

INSTRUCTIONS TO OFFERORS—
COMMERCIAL ITEMS (JAN 2005)

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(b) *Submission of offers.* * * *

(8) A completed copy of the representations and certifications at FAR 52.212-3 (see FAR 52.212-3(j) for those representations and certifications that the offeror shall complete electronically);

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■ 10. Amend section 52.212-3 by revising the date of the provision; adding an introductory paragraph and paragraph (j) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

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OFFEROR REPRESENTATIONS AND
CERTIFICATIONS—COMMERCIAL ITEMS
(JAN 2005)

An offeror shall complete only paragraph (j) of this provision if the offeror has completed the annual representations and certifications electronically at <http://orca.bpn.gov>. If an offeror has not completed the annual representations and certifications electronically at the ORCA website, the offeror shall complete only paragraphs (b) through (i) of this provision.

* * * * *

(j)(1) *Annual Representations and Certifications.* Any changes provided by the offeror in paragraph (j) of this provision do not automatically change the representations and certifications posted on the Online Representations and Certifications Application (ORCA) website.

(2) The offeror has completed the annual representations and certifications electronically via the ORCA website at <http://orca.bpn.gov>. After reviewing the ORCA database information, the offeror verifies by submission of this offer that the representations and certifications currently posted electronically at FAR 52.212-3, Offeror Representations and Certifications—Commercial Items, have been entered or updated in the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201), except for paragraphs _____.

[Offeror to identify the applicable paragraphs at (b) through (i) of this provision that the offeror has completed for the purposes of this solicitation only, if any.]

These amended representation(s) and/or certification(s) are also

incorporated in this offer and are current, accurate, and complete as of the date of this offer.

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.]

(End of provision)

52.214-30 [Removed and Reserved]

■ 11. Remove and reserve section 52.214-30.

52.215-7 [Removed and Reserved]

■ 12. Remove and reserve section 52.215-7.

[FR Doc. 04-27633 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 9, 22, 28, 44, and 52**

[FAC 2001-26; FAR Case 2002-023; Item II]

RIN 9000-AJ78

**Federal Acquisition Regulation;
Excluded Parties List System
Enhancement**

AGENCY: 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 publish an electronic list of parties excluded from doing business with the Federal Government online identified as the Excluded Parties List System (EPLS). This will obviate the need to publish the hard copy of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (List of Parties) produced by the Government Printing Office.

DATES: *Effective Date:* January 19, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Craig Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001-26, FAR case 2002-023.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule incorporates the Excluded Parties List System into the FAR and enables agencies to directly enter data on parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies or the Government Accountability Office. GSA maintains that direct entry by the acting agency will improve the reliability of the system, eliminate the need for a hard copy list, provide access to the archival data, and enhance the ability to verify entries by permitting a search by exact name and social security number where the agencies entering the data have the authority to collect, retain, and publish the party's social security number.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 67353, December 1, 2003. The Councils received comments in response to the proposed rule from six respondents. Several respondents concurred in the rule as written. Other comments are categorized as follows:

1. One respondent recommended that the names of the parties listed in the EPLS be linked to the Central Contractor Registry (CCR) accessible on the Internet at <http://www.ccr.gov/index.cfm>. The Councils partially concur; however, in light of impending review of the CCR and the Business Partner Network (BPN) by their Program Manager, within the next six months to ascertain the capabilities of these systems, no change was made at the present time.

2. One respondent pointed out a technological glitch in conducting searches using the EPLS search engine for a field for DUNS number that is not a required entry. He points out that if the searcher has a DUNS number and searches for that given DUNS number but the agency data entry person has not entered the number, the research results will indicate no such entry or "No records were found matching this criteria." Searchers could readily interpret this search engine response as an indication that the party to which Dun and Bradstreet assigned a DUNS number is not listed in EPLS when what such search results could also mean is that there is no data actually entered into a non-mandatory field. He suggested adding a cautionary note to FAR 9.404 or 9.105-1(c)(1). The Councils acknowledge the validity of his concern but decline to add a cautionary note to the FAR. The Councils acknowledge that while obtaining a DUNS number is a

requirement in many areas within which one “conducts business with the government,” it is not yet a universal requirement. For instance, OMB has issued guidance for its use by grantees but the requirement does not extend to sub-recipients. The Councils also noted that his concern may be equally applicable to any field where entry is optional or not required. GSA has been requested to modify the automated response when a searcher searches on data possibly entered into an optional/not required field, so that the search engine response states words to the effect of “No records were found matching this criteria; however, you have searched for data contained in a non-mandatory field. A negative response may only indicate that no data matching your search criterion has been entered in the field DUNS number field or SSN/TIN field. A search on other required fields is recommended.”

3. One respondent made five suggestions addressing broad policy changes in the suspension and debarment system. The respondent stated that the EPLS has not been adequately applied or uniformly enforced against large and small contractors and recommends five changes to improve the suspension and debarment system:

a. Create a centralized information database that should be consulted before awarding a contract or making a suspension and debarment system.

b. Require a contractor to disclose current suspensions or debarment, Federal or state litigation initiated against them in the past 3 years, and any Administrative Agreements the contractor is currently implementing.

c. Require an agency debarment official to use suspension and debarment actions equally against large and small contractors or to justify in writing a determination to do business with a nonresponsible contractor.

d. Amend the FAR to require mandatory suspension or debarment for a contractor that either had been criminally convicted or had a civil judgment entered against them for more than once in a three-year period.

e. Empower the Interagency Suspension and Debarment Committee (ISDC) to coordinate with the Federal agency taking a leadership role in a suspension or debarment case (especially with a repeat offender) and require the Interagency Committee to submit semi-annual reports to Congress regarding suspension and debarment decisions.

Because these comments lay outside the scope of the rule and addressed basic principles and policies leading to

decisions to exclude parties rather than with the procedural changes in the operation of the electronic system, no change to the final rule is required. However, we will bring these comments to the attention of the ISDC.

4. One respondent had a list of comments regarding errors in citation and conflicts between definitions used in the FAR and the Nonprocurement Common Rule (NCR) published November 26, 2003 (68 FR 66553). The Councils acknowledge the definitions used in the NCR, but do not concur with the recommended changes to the proposed rule in the FAR. The FAR terminology, although not identical to the NCR terminology, is not entirely inconsistent. The FAR uses the specific terms “suspension,” “debarment,” or “proposed for debarment” which are also used in the NCR, but for which the NCR has provided an overall term of “excluded,” which the FAR does not use. The FAR uses the term “ineligible” (defined in FAR 2.101) rather than the comparable term “disqualified” used in the NCR, but the NCR also uses the term “ineligible” to cover both “excluded” and “ineligible.” Therefore, the actions described as “ineligible” in the FAR are also “ineligible” under the NCR, although the NCR uses the term more broadly. The term “ineligible” has been used for many years in the FAR, and is imbedded in the “Procurement Cause and Treatment Codes” and in agency supplements such as the Defense Federal Acquisition Regulation Supplement. The Councils consider that it would be unnecessarily disruptive to remove this term from the FAR. As stated in paragraph (b) of FAR 9.400, although FAR Subpart 9.4 covers the listing of ineligible contractors and the effect of this listing, it does not prescribe policies and procedures governing declarations of ineligibility. The main thing a contracting officer needs to know is the effect of being listed in the “Excluded Parties List System,” not the underlying basis for the listing, and whether the party is considered “ineligible” or “disqualified.” The contracting officer also needs to know the effect of being listed and may glean this from consultation with the cause and treatment codes. Accordingly, the final rule retains the current definition of “ineligible” in the FAR and deletes the NCR definitions of “disqualified” and “excluded or exclusion” which appeared in the proposed rule. However, the final rule adds “or disqualified under the Nonprocurement Common Rule” to paragraph (b)(1) of FAR 9.404. The respondent also noted

that the proposed rule also used the definition “covered transactions” but no definition was provided and that the statutory citations to the listing of violating facilities in the Clean Water Act and Clean Air Act were erroneous in the definition of “excluded or exclusion.” Because the final rule deletes this definition, no change has been made, although the respondent was correct in noting the citations were wrong. Lastly, the respondent recommended that the word “generally” be added to paragraph (c)(5) of FAR 9.404 to occasions where 5 working days may be insufficient. The final rule includes the adverb but notes that posting the data beyond the five days provided should occur rarely.

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 only makes changes in the way GSA manages and maintains the list of excluded parties. It does not change the criteria for inclusion on the list or the effect of the list on award or administration of contracts.

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, 9, 28, 44, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 9, 22, 28, 44, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 9, 22, 28, 44, and 52 is revised to read as follows:

Authority: 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 definition “Excluded Parties List System”; and removing the definition “List of Parties Excluded from Federal Procurement and Nonprocurement Programs.” The added definition reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

Excluded Parties List System means an electronic database maintained and posted by the General Services Administration containing the list of all parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies, Government corporations, or by the Government Accountability Office.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.105-1 by revising paragraph (c)(1) to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) * * *

(1) The Excluded Parties List System maintained in accordance with Subpart 9.4.

* * * * *

■ 4. Amend section 9.207 by revising paragraph (a)(9) to read as follows:

9.207 Changes in status regarding qualification requirements.

(a) * * *

(9) The source is on the Excluded Parties List System (see Subpart 9.4); or

* * * * *

■ 5. Revise section 9.404 to read as follows:

9.404 Excluded Parties List System.

(a) The General Services Administration (GSA)—

(1) Operates the web-based Excluded Parties List System (EPLS);

(2) Provides technical assistance to Federal agencies in the use of the EPLS; and

(3) Includes in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The EPLS includes the—

(1) Names and addresses of all contractors debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified

under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) DUNS No.;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency must—

(1) Obtain password(s) from GSA to access the EPLS for data entry;

(2) Notify GSA in the event a password needs to be rescinded (*e.g.*, when an agency employee leaves or changes function);

(3) Enter the information required by paragraph (b) of this section within 5 working days after the action becomes effective;

(4) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar;

(5) Update EPLS, generally within 5 working days after modifying or rescinding an action;

(6) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(7) Establish procedures to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors whose names are in the EPLS, except as otherwise provided in this subpart;

(8) Direct inquiries concerning listed contractors to the agency or other authority that took the action; and

(9) Contact GSA for technical assistance with the EPLS, via the support e-mail address or on the technical support phone line available at the EPLS web site provided in paragraph (d) of this section.

(d) The EPLS is available at <http://epls.gov>.

9.405 [Amended]

■ 6. Amend section 9.405 by—

a. Removing from paragraph (b) “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the EPLS” in its place; and

b. Removing from paragraphs (d)(1) and (d)(4) “List of Parties Excluded from

Federal Procurement and Nonprocurement Programs” and adding “EPLS” in their place.

9.405-2 [Amended]

■ 7. Amend section 9.405-2 by removing from paragraphs (b) introductory text, (b)(2), and (b)(3) “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the EPLS” in their place.

PART 22—APPLICATIONS OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**22.1025 [Amended]**

■ 8. Amend the first sentence of section 22.1025 by removing “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “Excluded Parties List System” in its place.

PART 28—BONDS AND INSURANCE**28.203-7 [Amended]**

■ 9. Amend section 28.203-7 in paragraphs (c) and (d) by removing “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the Excluded Parties List System” in their place.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES**44.202-2 [Amended]**

■ 10. Amend section 44.202-2 in paragraph (a)(13) by removing “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the Excluded Parties List System” in its place.

44.303 [Amended]

■ 11. Amend section 44.303 in paragraph (c) by removing “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “Excluded Parties List System” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**52.209-6 [Amended]**

■ 12. Amend section 52.209-6 by revising the date of the clause to read “(JAN 2005)” removing from the introductory text of paragraph (c) “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “Excluded Parties List System” in its place; and removing from paragraphs (c)(2) and (c)(3) “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the Excluded Parties List System” in their place.

52.213-4 [Amended]

■ 13. Amend section 52.213-4 by revising the date of the clause to read "(JAN 2005)"; and by removing from paragraph (b)(2)(i) of the clause "(July 1995)" and adding "(JAN 2005)" in its place.

[FR Doc. 04-27634 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 12, 13, and 15**

[FAC 2001-26; FAR Case 2003-022; Item III]

RIN 9000-AJ88

**Federal Acquisition Regulation;
Special Emergency Procurement
Authority**

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 8312, February 23, 2004, to a final rule with changes. The rule amends the Federal Acquisition Regulation (FAR) to implement the special emergency procurement authorities of Section 1443 of the Services Acquisition Reform Act of 2003 (Pub. L. 108-136, Title XIV, codified at 41 U.S.C. 428a), and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. Section 822 of the Fiscal Year 2005 Defense Authorization Act further increased the threshold amounts for any contract to be awarded and performed, or purchases to be made, outside the United States.

Also, under section 1443, the head of the contracting activity carrying out a

procurement of supplies or services to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack may treat such supplies or services as a commercial item.

DATES: Effective Date: January 19, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAC 2001-26, FAR case 2003-022.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (SARA) (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. Section 1443 also authorizes the expanded use of Simplified Acquisition and Commercial Items procedures. Section 822 authorized a higher micro-purchase and simplified acquisition threshold for any contract to be awarded and performed, or purchases to be made, outside the United States, for the same purposes as authorized under section 1443 of SARA.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 69 FR 8312, February 23, 2004. The 60-day comment period for the interim rule ended April 23, 2004. Three comments were received; they are addressed below. Section 822 of the Fiscal Year 2005 Defense Authorization Act was enacted after publication of the interim rule. As a result, this final rule incorporates the increased thresholds provided by section 822.

One commenter recommended that the Councils seek a Governmentwide waiver from the Secretary of Labor from application of FAR clauses 52.222-26, Equal Opportunity, and 52.222-36, Affirmative Action for Workers With Disabilities, so that the purchase card could be used without having to also issue a purchase order with these clauses. The final rule does not adopt this suggestion because the FAR already authorizes the agency head to waive the

inclusion of these clauses when deemed to be in the interest of national security (FAR 22.807(a)(1) and 22.1403(b), respectively).

The same commenter suggested that the final rule address the fact that the Service Contract Act requires clauses in all service contracts above \$2,500. The final rule does not adopt this suggestion because neither SARA nor the Fiscal Year 2005 Defense Authorization Act suggested that these acquisitions are exempt from statutory requirements.

Another commenter questioned why the interim rule did not include contingency operations in the increased limitation on use of simplified acquisition procedures, as authorized by Section 1443. The final rule has been amended to include the procurement of commercial supplies and services in support of contingency operations in the increased limitation on use of simplified acquisition procedures. However, services and supplies procured in support of a contingency operation must meet the definition of a commercial item in FAR 2.101 for the increased limitation to apply.

This is not a significant regulatory action and, therefore, is 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

This final rule 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.* However, the increased limitations are limited to procurements that are entered into in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. There are no data available on the number of procurements that will be eligible. We expect the increased thresholds to this limited class of procurements will apply to a very small number of small entities.

This final rule does not impose any data collection requirements on small business concerns. The rule does not duplicate, overlap, or conflict with other relevant Federal rules. There is no significant alternative to the final rule that would accomplish the stated beneficial objective.

The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as follows:

1. *Description of the reasons why action by the agency is being considered.* This final rule revises the Federal Acquisition Regulation (FAR) in order to implement