

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]

BILLING CODE 6820-EP-S

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]

BILLING CODE 6820–EP–S

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. 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