goods,” “noncontiguous domestic trade,” and “released or declared value”;
- Require the use of commercial bills of lading for domestic shipments;
- Revise the references to “49 U.S.C. 10721” to read “49 U.S.C. 10721 and 13712” throughout FAR Part 47 to make it clear that Government rate tenders can be used in certain situations for the

transportation of household goods by rail carrier (authorized by 49 U.S.C. 10721), as well as by motor carrier, water carrier, and freight forwarder (authorized by 49 U.S.C. 13712 and the definition of “carrier” at 49 U.S.C. 13102); and

- Update the fact that the Federal Motor Carrier Safety Administration prescribes commercial zones at 49 CFR 372 Subpart B.

**Item II—Common Identification Standard for Contractors (FAR Case 2005–015)**

This interim rule amends the FAR by addressing the contractor personal identification requirements in Homeland Security Presidential Directive (HSPD–12), “Policy for a Common Identification Standard for Federal Employees and Contractors,” and Federal Information Processing Standards Publication (FIPS PUB) Number 201, “Personal Identity Verification (PIV) of Federal Employees and Contractors.” The primary objectives of HSPD–12 are to establish a process to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, Governmentwide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors.

**Item III—Change to Performance-based Acquisition (FAR Case 2003–018)**

This final rule amends the FAR by changing the terms “performance-based contracting (PBC)” and “performance-based service contracting (PBSC)” to

“performance-based acquisition (PBA)” throughout the FAR; adding applicable PBA definitions of “Performance Work Statement (PWS)” and “Statement of Objectives (SOO)”, and describing their uses; clarifying the order of precedence for requirements; eliminating redundancy where found; modifying the regulation to broaden the scope of PBA and give agencies more flexibility in applying PBA methods to contracts and orders of varying complexity; and reducing the burden of force-fitting contracts and orders into PBA, when it is not appropriate.

**Item IV—Free Trade Agreements—Australia and Morocco (FAR Case 2004–027)**

This final rule converts the interim rule published at 69 FR 77870, December 28, 2004, to a final rule with changes. It allows contracting officers to purchase the products of Australia without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements. The U.S. Trade Representative negotiated Free Trade Agreements with Australia and Morocco, which were scheduled to go into effect on or after January 1, 2005, according to Public Laws 108–286 and 108–302. However, the Morocco Free Trade Agreement has not yet entered into force and, therefore, the implementation of the Morocco Free Trade Agreement has been removed from the final rule. The Australian Free Trade Agreement joins the North American Free Trade Agreement (NAFTA) and the Chile and Singapore Free Trade Agreements which are already in the FAR. The threshold for

applicability of the Australian Free Trade Agreement is \$58,550 (the same as other Free Trade Agreements to date).

**Item V—Deletion of the Very Small Business Pilot Program (FAR Case 2005-013)**

This final rule amends the FAR to delete the Very Small Business Pilot Program. Under the pilot program, contracting officers were required to set aside for very small business concerns certain acquisitions with an anticipated dollar value between \$2,500 and \$50,000. The Councils are removing the FAR coverage because the legislative authority for the program terminated on September 30, 2003. Acquisitions previously set aside for pilot program vendors will now be open to other small businesses.

**Item VI—Purchases From Federal Prison Industries—Requirement for Market Research (FAR Case 2003-023)**

This final rule converts the interim rule published in FAC 2001-21 at 69 FR 16148, March 26, 2004, and the interim rule published as Item I of FAC 2005-03 at 70 FR 18954, April 11, 2005, to a final rule with amendments at FAR 8.602 to clarify the applicability of the rule. The rule implements Section 637 of Division H of the Consolidated Appropriations Act, 2005. Section 637 provides that no funds made available under the Consolidated Appropriations Act for fiscal year 2005, or under any other Act for fiscal year 2005 and each fiscal year thereafter, shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency, pursuant to Governmentwide procurement regulations issued pursuant to 41 U.S.C. 421(c)(1) that impose procedures, standards, and limitations of 10 U.S.C. 2410n.

**Item VII—Exception from Buy American Act for Commercial Information Technology (FAR Case 2005-022)**

This interim rule amends FAR 25.103 and FAR Subpart 25.11 to implement Section 517 of Division H, Title V of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447). Section 517

authorizes exemption from the Buy American Act for acquisitions of information technology that are commercial items. This applies only to the use of FY 2005 funds. This same exemption appeared last year in section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004 (Pub. L. 108-199). The FY 04 exemption was implemented through deviations by the individual agencies.

The interim rule is based on the estimation that the exemption of commercial information technology is likely to continue. If the exception does not appear in a future appropriations act, a prompt change to the FAR will be made to limit applicability of the exemption to the fiscal years to which it applies. The effect of this exemption is that the following clauses are no longer applicable in acquisition of commercial information technology:

- FAR 52.225-1, Buy American Act—Supplies.
- FAR 52.225-2, Buy American Act Certificate.
- FAR 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act.
- FAR 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

This is because the Buy American Act no longer applies; and the Free Trade Agreement non-discriminatory provisions are no longer necessary, since all products now are treated without the restrictions of the Buy American Act.

**Item VIII—Removal of Sanctions Against Libya (FAR Case 2005-026)**

This final rule removes Libya from the list of prohibited sources at FAR Subpart 25.7 and the associated clause at 52.225-13, Restriction on Certain Foreign Purchases. Acquisitions of products from Libya may still be subject to restrictions of the Buy American Act, trade agreements, or other domestic source restrictions. The Department of State has not yet removed Libya from the list of state sponsors of terrorism.

**Item IX—Elimination of Certain Subcontract Notification Requirements (FAR Case 2003-024)**

This final rule converts, with minor changes, the Federal Acquisition Regulation (FAR) interim rule published

in the **Federal Register** at 70 FR 11761, March 9, 2005. The rule impacts contractors with Department of Defense (DoD), National Aeronautics and Space Administration (NASA), or Coast Guard cost-reimbursement contracts and Government personnel who award and administer those contracts. The interim rule amended FAR 44.201-2, Advance Notification Requirements, and 52.244-2, Subcontracts, to implement Section 842 of the National Defense Authorization Act for Fiscal Year 2004, in Public Law 108-136. Section 842 removed the requirement under cost-reimbursement contracts with DoD, Coast Guard, and NASA for contractors to notify the agency before the award of any cost-plus-fixed-fee subcontract or any fixed-price subcontract that exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract if the contractor maintains a purchasing system approved by the contracting officer for the contract. The final rule makes two changes that resulted from one of the public comments. The final rule deletes Alternate I from FAR 44.204, Contract clauses for the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, and deletes the current Alternate I from 52.244-2, Subcontracts.

**Item X—Annual Representations and Certifications—NAICS Code/Size (FAR Case 2005-006)**

This final rule amends the FAR provision at 52.204-8 to provide a place for contracting officers to inform prospective offerors of the NAICS code and small business size standard applicable to the procurement.

**Item XI—Technical Amendments**

Editorial changes are made at FAR 9.203(b)(2), 11.102, 11.201(a), 11.201(b), 11.201(d)(2), 11.201(d)(3), 11.201(d)(4), 11.204(b), 25.1101(e)(2), and the provisions at 52.211-2 and 52.212-1 in order to update references.

The authority citation for FAR parts 27, 34, 38, 39, 43, 46, 48, and 50 is revised.

Dated: December 22, 2005.

**Gerald Zaffos,**

*Director, Contract Policy Division.*

[FR Doc. 05-24559 Filed 12-30-05; 8:45 am]

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