

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 19 and 52**

[FAC 2005-06; FAR Case 2004-036; Item VI]

RIN 9000-AK11

**Federal Acquisition Regulation;
Addition of Landscaping and Pest
Control Services to the Small Business
Competitiveness Demonstration
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 to finalize, without change, the interim rule published in the **Federal Register** at 70 FR 11740, March 9, 2005. This rule implements Section 821 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 821 added landscaping and pest control services to the Small Business Competitiveness Demonstration Program.

DATES: *Effective Date:* September 30, 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 Ms. Kimberly Marshall, Procurement Analyst, at (202) 219-0986. Please cite FAC 2005-06, FAR case 2004-036.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule finalizes, without change, the interim rule published in the **Federal Register** at 70 FR 11740, March 9, 2005. The rule implements Section 821 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375). Section 821 amended Section 717 of the Small Business Competitiveness Demonstration Program Act of 1988 (15 U.S.C. 644 note) by adding landscaping and pest control services to the program. As a result, agencies are precluded from considering acquisitions for landscaping and pest control services over the

emerging small business reserve, currently \$25,000, for small business set-asides unless the set-asides are needed to meet their assigned goals.

The Councils published the interim rule in the **Federal Register** at 70 FR 11740, March 9, 2005, with a request for comments by May 9, 2005. One respondent submitted a comment in response to the interim rule. The comment is addressed below.

Comment: The rule should be changed to provide small businesses, including "mom and pop" businesses, the first opportunity to compete for awards under NAICS codes 561730 and 561710.

Councils' response: The rule implements a statute which added landscaping and pest control services to the Small Business Competitiveness Demonstration Program. The Councils have no authority to change the statute or implementing regulation to make the suggested change. The Councils note, however, that the rule applies only to acquisitions over the emerging small business reserve amount which is currently \$25,000. Agencies will continue to set-aside, for emerging small businesses, acquisitions at or below the emerging small business reserve amount consistent with the requirements in FAR subparts 19.1007(c). In addition, agencies are allowed to reinstate the small business set-asides if needed to meet their assigned goals.

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.*, pertains to this final rule and a Final Regulatory Flexibility Analysis (FRFA) has been performed. The analysis is summarized as follows:

Final Regulatory Flexibility Analysis

This final rule amends FAR Parts 19 and 52 to implement Section 821 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, which amends Section 717 of the Small Business Competitiveness Demonstration Program Act of 1988 (15 U.S.C. 644 note). Section 821 provides for the addition of two North American Industry Classification System (NAICS) codes, landscaping (561730) and pest control services (561710) to the Small Business Competitiveness Demonstration Program under the designated industry groups.

The changes inform the agencies of the new additions to the Small Business Competitiveness Demonstration Program and also gives the Contracting Officer the specific

"Emerging small business reserve amount" of \$25,000 for the designated groups.

The objective of the final rule is to further assess the ability of small business concerns to compete successfully in certain industry categories without competition being restricted by the use of small business set-asides. The implementation of section 821 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375 will change the FAR as follows: (1) revises the designated industry groups to include Exterminating and Pest Control Services and Landscaping Services in FAR 19.1002(1) and 19.1005; (2) deletes the word "four" before designated industry groups in the FAR.

There was one comment that addressed the IRFA. The comment is addressed below:

Comment: The rule should be changed to provide small businesses, including "mom and pop" businesses, the first opportunity to compete for awards under NAICS codes 561730 and 561710.

Agency's Response: The rule implements a statute which added landscaping and pest control services to the Small Business Competitiveness Demonstration Program. The Councils have no authority to change the statute or implementing regulation to make the suggested change. The Councils note, however, that the rule applies only to acquisitions over the emerging small business reserve amount which is currently \$25,000. Agencies will continue to set-aside, for emerging small businesses, acquisitions at or below the emerging small business reserve amount consistent with the requirements in FAR subparts 19.1007(c). In addition, agencies are allowed to reinstate the small business set-asides if needed to meet their assigned goals.

The final rule will apply to all small business concerns that compete on Federal procurements falling under NAICS codes 561730 and 561710. Based on Governmentwide data retrieved from the Federal Procurement Data System (FPDS) for the specified NAICS codes, approximately 141 small business concerns were awarded contracts of \$25,000 or more on an unrestricted basis in fiscal year 2002 for NAICS code 561730. This represents about 88 percent of all contracts awarded with unrestricted competition for that NAICS code. In fiscal year 2003 there were 116 contracts awarded to small business concerns on an unrestricted basis, which represents approximately 81 percent of all contracts awarded with unrestricted competition for that NAICS codes. FPDS data also show that 25 small business concerns were awarded contracts of \$25,000 or more on an unrestricted basis in fiscal year 2002 for NAICS code 561710. This represents about 56 percent of all contracts awarded with unrestricted competition for that NAICS code. In fiscal year 2003 there were 17 contracts awarded to small business concerns on an unrestricted basis, which represents approximately 77 percent of all contracts awarded with unrestricted competition for that NAICS codes. It is estimated that small business concerns will continue to be successful in winning at least one-half to three-fourths of awards on an unrestricted

basis when these designated industry groups are added to the Small Business Competitiveness Demonstration Programs given the history of their success in recent unrestricted competitive Government acquisitions falling under NAICS codes 561730 and 561710. Additional data retrieved from FPDS show that the number of small business set-asides for NAICS code 561730 in fiscal years 2002 and 2003 combined was approximately 952 and the number of small business set-asides for NAICS code 561710 in fiscal years 2002 and 2003 combined was approximately 96. 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 previously set-aside acquisitions for services falling within NAICS codes 561730 and 561710 will now be included in the designated industry groups of the Small Business Competitiveness Demonstration Program. FAR 19.1007(b) states that "Solicitations for acquisitions in any of the designated industry groups that have an anticipated dollar value greater than the emerging small business reserve amount must not be considered for small business set-asides under FAR 19.5. However, agencies may reinstate the use of small business set-asides as necessary to meet their assigned goals, but only within organizational units that failed to meet the small business participation goal. Acquisitions in the designated industry groups must continue to be considered for placement under the 8(a) Program (see Subpart 19.8), the HUBZone Program (see Subpart 19.13), and the Service-Disabled Veteran-Owned Small Business Procurement Program (see Subpart 19.14)." Given the large number of awards made under these NAICS codes, it is anticipated that the addition of the two NAICS codes to the Small Business Competitiveness Demonstration Program will promote an increased number of opportunities for small business concerns to develop teaming arrangements and joint ventures.

The purpose of the Competitiveness Demonstration Program is to assess the ability of small businesses to compete successfully in certain industry categories without competition being restricted by the use of small business set-asides. This portion of the program is limited to the four designated industry groups listed in FAR 19.1005 and will include the addition of landscaping and pest control services to the designated industry groups. The final rule imposes no reporting, recordkeeping, or other compliance requirements.

The final rule does not duplicate, overlap, or conflict with any other Federal rules. There are no practical alternatives that will accomplish the objectives of this final rule.

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 19 and 52

Government procurement.

Dated: September 22, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 19 and 52, which was published at 70 FR 11740, March 9, 2005, is adopted as a final rule without change.

[FR Doc. 05-19473 Filed 9-29-05; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 28

[FAC 2005-06; FAR Case 2003-029; Item VII]

RIN 9000-AK01

Federal Acquisition Regulation; Powers of Attorney for Bid Bonds

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 establish that a copy of an original power of attorney, including a photocopy or facsimile copy, when submitted in support of a bid bond, is sufficient evidence of the authority to bind the surety. The authenticity and enforceability of the power of attorney at the time of the bid opening will be treated as a matter of responsibility.

DATES: *Effective Date:* September 30, 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 Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2005-06, FAR case 2003-029.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation to revise the policy relating to acceptance of copies of powers of attorney accompanying bid bonds. There has been a significant level of controversy surrounding contracting officers' decisions regarding the evaluation of bid bonds and accompanying powers of attorney.

Since 1999, a series of GAO decisions has rejected telefaxed as well as photocopied powers of attorney. The latest decision from GAO (*All Seasons Construction, Inc.*, B-291166.2, Dec. 6, 2002) has been interpreted by industry and procuring agencies to require a contracting officer to inspect the power of attorney at bid opening to ascertain that the signatures are original and applied after generation of the documents. This case law has created a costly and unworkable requirement for the surety industry and left contracting officers with an almost impossible standard to enforce. More recently, on January 9, 2004, the U.S. Court of Federal Claims, in *Hawaiian Dredging Construction, Co. v. U.S.*, 59 Fed. Cl. 205 (2004), issued a ruling highlighting that the FAR does not require an original signature on the document serving as evidence of authority to bind the surety. The court was critical of GAO's reasoning in the *All Seasons* case. In response to the split between the two bid protest fora and the quandary shared by industry and government in implementing a workable standard to be applied at bid opening, the Councils agreed to a revision to FAR part 28 that would remove the matter of authenticity and enforceability of powers of attorney from a contracting officer's responsiveness determination, which is based solely on documents available at the time of bid opening. Instead, the rule instructs contracting officers to address these issues after bid opening as a matter of responsibility.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 51936, August 23, 2004, and 46 public comments were received. A resolution of the public comments follows: