

public comments before agreeing to convert the proposed rule to a final rule with minor changes. A summary of the comments is provided below:

Comment: To avoid potential misinterpretation, the rule should more clearly call attention to the mandatory source requirement for purchase of FPI products and more clearly point out that a negative past performance evaluation may be used as a basis for a waiver request.

Response: We agree. The intent of the rule is to ensure contracting officers understand that the waiver process is still in effect and that performance evaluations may be used to support future award decisions. Therefore, the final rule amends FAR 8.607 and 42.1503(b) to more clearly articulate that the waiver requirement, referred to at FAR 8.605 as a clearance, still applies and that a negative performance evaluation can be used to support clearance requests.

Comment: There is no basis for an assessment of FPI's past performance. FPI's past performance is irrelevant to whether an agency is required to obtain goods from FPI because of its mandatory source status. Therefore, the collection of data is a patent waste of Government resources since it cannot be used for source selection purposes.

Response: We believe that there is benefit to assessing FPI's performance. The May 2000 Office of Federal Procurement Policy (OFPP) guide "Best Practices for Collecting and Using Current and Past Performance Information" states that the active dialog that results from assessing a contractor's current performance results in better performance on the instant contract, and that such assessments are a basic best practice for good contract administration. As previously stated, this information can also be used to support FPI clearance requests.

Comment: What is the relationship between this rule and Section 811 of the National Defense Authorization Act of FY 2002? Section 811 does not apply to agencies outside of DoD.

Response: This rule has no relationship to Section 811 of the FY 2002 National Defense Authorization Act. The genesis of this case was a memorandum from FPI requesting past performance evaluations on their contracts.

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 extending the collection of past performance data to include FPI contracts can be accomplished within our normal means of performing business and further serves to promote competition among offerors.

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 and 42

Government procurement.

Dated: May 13, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8 and 42 as set forth below:

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

■ 2. Add section 8.607 to read as follows:

8.607 Evaluating FPI performance.

Agencies shall evaluate FPI contract performance in accordance with subpart 42.15. Performance evaluations do not negate the requirements of 8.602 and 8.605, but they may be used to support a clearance request in accordance with 8.605.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1502 [Amended]

■ 3. Amend section 42.1502 in the first sentence of paragraph (b) by removing "subparts 8.6 and" and adding "subpart" in its place.

■ 4. Amend section 42.1503 in paragraph (b) by adding a new seventh sentence to read as follows:

42.1503 Procedures.

* * * * *

(b) * * * Evaluation of Federal Prison Industries (FPI) performance may be used to support a clearance request (see 8.605) when FPI is a mandatory source in accordance with subpart 8.6. * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2001-14; FAR Case 2000-009; Item VII]

RIN 9000-AJ34

Federal Acquisition Regulation; Contract Terms and Conditions Required To Implement Statute or Executive Orders—Commercial Items

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 update the clause regarding commercial items contract terms and conditions required to implement statute or Executive orders.

DATES: Effective Date: June 23, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 2001-14, FAR case 2000-009.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Regulation Part 12, Acquisition of Commercial Items, was developed to implement Title VIII of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355). The regulations became effective on October 1, 1995. Several areas have been identified that need updating and clarification. This rule addresses some of those changes.

The list of contract terms and conditions required to implement statutes or Executive orders in the clause at FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, is amended to ensure that required statutes enacted subsequent to FASA that contain civil or criminal penalties or specifically cite their applicability to commercial items are included on the list, and to ensure that any post-FASA items that did not meet this criteria are deleted from the list. In addition, the pre-FASA clauses and alternates that were inadvertently left off the list are added. The date of each clause is added to the list to identify what revision of the listed clause applies when this clause is added to a contract.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 13076, March 20, 2002. The 60-day comment period ended May 20, 2002. Two sources submitted comments on the proposed rule. Both comments suggested revisions to paragraph 52.212-5(e) to clarify flow-down requirements. Accordingly, paragraph 52.212-5(e) is revised in the final rule to flow down clauses that are applicable to the subcontract and required to implement statute or Executive order.

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 a new policy requirement on small entities. The changes made by the rule update clause references, clarify language, and do not change existing policy.

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: May 13, 2003.

Laura G. Smith,

Director, Acquisition 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 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).

■ 2. Amend section 52.212-5 by revising the date of the clause and paragraphs (a), (b), (c), and (e) 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 (June 2003)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clause, which is incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of commercial items: 52.233-3, Protest after Award (AUG 1996) (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items: [Contracting Officer check as appropriate.]

__ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government (JUL 1995), with Alternate I (OCT 1995) (41 U.S.C. 253g and 10 U.S.C. 2402).

__ (2) 52.219-3, Notice of Total HUBZone Set-Aside (JAN 1999) (15 U.S.C. 657a).

__ (3) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (JAN 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

__ (4)(i) 52.219-5, Very Small Business Set-Aside (JUNE 2003) (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

__ (ii) Alternate I (MAR 1999) of 52.219-5.

__ (iii) Alternate II (JUNE 2003) of 52.219-5.

__ (5)(i) 52.219-6, Notice of Total Small Business Set-Aside (JUNE 2003) (15 U.S.C. 644).

__ (ii) Alternate I (OCT 1995) of 52.219-6.

__ (6)(i) 52.219-7, Notice of Partial Small Business Set-Aside (JUNE 2003) (15 U.S.C. 644).

__ (ii) Alternate I (OCT 1995) of 52.219-7.

__ (7) 52.219-8, Utilization of Small Business Concerns (OCT 2000) (15 U.S.C. 637 (d)(2) and (3)).

__ (8)(i) 52.219-9, Small Business Subcontracting Plan (JAN 2002) (15 U.S.C. 637(d)(4)).

__ (ii) Alternate I (OCT 2001) of 52.219-9.

__ (iii) Alternate II (OCT 2001) of 52.219-9.

__ (9) 52.219-14, Limitations on Subcontracting (DEC 1996) (15 U.S.C. 637(a)(14)).

__ (10)(i) 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (JUNE 2003) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

__ (ii) Alternate I (JUNE 2003) of 52.219-23.

__ (11) 52.219-25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (OCT 1999) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

__ (12) 52.219-26, Small Disadvantaged Business Participation Program—Incentive Subcontracting (OCT 2000) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

__ (13) 52.222-3, Convict Labor (JUNE 2003) (E.O. 11755).

__ (14) 52.222-19, Child Labor—Cooperation with Authorities and Remedies (SEP 2002) (E.O. 13126).

__ (15) 52.222-21, Prohibition of Segregated Facilities (FEB 1999).

__ (16) 52.222-26, Equal Opportunity (APR 2002) (E.O. 11246).

__ (17) 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212).

__ (18) 52.222-36, Affirmative Action for Workers with Disabilities (JUN 1998) (29 U.S.C. 793).

__ (19) 52.222-37, Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212).

__ (20)(i) 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (AUG 2000) (42 U.S.C. 6962(c)(3)(A)(ii)).

__ (ii) Alternate I (AUG 2000) of 52.223-9 (42 U.S.C. 6962(i)(2)(C)).

__ (21) 52.225-1, Buy American Act—Supplies (JUNE 2003) (41 U.S.C. 10a-10d).

__ (22)(i) 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act (JUNE 2003) (41 U.S.C. 10a-10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).

__ (ii) Alternate I (MAY 2002) of 52.225-3.

__ (iii) Alternate II (MAY 2002) of 52.225-3.

__ (23) 52.225-5, Trade Agreements (JUNE 2003) (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).

__ (24) 52.225-13, Restrictions on Certain Foreign Purchases (JUNE 2003) (E.O. 12722, 12724, 13059, 13067, 13121, and 13129).

__ (25) 52.225-15, Sanctioned European Union Country End Products (FEB 2000) (E.O. 12849).

__ (26) 52.225-16, Sanctioned European Union Country Services (FEB 2000) (E.O. 12849).

__ (27) 52.232-29, Terms for Financing of Purchases of Commercial Items (FEB 2002) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

__ (28) 52.232-30, Installment Payments for Commercial Items (OCT 1995) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

___(29) 52.232–33, Payment by Electronic Funds Transfer—Central Contractor Registration (MAY 1999) (31 U.S.C. 3332).

___(30) 52.232–34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration (MAY 1999) (31 U.S.C. 3332).

___(31) 52.232–36, Payment by Third Party (MAY 1999) (31 U.S.C. 3332).

___(32) 52.239–1, Privacy or Security Safeguards (AUG 1996) (5 U.S.C. 552a).

___(33)(i) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631).

___(ii) Alternate I (APR 1984) of 52.247–64.

___(c) The Contractor shall comply with the FAR clauses in this paragraph (c), applicable to commercial services, that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items: [Contracting Officer check as appropriate.]

___(1) 52.222–41, Service Contract Act of 1965, as Amended (MAY 1989) (41 U.S.C. 351, *et seq.*).

___(2) 52.222–42, Statement of Equivalent Rates for Federal Hires (MAY 1989) (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

___(3) 52.222–43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts) (MAY 1989) (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

___(4) 52.222–44, Fair Labor Standards Act and Service Contract Act—Price Adjustment (February 2002) (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

___(5) 52.222–47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to PreDecember 31 Contractor Collective Bargaining Agreements (CBA) (May 1989) (41 U.S.C. 351, *et seq.*).

* * * * *

(e)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c), and (d) of this clause, the Contractor is not required to flow down any FAR clause, other than those in paragraphs (i) through (vi) of this paragraph in a subcontract for commercial items. Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(i) 52.219–8, Utilization of Small Business Concerns (October 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$500,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222–26, Equal Opportunity (April 2002) (E.O. 11246).

(iii) 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (December 2001) (38 U.S.C. 4212).

(iv) 52.222–36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793).

(v) 52.222–41, Service Contract Act of 1965, as Amended (May 1989), flow down

required for all subcontracts subject to the Service Contract Act of 1965 (41 U.S.C. 351, *et seq.*).

(vi) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (April 2003) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247–64.

(2) While not required, the contractor May include in its subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2001–14; Item VIII]

Federal Acquisition Regulation; Technical Amendments

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

ACTION: Final rule.

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

DATES: *Effective Date:* June 23, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FAC 2001–14, Technical Amendments.

List of Subjects in 48 CFR Part 52

Government procurement.

Dated: May 13, 2003.

Laura G. Smith,

Director, Acquisition 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 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).

52.213–4 [Amended]

■ 2. Amend section 52.213–4 in paragraph (a)(2)(vi) by removing “(Dec 2001)” and adding “(Apr 2003)” in its place.

52.244–6 Subcontracts for Commercial Items.

■ 3. In section 52.244–6, revise the section heading to read as set forth above; and in the clause heading, remove the words “and Commercial Components”.

52.247–64 [Amended]

■ 4. Amend section 52.247–64 in the first parenthetical in the introductory text of paragraph (a) by adding “Appx” after “U.S.C.”.

[FR Doc. 03–12308 Filed 5–21–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2001–14 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–14 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content,