



# Federal Register

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**Wednesday,  
March 20, 2002**

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## **Part II**

**Department of Defense  
General Services  
Administration**

**National Aeronautics and  
Space Administration**

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**48 CFR Parts 1, 2, et al.  
Federal Acquisition Circular and  
Regulations; Final Rules**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2001-06; Introduction**

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

**ACTION:** Summary presentation of final rules.

**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) 2001-06. 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.arnet.gov/far>.

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

**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 the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001-06 and specific FAR case number(s). Interested parties may also visit our website at <http://www.arnet.gov/far>.

Item	Subject	FAR Case	Analyst
I	Commercial Items—Standard Form 1449	2000-012	Moss.
II	Definitions for “Contract Action” and “Contracting Action”	2000-402	Moss.
III	Definitions for Sealed Bid and Negotiated Procurements	2000-403	DeStefano.
IV	Procurement Integrity Rewrite	1998-024	DeStefano.
V	Acquisition of Helium	2000-008	Nelson.
VI	HUBZone Program Applicability	2001-003	Cundiff.
VII	Application of Labor Clauses	1999-612	Nelson.
VIII	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 2001-06 amends the FAR as specified below:

**Item I—Commercial Items SF 1449 (FAR Case 2000-012)**

Standard Form 1449, Solicitation/Contract/Order for Commercial Items, is prescribed by the FAR for the acquisition of commercial items. This final rule makes several minor revisions to the form, including the addition of a block to indicate that the acquisition is a HUBZone set-aside, the substitution of a NAICS code for the SIC code, the notation that award is made only on the offeror’s items specifically listed in block 29, and the addition of several blocks in the area of the form used as a receiving report by the Government. All of the changes involve blocks that are completed by the Government.

**Item II—Definitions for “Contract Action” and “Contracting Action” (FAR Case 2000-402)**

This final rule amends the FAR to provide for consistent use of the term “contract action.” The rule changes the term “contracting action” to “contract action” throughout the FAR and makes other editorial changes to clarify the text.

**Item III—Definitions for Sealed Bid and Negotiated Procurements (FAR Case 2000-403)**

This final rule amends the FAR to clarify definitions that are used for sealed bid and negotiated procurements. The final rule—

- Moves the definitions of “bid sample” and “descriptive literature” from FAR Part 14 to FAR 2.101 because the definitions apply to more than one FAR part, e.g., Parts 14 and 15;
- Amends those definitions and the definition of “offer” in accordance with plain language guidelines;
- Revises applicable provisions in FAR Part 52 to conform with the new definitions;
- Adds a new definition for “solicitation” at FAR 2.101; and
- Provides definitions for “bid” and “bidder” in FAR Part 28 because, as used in that part, the terms address sealed bid and negotiated acquisitions.

The rule clarifies terminology used in FAR 15.201(f), 15.609(e), and 35.007(g). Where we mean an entity that is actively seeking a contract, we use the term “prospective offeror.” However, those cites describe processes that are set up to ensure fair and open competition. Therefore, any interested party is able to participate, including parties that the Government has not yet identified. Therefore, the rule uses the more general term “potential offeror.”

**Item IV—Procurement Integrity Rewrite (FAR Case 1998-024)**

This final rule amends FAR parts 2, 3, 4, 9, 15, and 52 to rewrite the procurement integrity coverage (the implementation of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (more commonly referred to as the Procurement Integrity Act)) in plain language.

FAR 3.104 implements prohibitions, restrictions, and other requirements of the Procurement Integrity Act that are placed on certain agency officials that participate in Federal agency procurements. However, other statutes and regulations also govern the conduct of Government employees. While specific guidance pertaining to the Procurement Integrity Act at FAR 3.104 does not implement these other statutes and regulations, the rule does add guidance to alert these agency officials that they should seek advice from agency ethics officials before engaging in certain activities that could have serious consequences, including criminal prosecution.

These revisions to FAR 3.104 do not change either the requirements of the Procurement Integrity Act or change, in any manner, who is covered by, or the activities covered in, Office of Government Ethics regulations interpreting conflict of interest statutes.

**Item V—Acquisition of Helium (FAR Case 2000-008)**

This final rule revises FAR Subpart 8.5 and the clause at 52.208-8 to

implement the Department of the Interior final rule regarding helium contracts that was published in the **Federal Register** at 63 FR 66760, December 3, 1998. The final rule—

- Changes the definitions;
- Eliminates the requirement for certain contractors and subcontractors to submit helium forecasts; and
- Establishes the requirement that contractors and subcontractors under contracts with a major helium requirement must report purchases of helium from Federal helium suppliers.

#### **Item VI—HUBZone Program Applicability (FAR Case 2001–003)**

The HUBZone Act of 1997 expanded the applicability of the HUBZONE Program to all agencies covered by the FAR after September 30, 2000, and is currently reflected in the FAR. This rule amends the FAR to simplify the existing language at FAR Parts 12, 19, and 52.

#### **Item VII—Application of Labor Clauses (FAR Case 1999–612)**

This final rule affects all contracting officers who use the FAR. The rule—

- Moves the Prohibition of Segregated Facilities clause from the list at paragraph (b), to the list at paragraph (a), of the clause at 52.213–4 and clarifies the existing requirements of 41 CFR 60–1.8, promulgated by the Department of Labor under E.O. 11246. The Prohibition of Segregated Facilities clause must be included in contracts whenever the Equal Opportunity clause (FAR 52.222–26) is included.

- Moves the Equal Opportunity clause from the list at paragraph (b), to the list at paragraph (a), of the clause at 52.213–4 because the clause must be included in almost all contracts, even those under \$10,000, in accordance with the requirements at FAR 22.802(a)(1) and 22.807(b). Even though included, the clause is inapplicable unless the aggregate value of contracts and subcontracts awarded to the contractor exceeds \$10,000 in a year.

- Makes other revisions to the clause at FAR 52.222–26, Equal Opportunity, to include a definition of “United States” and incorporate the exception for work performed outside the United States.

#### **Item VIII—Technical Amendments**

These amendments update sections and make editorial changes at FAR 1.404, 5.207, 6.302–5, 9.104–3, 31.101, 52.219–19, and 52.219–20.

Dated: March 6, 2002.

**Al Matera,**  
*Director, Acquisition Policy Division.*

#### **Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001–06 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 2001–06 are effective April 4, 2002.

Dated: March 4, 2002.

**Deidre A. Lee,**  
*Director, Defense Procurement.*

Dated: March 4, 2002.

**David A. Drabkin,**  
*Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.*

Dated: March 1, 2002.

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

[FR Doc. 02–5819 Filed 3–19–02; 8:45 am]

**BILLING CODE 6820–EP–P**

## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

#### **48 CFR Parts 1 and 53**

[FAC 2001–06; FAR Case 2000–012; Item I]

**RIN 9000–AJ31**

#### **Federal Acquisition Regulation; Commercial Items—Standard Form 1449**

**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 Standard Form 1449, Solicitation/Contract/Order for Commercial Items.

**DATES:** *Effective Date:* April 4, 2002.

**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 2001–06, FAR case 2000–012.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

Standard Form 1449, Solicitation/Contract/Order for Commercial Items, is prescribed by the FAR for the acquisition of commercial items. This final rule makes several minor revisions to the form, including the addition of a block to indicate that the acquisition is a HUBZone set-aside, the substitution of a NAICS code for the SIC code, the notation that award is made only on the offeror's items specifically listed in block 29, and the addition of several blocks in the area of the form used as a receiving report by the Government. None of the changes involve blocks that are completed by the public.

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**

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 1 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 2001–06, FAR case 2000–012), in correspondence.

##### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0136. The previous edition of the form indicated that the public reporting burden related to the form had been cleared under OMB No. 9000–0136. That statement has been removed from this edition because OMB Clearance 9000–0136 covers information collections unique to commercial item acquisition. It does not cover the information required by this form. This form is primarily completed by the Government. The contractor/offeror fills in only its name, address, and proposed prices. Those pieces of information do not require clearance in the FAR under

the Paperwork Reduction Act. Office of Management and Budget Number 9000-0136 remains valid for the other information collection requirements related to the acquisition of commercial items.

**List of Subjects in 48 CFR Parts 1 and 53**

Government procurement.

Dated: March 6, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1 and 53 as set forth below:

1. The authority citation for 48 CFR parts 1 and 53 continues to read as follows:

**Authority:** 40 U.S.C. 486(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 by removing the FAR segment “SF 1449” and its corresponding OMB Control Number “9000–0136”.

**PART 53—FORMS**

**53.212 [Amended]**

3. Amend section 53.212 by removing “(OCT 1995)” and adding “(Rev. 4/02)” in its place.

**53.213 [Amended]**

4. Amend section 53.213 in paragraph (a) and the introductory text of paragraph (f) by removing “(10/95 Ed.)” and adding “(Rev. 4/02)” in its place.

5. Revise section 53.301–1449 to read as follows.

**53.301–1449 Solicitation/Contract/Order for Commercial Items.**

BILLING CODE 6820–EP–P

<b>SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS</b> <b>OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, &amp; 30</b>				1. REQUISITION NUMBER		PAGE 1 OF																	
2. CONTRACT NO.		3. AWARD/EFFECTIVE DATE		4. ORDER NUMBER		5. SOLICITATION NUMBER		6. SOLICITATION ISSUE DATE															
7. FOR SOLICITATION INFORMATION CALL:				a. NAME				b. TELEPHONE NUMBER (No collect calls)		8. OFFER DUE DATE / LOCAL TIME													
9. ISSUED BY			CODE			10. THIS ACQUISITION IS			11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED			12. DISCOUNT TERMS											
						<input type="checkbox"/> UNRESTRICTED <input type="checkbox"/> SET ASIDE: % FOR <input type="checkbox"/> SMALL BUSINESS <input type="checkbox"/> HUBZONE SMALL BUSINESS <input type="checkbox"/> 8(A) NAICS: SIZE STANDARD:			<input type="checkbox"/> SEE SCHEDULE <input type="checkbox"/> 13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700) 13b. RATING 14. METHOD OF SOLICITATION <input type="checkbox"/> RFQ <input type="checkbox"/> IFR <input type="checkbox"/> RFP														
15. DELIVER TO				CODE				16. ADMINISTERED BY				CODE											
17a. CONTRACTOR/OFFEROR				CODE				FACILITY CODE				18a. PAYMENT WILL BE MADE BY				CODE							
TELEPHONE NO.								<input type="checkbox"/> 17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER								18b. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED <input type="checkbox"/> SEE ADDENDUM							
19. ITEM NO.		20. SCHEDULE OF SUPPLIES/SERVICES						21. QUANTITY		22. UNIT		23. UNIT PRICE		24. AMOUNT									
<i>(Use Reverse and/or Attach Additional Sheets as Necessary)</i>																							
25. ACCOUNTING AND APPROPRIATION DATA										26. TOTAL AWARD AMOUNT (For Govt. Use Only)													
<input type="checkbox"/> 27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4, FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA										<input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED		<input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED											
<input type="checkbox"/> 27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4, FAR 52.212-5 IS ATTACHED. ADDENDA										<input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED		<input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED											
<input type="checkbox"/> 28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.								<input type="checkbox"/> 29. AWARD OF CONTRACT: REF. _____ OFFER DATED _____ YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:															
30a. SIGNATURE OF OFFEROR/CONTRACTOR						31a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)																	
30b. NAME AND TITLE OF SIGNER (Type or print)				30c. DATE SIGNED		31b. NAME OF CONTRACTING OFFICER (Type or print)				31c. DATE SIGNED													

19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT

32a. QUANTITY IN COLUMN 21 HAS BEEN  
 RECEIVED     INSPECTED     ACCEPTED, AND CONFORMS TO THE CONTRACT, EXCEPT AS NOTED: \_\_\_\_\_

32b. SIGNATURE OF AUTHORIZED GOVERNMENT REPRESENTATIVE	32c. DATE	32d. PRINTED NAME AND TITLE OF AUTHORIZED GOVERNMENT REPRESENTATIVE
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32e. MAILING ADDRESS OF AUTHORIZED GOVERNMENT REPRESENTATIVE	32f. TELEPHONE NUMBER OF AUTHORIZED GOVERNMENT REPRESENTATIVE
	32g. E-MAIL OF AUTHORIZED GOVERNMENT REPRESENTATIVE

33. SHIP NUMBER <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL	34. VOUCHER NUMBER	35. AMOUNT VERIFIED CORRECT FOR	36. PAYMENT <input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL	37. CHECK NUMBER
--	--------------------	---------------------------------	--	------------------

38. S/R ACCOUNT NUMBER	39. S/R VOUCHER NUMBER	40. PAID BY
------------------------	------------------------	-------------

41a. I CERTIFY THIS ACCOUNT IS CORRECT AND PROPER FOR PAYMENT		42a. RECEIVED BY ( <i>Print</i> )	
41b. SIGNATURE AND TITLE OF CERTIFYING OFFICER	41c. DATE	42b. RECEIVED AT ( <i>Location</i> )	
		42c. DATE REC'D (YY/MM/DD)	42d. TOTAL CONTAINERS

STANDARD FORM 1449 (REV. 4/2002) BACK

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 1, 5, 6, 8, 17, 19, 32, and  
52**[FAC 2001-06; FAR Case 2000-402; Item  
II]

RIN 9000-A176

**Federal Acquisition Regulation;  
Definitions for "Contract Action" and  
"Contracting Action"****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 amend the  
Federal Acquisition Regulation (FAR) to  
provide for consistent use of the term  
"contract action" and to make other  
editorial changes to clarify the text.**DATES:** *Effective Date:* April 4, 2002.**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-  
06, FAR case 2000-402.**SUPPLEMENTARY INFORMATION:****A. Background**

This rule amends the FAR to provide  
for consistent use of the term "contract  
action." The rule changes the term  
"contracting action" to "contract  
action" throughout the FAR and makes  
other editorial changes to clarify the  
text.

DoD, GSA, and NASA published a  
proposed rule in the **Federal Register** on  
May 31, 2000 (65 FR 34894). One  
respondent submitted comments on the  
proposed rule. Based on those  
comments, the rule was changed to  
provide for more consistent use of the  
term "contract action" and to place  
definitions in the proper FAR sections.

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 we  
are not substantively changing  
procedures for award and  
administration of contracts. We did not  
receive any comments regarding this  
determination as a result of publication  
of the proposed rule in the **Federal  
Register** on May 31, 2000 (65 FR 34894).

**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  
Office of Management and Budget  
approval under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 1, 5, 6,  
8, 17, 19, 32, and 52**

Government procurement.

Dated: March 6, 2002.

**Al Matera,***Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA  
amend 48 CFR parts 1, 5, 6, 8, 17, 19,  
32, and 52 as set forth below:

1. The authority citation for 48 CFR  
parts 1, 5, 6, 8, 17, 19, 32, and 52  
continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C.  
chapter 137; and 42 U.S.C. 2473(c).

**PART 1—FEDERAL ACQUISITION  
REGULATIONS SYSTEM**

2. Revise section 1.403 to read as  
follows:

**1.403 Individual deviations.**

Individual deviations affect only one  
contract action, and, unless 1.405(e) is  
applicable, may be authorized by the  
agency head. The contracting officer  
must document the justification and  
agency approval in the contract file.

3. Revise the introductory paragraph  
of section 1.404 to read as follows:

**1.404 Class deviations.**

Class deviations affect more than one  
contract action. When an agency knows  
that it will require a class deviation on  
a permanent basis, it should propose a  
FAR revision, if appropriate. Civilian  
agencies, other than NASA, must  
furnish a copy of each approved class  
deviation to the FAR Secretariat.

\* \* \* \* \*

**1.701 [Amended]**

4. Amend the first sentence of section  
1.701 by removing the word  
"contracting" and adding "contract" in  
its place.

**1.703 [Amended]**

5. Amend section 1.703 in paragraph  
(a) by removing the word "contracting"  
each time it appears (3 times) and  
adding "contract" in its place.

6. Amend section 1.705 by revising  
paragraph (b) to read as follows:

**1.705 Supersession and modification.**

\* \* \* \* \*

(b) The contracting officer need not  
cancel the solicitation if the D&F, as  
modified, supports the contract action.

**PART 5—PUBLICIZING CONTRACT  
ACTIONS**

7. Revise section 5.001 to read as  
follows:

**5.001 Definition.**

*Contract action*, as used in this part,  
means an action resulting in a contract,  
as defined in subpart 2.1, including  
actions for additional supplies or  
services outside the existing contract  
scope, but not including actions that are  
within the scope and under the terms of  
the existing contract, such as contract  
modifications issued pursuant to the  
Changes clause, or funding and other  
administrative changes.

**PART 6—COMPETITION  
REQUIREMENTS****6.502 [Amended]**

8. Amend section 6.502 in paragraph  
(b)(1)(iv) by removing the word  
"contracting" and adding "contract" in  
its place.

**PART 8—REQUIRED SOURCES OF  
SUPPLIES AND SERVICES**

9. Revise section 8.102 to read as  
follows:

**8.102 Policy.**

When practicable, agencies must use  
excess personal property as the first  
source of supply for agency and cost-  
reimbursement contractor requirements.  
Agency personnel must make positive  
efforts to satisfy agency requirements by  
obtaining and using excess personal  
property (including that suitable for  
adaptation or substitution) before  
initiating a contract action.

**PART 17—SPECIAL CONTRACTING METHODS**

**17.104 [Amended]**

10. Amend section 17.104 in the second sentence of paragraph (b) by removing the words “contracting action” and adding “contract” in their place.

11. Amend section 17.503 by revising the introductory text of paragraph (b) to read as follows:

**17.503 Determinations and findings requirements.**

\* \* \* \* \*

(b) If the Economy Act order requires contract action by the servicing agency, the D&F must also include a statement that at least one of the following circumstances applies:

\* \* \* \* \*

**PART 19—SMALL BUSINESS PROGRAMS**

**19.302 [Amended]**

12. Amend section 19.302 in the first sentence of paragraph (h)(4) by removing the words “contracting action” and adding “contract action” in their place.

13. Amend section 19.505 by revising paragraph (c) to read as follows:

**19.505 Rejecting Small Business Administration recommendations.**

\* \* \* \* \*

(c) If the head of the contracting activity agrees that the contracting officer’s rejection was appropriate—

(1) Within 1 working day, the SBA procurement center representative may request the contracting officer to suspend action on the acquisition until the SBA Administrator appeals to the agency head (see paragraph (f) of this section); and

(2) The SBA must be allowed 15 working days after making such a written request, within which the Administrator of SBA—

(i) May appeal to the Secretary of the Department concerned; and

(ii) Must notify the contracting officer whether the further appeal has, in fact, been taken. If notification is not received by the contracting officer within the 15-day period, it is deemed that the SBA request to suspend the contract action has been withdrawn and that an appeal to the Secretary was not taken.

\* \* \* \* \*

**PART 32—CONTRACT FINANCING**

14. Revise the introductory paragraph of section 32.000 to read as follows:

**32.000 Scope of part.**

This part prescribes policies and procedures for contract financing and other payment matters. This part addresses—

\* \* \* \* \*

15. Amend section 32.001 by revising the definition “Contract action” to read as follows:

**32.001 Definitions.**

\* \* \* \* \*

*Contract action* means an action resulting in a contract, as defined in subpart 2.1, including actions for additional supplies or services outside the existing contract scope, but not including actions that are within the scope and under the terms of the existing contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

\* \* \* \* \*

**32.703–2 [Amended]**

16. Amend section 32.703–2 in the first sentence of the introductory text of paragraph (a) by removing the words “contracting action” and adding “contract action” in their place; by removing the semicolon after the word “available” and adding a comma in its place; and by removing the comma after the word “provided”.

17. Amend section 32.705–1 by revising paragraph (a) to read as follows:

**32.705–1 Clauses for contracting in advance of funds.**

(a) Insert the clause at 52.232–18, Availability of Funds, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contract action will be initiated before the funds are available.

\* \* \* \* \*

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

18. Amend section 52.232–18 by revising the introductory text to read as follows:

**52.232–18 Availability of Funds.**

As prescribed in 32.705–1(a), insert the following clause:

\* \* \* \* \*

[FR Doc. 02–5821 Filed 3–19–02; 8:45 am]  
BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 3, 14, 15, 28, 35, and 52**

[FAC 2001–06; FAR Case 2000–403; Item III]

RIN 9000–A184

**Federal Acquisition Regulation; Definitions for Sealed Bid and Negotiated Procurements**

**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 amend the Federal Acquisition Regulation (FAR) to provide consistent definitions for sealed bids and negotiated procurements.

**DATES:** *Effective Date:* April 4, 2002.

**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 Mr. Ralph De Stefano, Procurement Analyst, at (202) 501–1758. Please cite FAC 2001–06, FAR case 2000–403.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The rule clarifies definitions that are used in the FAR for sealed bid and negotiated procurements. The rule—

- Moves the definitions of “bid sample” and “descriptive literature” from FAR part 14 to FAR 2.101 because the definitions apply to more than one FAR part;

- Amends those definitions and the definition of “offer” in accordance with plain language guidelines;

- Revises applicable provisions in FAR part 52 to conform with the new definitions;

- Adds a new definition for “solicitation” at FAR 2.101; and
- Provides definitions for “bid” and “bidder” in FAR part 28 because, as used in that part, the terms address sealed bid and negotiated acquisitions.

We also reviewed every instance where the terms “offeror,” “prospective offeror,” and “potential offeror” are used in the FAR. The rule clarifies



terminology used in FAR 15.201(f), 15.609(e), and 35.007(g). Where we mean an entity that is actively seeking a contract, we use the term "prospective offeror." However, those cites describe processes that are set up to ensure competition. Therefore, any interested party is able to participate, including parties that the Government has not yet identified. Therefore, the rule uses the more general term "potential offeror."

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 42852, July 11, 2000. Four respondents submitted comments on the proposed rule. The Councils considered all comments in the development of the final rule. A summary of the substantive comments is provided:

- *Comment:* Under 52.214-20, paragraph (c), change the second sentence to read "The Government will reject the bid when the sample fails" for clarity.

*Response:* Accepted.

- *Comment:* Under FAR 2.101, the definition of an "offer" does not include a "quotation." The definition of a "solicitation" includes a "quotation." Both definitions should be consistent.

*Response:* Not accepted. The definition of "offer" is not all-inclusive. It does not include "quotations." A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. See FAR 13.004.

- *Comment:* The proposed language under FAR 14.202-5(e) should cite FAR 14.202-4(f) in lieu of (g).

*Response:* Accepted.

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, while we have made changes for clarity and consistency, we have not substantively changed procedures for award and 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

Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

## List of Subjects in 48 CFR Parts 2, 3, 14, 15, 28, 35, and 52

Government procurement.

Dated: March 6, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR Parts 2, 3, 14, 15, 28, 35, and 52 as set forth below:

1. The authority citation for 48 CFR Parts 2, 3, 14, 15, 28, 35, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(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 by adding, in alphabetical order, the definitions "Bid sample" and "Descriptive literature"; revising the definition "Offer"; and by adding the definition "Solicitation" to read as follows:

### 2.101 Definitions.

\* \* \* \* \*

*Bid sample* means a product sample required to be submitted by an offeror to show characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the solicitation (*e.g.*, balance, facility of use, or pattern).

\* \* \* \* \*

*Descriptive literature* means information provided by an offeror, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction of a product or explains its operation. The term includes only that information needed to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

\* \* \* \* \*

*Offer* means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses to requests for quotations (simplified acquisition) are "quotations", not offers. For unsolicited proposals, see subpart 15.6.

\* \* \* \* \*

*Solicitation* means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called "invitations for bids." *Solicitations* under negotiated

procedures are called "requests for proposals." Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.

\* \* \* \* \*

## PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Amend section 3.302 by revising the definition "Line item" to read as follows:

### 3.302 Definitions.

\* \* \* \* \*

*Line item* means an item of supply or service, specified in a solicitation, that the offeror must separately price.

## PART 14—SEALED BIDDING

4. Amend section 14.201-6 by—  
a. Revising paragraph (a);  
b. Removing paragraphs (b)(1) and (b)(2) and redesignating paragraphs (b)(3) and (b)(4) as (b)(1) and (b)(2);  
c. Revising the introductory text of paragraph (o)(2) and paragraph (o)(3); and

d. Removing from paragraph (p)(3) "14.202-5(e)(2)" and adding "14.202-5(d)(2)" in its place. The revised text reads as follows:

### 14.201-6 Solicitation provisions.

(a) The provisions prescribed in this subsection apply to preparation and submission of bids in general. See other FAR parts for provisions and clauses related to specific acquisition requirements.

\* \* \* \* \*

(o)(1) \* \* \*

(2) If it appears that the conditions in 14.202-4(e)(1) will apply and the contracting officer anticipates granting waivers and—

\* \* \* \* \*

(3) See 14.202-4(e)(2) regarding waiving the requirement for all bidders.

\* \* \* \* \*

### 14.202-4 [Amended]

5. Amend section 14.202-4 by removing paragraph (a); redesignating paragraphs (b) through (h) as (a) through (g), respectively; and by removing the word "of" from the heading of newly designated paragraph (g).

6. Revise section 14.202-5 to read as follows:

### 14.202-5 Descriptive literature.

(a) *Policy.* Contracting officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the

products offered meet the specification and to establish exactly what the bidder proposes to furnish.

(b) *Justification.* The contracting officer must document in the contract file the reasons why product acceptability cannot be determined without the submission of descriptive literature, except when the contract specifications require submission.

(c) *Requirements of invitation for bids.* (1) The invitation must clearly state—

(i) What descriptive literature the bidders must furnish;

(ii) The purpose for requiring the literature;

(iii) The extent of its consideration in the evaluation of bids; and

(iv) The rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature provided does not comply with the requirements of the invitation.

(2) If bidders must furnish descriptive literature, see 14.201–6(p).

(d) *Waiver of requirement for descriptive literature.* (1) The contracting officer may waive the requirement for descriptive literature if—

(i) The bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the contracting activity; and

(ii) The contracting officer determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. When the contracting officer waives the requirement, see 14.201–6(p)(2).

(2) When descriptive literature is not necessary and a waiver of literature requirements of a specification has been authorized, the contracting officer must include a statement in the invitation that, despite the requirements of the specifications, descriptive literature will not be required.

(3) If the solicitation provides for a waiver, a bidder may submit a bid on the basis of either the descriptive literature furnished with the bid or a previously furnished product. If the bid is submitted on one basis, the bidder may not have it considered on the other basis after bids are opened.

(e) *Unsolicited descriptive literature.* If descriptive literature is furnished when it is not required by the invitation for bids, the procedures set forth in 14.202–4(f) must be followed.

**14.404–4 [Amended]**

7. Amend section 14.404–4 in the first sentence by removing “14.202–5(a)” and adding “2.101” in its place; and in

the last sentence by removing “14.202–5(f)” and adding “14.202–5(e)” in its place.

**PART 15—CONTRACTING BY NEGOTIATION**

8. Amend section 15.201 by removing the undesignated paragraph at the end of the section and revising paragraph (f) to read as follows:

**15.201 Exchanges with industry before receipt of proposals.**

\* \* \* \* \*

(f) General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the potential offeror’s confidential business strategy, and is protected under 3.104 or subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.

9. Amend section 15.609 by revising paragraph (e) to read as follows:

**15.609 Limited use of data.**

\* \* \* \* \*

(e) Use the notice in paragraph (d) of this section solely as a manner of handling unsolicited proposals that will be compatible with this subpart. However, do not use this notice to justify withholding of a record, or to improperly deny the public access to a record, where an obligation is imposed by the Freedom of Information Act (5 U.S.C. 552). An offeror should identify trade secrets, commercial or financial information, and privileged or confidential information to the Government (see paragraph (a) of this section).

\* \* \* \* \*

**PART 28—BONDS AND INSURANCE**

10. Revise section 28.000 to read as follows:

**28.000 Scope of part.**

This part prescribes requirements for obtaining financial protection against losses under contracts that result from the use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

11. Amend section 28.001 by adding, in alphabetical order, the definitions “Bid” and “Bidder” to read as follows:

**28.001 Definitions.**

\* \* \* \* \*

*Bid* means any response to a solicitation, including a proposal under a negotiated acquisition. See the definition of “offer” at 2.101.

\* \* \* \* \*

*Bidder* means any entity that is responding or has responded to a solicitation, including an offeror under a negotiated acquisition.

\* \* \* \* \*

**PART 35—RESEARCH AND DEVELOPMENT CONTRACTING**

12. Amend section 35.007 by revising paragraph (g) to read as follows:

**35.007 Solicitations.**

\* \* \* \* \*

(g) The contracting officer should ensure that potential offerors fully understand the details of the work, especially the Government interpretation of the work statement. If the effort is complex, the contracting officer should provide potential offerors an opportunity to comment on the details of the requirements as contained in the work statement, the contract Schedule, and any related specifications. This may be done at a preproposal conference (see 15.201).

\* \* \* \* \*

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

**52.214–1 [Reserved]**

13. Remove and reserve section 52.214–1.

**52.214–3 [Amended]**

14. Amend section 52.214–3 in the prescription by removing “14.201–6(b)(3)” and adding “14.201–6(b)(1)” in its place.

**52.214–4 [Amended]**

15. Amend section 52.214–4 in the prescription by removing “14.201–6(b)(4)” and adding “14.201–6(b)(2)” in its place.

16. Amend section 52.214–20 by revising the introductory paragraph, date of the provision, and paragraphs

(a), (b), and the introductory text of paragraph (c); and by removing from Alternates I and II "14.202-4(f)(1)" and adding "14.202-4(e)(1)" in its place. The revised text reads as follows:

#### 52.214-20 Bid Samples.

As prescribed in 14.201-6(o)(1), insert the following provision:

#### Bid Samples (Apr 2002)

(a) *Bid sample* means a product sample required to be submitted by a bidder to show those characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the invitation for bid (e.g., balance, facility of use, or pattern).

(b) Bidders must furnish bid samples as part of the bid. The Government must receive the bid samples by the time specified in the invitation for bids. If the bidder fails to submit samples on time, the Government will reject the bid, except that the Contracting Officer will consider a late sample sent by mail under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(c) The Government will test or evaluate bid samples to determine compliance with all the characteristics listed for examination in this solicitation. The Government will reject the bid when the sample fails to conform to the required characteristics. Products delivered under any resulting contract must conform to—

\* \* \* \* \*

(End of provision)

\* \* \* \* \*

17. Revise section 52.214-21 to read as follows:

#### 52.214-21 Descriptive Literature.

As prescribed in 14.201-6(p)(1), insert the following provision:

#### Descriptive Literature (Apr 2002)

(a) *Descriptive literature*, as used in this provision, means information furnished by a bidder, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction or explains its operation. The term includes only that information required to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

(b) Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as—

- (1) Design;
- (2) Materials;
- (3) Components;
- (4) Performance characteristics; and
- (5) Methods of manufacture, assembly, construction, or operation.

(c) Descriptive literature, required elsewhere in this solicitation, shall be—

- (1) Identified to show the item(s) of the offer to which it applies; and
- (2) Received by the time specified in this solicitation.

(d) If the bidder fails to submit descriptive literature on time, the Government will reject the bid, except that late descriptive literature sent by mail may be considered under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(e) If the descriptive literature fails to show that the product offered conforms to the requirements of the solicitation, the Government will reject the bid.

(End of provision)

*Alternate I (Apr 2002).* As prescribed in 14.201-6(p)(2), add the following paragraphs (f) and (g) to the basic provision:

(f) The Contracting Officer may waive the requirement for furnishing descriptive literature if the offeror has supplied a product that is the same as that required by this solicitation under a prior contract. A bidder that requests a waiver of this requirement shall provide the following information:

Prior contract number \_\_\_\_\_  
 Date of prior contract \_\_\_\_\_  
 Contract line item number of product supplied \_\_\_\_\_  
 Name and address of Government activity to which delivery was made \_\_\_\_\_  
 Date of final delivery product supplied \_\_\_\_\_

(g) Bidders shall submit bids on the basis of required descriptive literature or on the basis of a previously supplied product under paragraph (f) of this provision. A bidder submitting a bid on one of these two bases may not elect to have its bid considered on the alternative basis after the time specified for receipt of bids. The Government will disregard a bidder's request for a waiver under paragraph (f) if that bidder has submitted the descriptive literature requested under this solicitation.

[FR Doc. 02-5822 Filed 3-19-02; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 3, 4, 9, 15, and 52

[FAC 2001-06; FAR Case 1998-024; Item IV]

RIN 9000-AI61

#### Federal Acquisition Regulation; Procurement Integrity Rewrite

**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 rewrite procurement integrity coverage in plain language.

**DATES:** *Effective Date:* April 4, 2002.

**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 Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 2001-06, FAR case 1998-024.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is more commonly referred to as the Procurement Integrity Act (hereinafter referred to as the Act). FAR 3.104 implements prohibitions, restrictions, and other requirements of the Act that are placed on certain agency officials that participate in Federal agency procurements.

Other statutes and regulations also govern the conduct of Government employees. In particular, the Office of Government Ethics regulations provide interpretive guidance on the prohibitions in 18 U.S.C. 207 and 208 that also apply to Government employees that participate in procurement activities during the conduct of a Federal agency procurement. While FAR 3.104 does not implement these other statutes and regulations, it is very important for agency employees to be aware, not only of the prohibitions and restrictions in the Act, but also those contained in other statutes and regulations that deal with the same or related prohibited conduct. Criminal and administrative penalties can result if an employee violates the restrictions or otherwise engages in prohibited conduct.

It became apparent that we could improve FAR 3.104 by reorganizing and simplifying the text. Moreover, we clarify 3.104 to alert agency officials that even if their participation does not meet the definition in FAR 3.104 of participating personally and substantially, they are precluded from participating in a Federal agency procurement if they engage in certain conduct otherwise prohibited by other statutes and regulations. We added this guidance in FAR 3.104-2(b), 3.104-3(c), and 3.104-5(a) to alert these agency officials that they should seek advice from agency ethics officials before engaging in certain activities that could have serious consequences, including

criminal prosecution. These revisions to FAR 3.104 do not change either the requirements of the Act or change, in any manner, who is covered by, or the activities covered in, Office of Government Ethics regulations interpreting conflict of interest statutes.

To avoid possible violations of 18 U.S.C. 208, agency employees need to be aware that while their participation in a Federal agency procurement may not be considered "participating personally and substantially in a Federal agency procurement" for purposes of certain requirements in the Act, nevertheless, there will be instances where the employee will be considered to be participating personally and substantially for purposes of 18 U.S.C. 208. We have added these revisions to FAR 3.104 to alert agency officials that, while participating in a Federal agency procurement, they must be aware of and comply with the applicable disqualification requirements of 5 CFR 2635.604 and 2635.606.

These revisions also may assist agency ethics officials in advising agency officials participating in a Federal agency procurement. Certain conduct by an agency official during the conduct of a Federal agency procurement requires the official's disqualification from participation irrespective of whether or not the official's participation meets the definition of participating personally and substantially for purposes of the Act.

A proposed rule was published in the **Federal Register** at 65 FR 16758, March 29, 2000. Seven sources submitted comments in response to the proposed rule. All comments were considered in the development of the final rule. A summary of the substantive comments is provided.

- *Comment:* Additional clarification should be added that merely signing appointment letters for source selection evaluation panels, boards is not "participating personally and substantially participation in a Federal agency procurement."

*Response:* Not accepted. The definition of "participating personally and substantially in a Federal agency procurement" is already quite detailed and more clarification is unnecessary.

- *Comment:* The standards identified in FAR 3.104-3(d) concerning prohibition on a former official's acceptance of compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor should be made more restrictive.

*Response:* Not accepted. The regulatory coverage tracks the statutory language.

- *Comment:* A definition of "must" should be added.

*Response:* The definition of "must" was added to FAR 2.101 under another final rule and is currently in the FAR.

- *Comment:* Does the definition of "source selection information" include quotations in FAR Subpart 13.5, Test Program for Certain Commercial Items, that are over the simplified acquisition threshold, normally over \$100,000.

*Response:* No. Bids and proposals are addressed in the Act. Bids and proposals are terms of art to distinguish methods of contracting (bids under sealed bidding and proposals under negotiation). A quotation is not a bid or a proposal.

- *Comment:* The references to "procurement" in the rule should be changed to read "acquisition."

*Response:* Not accepted. The Act and its implementation in FAR 3.104 apply only to a "Federal agency procurement." The term "Federal agency procurement" is defined in both the Act and FAR 3.104. The definition is different from the definition of "acquisition" in FAR 2.101.

- *Comment:* Head of the contracting activity delegation restrictions in FAR 3.104-7(g) should be relaxed.

*Response:* Not accepted. The issues being addressed are very significant, *i.e.*, violations or possible violations of the Act; therefore, relaxation of the restriction is not appropriate.

- *Comment:* Informing acquisition employees that some post-employment restrictions are not tied to "personal and substantial participation" should be added in the rule.

*Response:* Accepted. See discussion under Supplementary Information, Background, above.

- *Comment:* Suggest retaining current FAR definition at FAR 3.104-1, "Participating personally and substantially in a Federal agency procurement," as applied to the OMB Circular A-76, paragraph (4). The proposed rule contains an expanded definition.

*Response:* Accepted. The 1996 amendments to the Act limit the application of the post-employment restrictions to designated positions; therefore, the participation of most personnel in these activities would not place them at risk of losing any right of first refusal. See paragraph (4)(iv) of FAR 3.104-1, "Participating substantially".

- *Comment:* Clarify what constitutes a "contact" under the Act. *Response:* An explanation of "contact" was added to

the rule at FAR 3.104-3(c)(2). The addition gives the suggested guidance.

- *Comment:* A clarification that employment contacts through agents are subject to disqualification needs to be added at FAR 3.104-5(a).

*Response:* Accepted. The added language makes a clear statement that an employment contact through agents is subject to disqualification under this final rule.

- *Comment:* The number of individuals required to receive the disqualification notice directly from the agency official disqualifying herself/himself should be reduced.

*Response:* Partially accepted. The requirement for a notice of disqualification to the head of the contracting activity was deleted, but the requirements for notice to the contracting officer, source selection official, and immediate supervisor were retained. In an attempt to reduce the number of officials required to be notified, it was determined that the head of the contracting activity could be deleted. The Act places an affirmative responsibility on the agency official to disqualify herself/himself.

- *Comment:* Clarify that satisfying the requirement of 18 U.S.C 208 does not automatically authorize the disqualified official to resume participation in the procurement.

*Response:* The wording of the first sentence of 3.104-5(c) was revised to clarify that the conditions for resumption of participation in 3.104-3(c)(1)(ii) are statutorily mandated and that reinstatement is not necessarily automatic after those conditions have been met.

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 clarification only applies to individuals that are Government officials.

## 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, 3, 4, 9, 15, and 52

Government procurement.

Dated: March 6, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 4, 9, 15, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 4, 9, 15, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(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 by adding, in alphabetical order, the definitions "Offeror" and "Source selection information" to read as follows:

#### 2.101 Definitions.

\* \* \* \* \*

*Offeror* means offeror or bidder.

\* \* \* \* \*

*Source selection information* means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.
- (3) Source selection plans.
- (4) Technical evaluation plans.
- (5) Technical evaluations of proposals.
- (6) Cost or price evaluations of proposals.
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- (8) Rankings of bids, proposals, or competitors.
- (9) Reports and evaluations of source selection panels, boards, or advisory councils.
- (10) Other information marked as "Source Selection Information—See FAR 2.101 and 3.104" based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the

Federal agency procurement to which the information relates.

\* \* \* \* \*

### PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Remove sections 3.104–10 and 3.104–11 and revise sections 3.104 through 3.104–9 to read as follows:

#### 3.104 Procurement integrity.

##### 3.104–1 Definitions.

As used in this section—

*Agency ethics official* means the designated agency ethics official described in 5 CFR 2638.201 or other designated person, including—

- (1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104–6 has been delegated by the designated agency ethics official; and
- (2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

*Compensation* means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Compensation is indirectly provided if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual.

*Contractor bid or proposal information* means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Cost or pricing data (as defined by 10 U.S.C. 2306a(h)) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), with respect to procurements subject to that section.
- (2) Indirect costs and direct labor rates.
- (3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.
- (4) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation.
- (5) Information marked in accordance with 52.215–1(e).

*Decision to award a subcontract or modification of subcontract* means a decision to designate award to a particular source.

*Federal agency procurement* means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds. For broad agency announcements and small business innovative research programs, each proposal received by an agency constitutes a separate procurement for purposes of the Act.

*In excess of \$10,000,000* means—

- (1) The value, or estimated value, at the time of award, of the contract, including all options;
- (2) The total estimated value at the time of award of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;
- (3) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;
- (4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;
- (5) The amount paid or to be paid in settlement of a claim; or
- (6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

*Official* means—

- (1) An officer, as defined in 5 U.S.C. 2104;
- (2) An employee, as defined in 5 U.S.C. 2105;
- (3) A member of the uniformed services, as defined in 5 U.S.C. 2101(3); or
- (4) A special Government employee, as defined in 18 U.S.C. 202.

*Participating personally and substantially in a Federal agency procurement* means—

- (1) Active and significant involvement of an official in any of the following activities directly related to that procurement:
  - (i) Drafting, reviewing, or approving the specification or statement of work for the procurement.
  - (ii) Preparing or developing the solicitation.
  - (iii) Evaluating bids or proposals, or selecting a source.
  - (iv) Negotiating price or terms and conditions of the contract.
  - (v) Reviewing and approving the award of the contract.

(2) *Participating personally* means participating directly, and includes the direct and active supervision of a subordinate's participation in the matter.

(3) *Participating substantially* means that the official's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory

involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

(4) Generally, an official will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:

(i) Agency-level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency-level missions or objectives.

(ii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement.

(iii) Clerical functions supporting the conduct of a particular procurement.

(iv) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

*Source selection evaluation board* means any board, team, council, or other group that evaluates bids or proposals.

### 3.104-2 General.

(a) This section implements section 27 of the Office of Federal Procurement Policy Act (the Procurement Integrity Act) (41 U.S.C. 423) referred to as "the Act"). Agency supplementation of 3.104, including specific definitions to identify individuals who occupy positions specified in 3.104-3(d)(1)(ii), and any clauses required by 3.104 must be approved by the senior procurement executive of the agency, unless a law

establishes a higher level of approval for that agency.

(b) Agency officials are reminded that there are other statutes and regulations that deal with the same or related prohibited conduct, for example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201 and 10 U.S.C. 2207. The acceptance of a gift, under certain circumstances, is prohibited by 5 U.S.C. 7353 and 5 CFR part 2635;

(2) Contacts with an offeror during the conduct of an acquisition may constitute "seeking employment," (see subpart F of 5 CFR part 2636 and 3.104-3(c)(2)). Government officers and employees (employees) are prohibited by 18 U.S.C. 208 and 5 CFR part 2635 from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is seeking employment. An employee who engages in negotiations or is otherwise seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must comply with the applicable disqualification requirements of 5 CFR 2635.604 and 2635.606. The statutory prohibition in 18 U.S.C. 208 also may require an employee's disqualification from participation in the acquisition even if the employee's duties may not be considered "participating personally and substantially," as this term is defined in 3.104-1;

(3) Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR parts 2637 and 2641, that prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated personally and substantially while employed by the Government. Additional restrictions apply to certain senior Government employees and for particular matters under an employee's official responsibility;

(4) Parts 14 and 15 place restrictions on the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. 1905;

(5) Release of information both before and after award (see 3.104-4) may be prohibited by the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), and other laws; and

(6) Using nonpublic information to further an employee's private interest or that of another and engaging in a financial transaction using nonpublic

information are prohibited by 5 CFR 2635.703.

### 3.104-3 Statutory and related prohibitions, restrictions, and requirements.

(a) *Prohibition on disclosing procurement information (subsection 27(a) of the Act)*. (1) A person described in paragraph (a)(2) of this subsection must not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. (See 3.104-4(a).)

(2) Paragraph (a)(1) of this subsection applies to any person who—

(i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

(b) *Prohibition on obtaining procurement information (subsection 27(b) of the Act)*. A person must not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

(c) *Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (subsection 27(c) of the Act)*. (1) If an agency official, participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold, contacts or is contacted by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official must—

(i) Promptly report the contact in writing to the official's supervisor and to the agency ethics official; and

(ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5) until such time as the agency authorizes the official to resume participation in that procurement, in accordance with the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

(A) The person is no longer an offeror in that Federal agency procurement; or

(B) All discussions with the offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

(2) A contact is any of the actions included as "seeking employment" in 5 CFR 2635.603(b). In addition, unsolicited communications from offerors regarding possible employment are considered contacts.

(3) Agencies must retain reports of employment contacts for 2 years from the date the report was submitted.

(4) Conduct that complies with subsection 27(c) of the Act may be prohibited by other criminal statutes and the Standards of Ethical Conduct for Employees of the Executive Branch. See 3.104-2(b)(2).

(d) *Prohibition on former official's acceptance of compensation from a contractor (subsection 27(d) of the Act).*

(1) A former official of a Federal agency may not accept compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former official—

(i) Served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(ii) Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(iii) Personally made for the Federal agency a decision to—

(A) Award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;

(B) Establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

(C) Approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or

(D) Pay or settle a claim in excess of \$10,000,000 with that contractor.

(2) The 1-year prohibition begins on the date—

(i) Of contract award for positions described in paragraph (d)(1)(i) of this subsection, or the date of contractor selection if the official was not serving in the position on the date of award;

(ii) The official last served in one of the positions described in paragraph (d)(1)(ii) of this subsection; or

(iii) The official made one of the decisions described in paragraph (d)(1)(iii) of this subsection.

(3) Nothing in paragraph (d)(1) of this subsection may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in paragraph (d)(1) of this subsection.

**3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.**

(a) Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the agency head or the contracting officer to receive such information.

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure in accordance with 14.401, 15.207, applicable law, and agency regulations.

(c) Individuals unsure if particular information is source selection information, as defined in 2.101, should consult with agency officials as necessary. Individuals responsible for preparing material that may be source selection information as described at paragraph (10) of the "source selection information" definition in 2.101 must mark the cover page and each page that the individual believes contains source selection information with the legend "Source Selection Information—See FAR 2.101 and 3.104." Although the information in paragraphs (1) through (9) of the definition in 2.101 is considered to be source selection information whether or not marked, all reasonable efforts must be made to mark such material with the same legend.

(d) Except as provided in paragraph (d)(3) of this subsection, the contracting officer must notify the contractor in writing if the contracting officer believes that proprietary information, contractor bid or proposal information, or information marked in accordance with 52.215-1(e) has been inappropriately marked. The contractor that has affixed the marking must be given an opportunity to justify the marking.

(1) If the contractor agrees that the marking is not justified, or does not respond within the time specified in the notice, the contracting officer may remove the marking and release the information.

(2) If, after reviewing the contractor's justification, the contracting officer determines that the marking is not justified, the contracting officer must notify the contractor in writing before releasing the information.

(3) For technical data marked as proprietary by a contractor, the contracting officer must follow the procedures in 27.404(h).

(e) This section does not restrict or prohibit—

(1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(2) The disclosure or receipt of information, not otherwise protected, relating to a Federal agency procurement after it has been canceled by the Federal agency, before contract award, unless the Federal agency plans to resume the procurement;

(3) Individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur; or

(4) The Government's use of technical data in a manner consistent with the Government's rights in the data.

(f) This section does not authorize—

(1) The withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to the conduct of a Federal agency procurement and notify the recipient that the disclosure of the information is restricted by section 27 of the Act;

(2) The withholding of information from, or restricting its receipt by, the Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract;

(3) The release of information after award of a contract or cancellation of a procurement if such information is

contractor bid or proposal information or source selection information that pertains to another procurement; or

(4) The disclosure, solicitation, or receipt of bid or proposal information or source selection information after award if disclosure, solicitation, or receipt is prohibited by law. (See 3.104–2(b)(5) and subpart 24.2.)

### 3.104–5 Disqualification.

(a) *Contacts through agents or other intermediaries.* Employment contacts between the employee and the offeror, that are conducted through agents, or other intermediaries, may require disqualification under 3.104–3(c)(1). These contacts may also require disqualification under other statutes and regulations. (See 3.104–2(b)(2).)

(b) *Disqualification notice.* In addition to submitting the contact report required by 3.104–3(c)(1), an agency official who must disqualify himself or herself pursuant to 3.104–3(c)(1)(ii) must promptly submit written notice of disqualification from further participation in the procurement to the contracting officer, the source selection authority if other than the contracting officer, and the agency official's immediate supervisor. As a minimum, the notice must—

- (1) Identify the procurement;
- (2) Describe the nature of the agency official's participation in the procurement and specify the approximate dates or time period of participation; and
- (3) Identify the offeror and describe its interest in the procurement.

(c) *Resumption of participation in a procurement.* (1) The official must remain disqualified until such time as the agency, at its sole and exclusive discretion, authorizes the official to resume participation in the procurement in accordance with 3.104–3(c)(1)(ii).

(2) After the conditions of 3.104–3(c)(1)(ii)(A) or (B) have been met, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize the disqualified official to resume participation in the procurement, or may determine that an additional disqualification period is necessary to protect the integrity of the procurement process. In determining the disqualification period, the HCA must consider any factors that create an appearance that the disqualified official acted without complete impartiality in the procurement. The HCA's reinstatement decision should be in writing.

(3) Government officer or employee must also comply with the provisions of 18 U.S.C. 208 and 5 CFR part 2635 regarding any resumed participation in

a procurement matter. Government officer or employee may not be reinstated to participate in a procurement matter affecting the financial interest of someone with whom the individual is seeking employment, unless the individual receives—

(i) A waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3); or

(ii) An authorization in accordance with the requirements of subpart F of 5 CFR part 2635.

### 3.104–6 Ethics advisory opinions regarding prohibitions on a former official's acceptance of compensation from a contractor.

(a) An official or former official of a Federal agency who does not know whether he or she is or would be precluded by subsection 27(d) of the Act (see 3.104–3(d)) from accepting compensation from a particular contractor may request advice from the appropriate agency ethics official before accepting such compensation.

(b) The request for an advisory opinion must be in writing, include all relevant information reasonably available to the official or former official, and be dated and signed. The request must include information about the—

(1) Procurement(s), or decision(s) on matters under 3.104–3(d)(1)(iii), involving the particular contractor, in which the individual was or is involved, including contract or solicitation numbers, dates of solicitation or award, a description of the supplies or services procured or to be procured, and contract amount;

(2) Individual's participation in the procurement or decision, including the dates or time periods of that participation, and the nature of the individual's duties, responsibilities, or actions; and

(3) Contractor, including a description of the products or services produced by the division or affiliate of the contractor from whom the individual proposes to accept compensation.

(c) Within 30 days after receipt of a request containing complete information, or as soon thereafter as practicable, the agency ethics official should issue an opinion on whether the proposed conduct would violate subsection 27(d) of the Act.

(d)(1) If complete information is not included in the request, the agency ethics official may ask the requester to provide more information or request information from other persons, including the source selection authority, the contracting officer, or the requester's immediate supervisor.

(2) In issuing an opinion, the agency ethics official may rely upon the accuracy of information furnished by the requester or other agency sources, unless he or she has reason to believe that the information is fraudulent, misleading, or otherwise incorrect.

(3) If the requester is advised in a written opinion by the agency ethics official that the requester may accept compensation from a particular contractor, and accepts such compensation in good faith reliance on that advisory opinion, then neither the requester nor the contractor will be found to have knowingly violated subsection 27(d) of the Act. If the requester or the contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information, their reliance upon the opinion will not be deemed to be in good faith.

### 3.104–7 Violations or possible violations.

(a) A contracting officer who receives or obtains information of a violation or possible violation of subsection 27(a), (b), (c), or (d) of the Act (see 3.104–3) must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.

(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer must forward the information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the procurement to an individual designated in accordance with agency procedures.

(i) If that individual concurs, the contracting officer may proceed with the procurement.

(ii) If that individual does not concur, the individual must promptly forward the information and documentation to the HCA and advise the contracting officer to withhold award.

(2) If the contracting officer concludes that the violation or possible violation impacts the procurement, the contracting officer must promptly forward the information to the HCA.

(b) The HCA must review all information available and, in accordance with agency procedures, take appropriate action, such as—

- (1) Advise the contracting officer to continue with the procurement;
- (2) Begin an investigation;
- (3) Refer the information disclosed to appropriate criminal investigative agencies;
- (4) Conclude that a violation occurred; or



(5) Recommend that the agency head determine that the contractor, or someone acting for the contractor, has engaged in conduct constituting an offense punishable under subsection 27(e) of the Act, for the purpose of voiding or rescinding the contract.

(c) Before concluding that an offeror, contractor, or person has violated the Act, the HCA may consider that the interests of the Government are best served by requesting information from appropriate parties regarding the violation or possible violation.

(d) If the HCA concludes that section 27 of the Act has been violated, the HCA may direct the contracting officer to—

(1) If a contract has not been awarded—

- (i) Cancel the procurement;
- (ii) Disqualify an offeror; or
- (iii) Take any other appropriate actions in the interests of the Government.

(2) If a contract has been awarded—

(i) Effect appropriate contractual remedies, including profit recapture under the clause at 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity, or, if the contract has been rescinded under paragraph(d)(2)(ii) of this subsection, recovery of the amount expended under the contract;

(ii) Void or rescind the contract with respect to which—

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct constitutes a violation of subsection 27(a) or (b) of the Act for the purpose of either—

(1) Exchanging the information covered by the subsections for anything of value; or

(2) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(B) The agency head has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under subsection 27(e)(1) of the Act; or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspending or debarring official.

(e) The HCA should recommend or direct an administrative or contractual remedy commensurate with the severity and effect of the violation.

(f) If the HCA determines that urgent and compelling circumstances justify an award, or award is otherwise in the interests of the Government, the HCA, in accordance with agency procedures, may authorize the contracting officer to

award the contract or execute the contract modification after notifying the agency head.

(g) The HCA may delegate his or her authority under this subsection to an individual at least one organizational level above the contracting officer and of General Officer, Flag, Senior Executive Service, or equivalent rank.

### 3.104–8 Criminal and civil penalties, and further administrative remedies.

Criminal and civil penalties, and administrative remedies, may apply to conduct that violates the Act (see 3.104–3). See 33.102(f) for special rules regarding bid protests. See 3.104–7 for administrative remedies relating to contracts.

(a) An official who knowingly fails to comply with the requirements of 3.104–3 is subject to the penalties and administrative action set forth in subsection 27(e) of the Act.

(b) An offeror who engages in employment discussion with an official subject to the restrictions of 3.104–3, knowing that the official has not complied with 3.104–3(c)(1), is subject to the criminal, civil, or administrative penalties set forth in subsection 27(e) of the Act.

(c) An official who refuses to terminate employment discussions (see 3.104–5) may be subject to agency administrative actions under 5 CFR 2635.604(d) if the official's disqualification from participation in a particular procurement interferes substantially with the individual's ability to perform assigned duties.

### 3.104–9 Contract clauses.

In solicitations and contracts for other than commercial items that exceed the simplified acquisition threshold, insert the clauses at—

(a) 52.203–8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity; and

(b) 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity.

### 3.704 [Amended]

4. Amend section 3.704 in paragraph (c)(1) by removing “3.104–10” and adding “3.104–7” in its place.

## PART 4—ADMINISTRATIVE MATTERS

5. Amend section 4.802 in paragraphs (a)(1), (a)(2), and (a)(3) by removing “, which shall document” and adding “that documents” in their place; in the introductory text of paragraph (c) by removing “shall” the first time it appears and adding “must” in its place, and removing “shall” the second time it appears; in the first sentence of

paragraph (d) by removing “shall” and adding “must” in its place; and by revising paragraph (e) to read as follows:

### 4.802 Contract files.

\* \* \* \* \*

(e) Contents of contract files that are contractor bid or proposal information or source selection information as defined in 2.101 must be protected from disclosure to unauthorized persons (see 3.104–4).

\* \* \* \* \*

## PART 9—CONTRACTOR QUALIFICATIONS

### 9.105–3 [Amended]

6. Amend section 9.105–3 in paragraph (c) by removing “and/or” and adding “or” in its place, and by removing “3.104–3” and adding “3.104–4” in its place.

### 9.505 [Amended]

7. Amend section 9.505 in paragraph (b)(2) by removing “3.104–3” and adding “2.101” in its place.

## PART 15—CONTRACTING BY NEGOTIATION

8. Amend section 15.404–2 by revising paragraph (a)(5) to read as follows:

### 15.404–2 Information to support proposal analysis.

(a) \* \* \*

(5) Field pricing information and other reports may include proprietary or source selection information (see 2.101). This information must be appropriately identified and protected accordingly.

\* \* \* \* \*

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 52.203–8 [Amended]

9. Amend section 52.203–8 in the introductory paragraph by removing “in solicitations and contracts”.

[FR Doc. 02–5823 Filed 3–19–02; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 8 and 52**

[FAC 2001-06; FAR Case 2000-008; Item V]

RIN 9000-AJ09

**Federal Acquisition Regulation;  
Acquisition of Helium**

**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 the Helium Privatization Act of 1996 (Pub. L. 104-273) and associated changes to the Department of the Interior's regulations regarding its helium program.

**DATES:** *Effective Date:* April 4, 2002.

**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. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-06, FAR case 2000-008.

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

This final rule revises FAR Subpart 8.5 and the clause at 52.208-8 to implement the Department of Interior final rule regarding helium contracts that was published in the **Federal Register** at 63 FR 66760, December 3, 1998. The final rule—

- Changes the definitions;
- Eliminates the requirement for certain contracts and subcontractors to submit helium forecasts; and
- Establishes the requirement that contractors and subcontractors under contracts with a major helium requirement must report purchases of helium from Federal helium suppliers.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 66 FR 2752, January 11, 2001. One source, the Department of Interior, submitted a comment in response to the proposed rule, recommending that the

Councils add "Amarillo Field Office" to the address provided in the definition of "Bureau of Land Management" at FAR 8.501 and the clause at 52.208-8(a). The Councils concurred with the change and included it in the 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.*, because the rule eliminates the information requirement for submitting helium forecasts and replaces it with a similar information requirement to report helium purchases. We estimate that the net change is zero.

**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 Number 9000-0113.

**List of Subjects in 48 CFR Parts 8 and 52**

Government procurement.

Dated: March 6, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 8 and 52 as set forth below:

1. The authority citation for 48 CFR parts 8 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 8—REQUIRED SOURCES OF  
SUPPLIES AND SERVICES**

2. Revise subpart 8.5, consisting of sections 8.500 through 8.505, to read as follows:

**Subpart 8.5—Acquisition of Helium****8.500 Scope of subpart.**

This subpart implements the requirements of the Helium Act (50 U.S.C. 167, *et seq.*) concerning the acquisition of liquid or gaseous helium

by Federal agencies or by Government contractors or subcontractors for use in the performance of a Government contract (also see 43 CFR part 3195).

**8.501 Definitions.**

As used in this subpart—

*Bureau of Land Management* means the Department of the Interior, Bureau of Land Management, Amarillo Field Office, Helium Operations, 801 South Fillmore Street, Suite 500, Amarillo, TX 79101-3545.

*Federal helium supplier* means a private helium vendor that has an in-kind crude helium sales contract with the Bureau of Land Management (BLM) and that is on the BLM Amarillo Field Office's Authorized List of Federal Helium Suppliers available via the Internet at [http://www.nm.blm.gov/www/amfo/amfo\\_home.html](http://www.nm.blm.gov/www/amfo/amfo_home.html).

*Major helium requirement* means an estimated refined helium requirement greater than 200,000 standard cubic feet (scf) (measured at 14.7 pounds per square inch absolute pressure and 70 degrees Fahrenheit temperature) of gaseous helium or 7510 liters of liquid helium delivered to a helium use location per year.

**8.502 Policy.**

Agencies and their contractors and subcontractors must purchase major helium requirements from Federal helium suppliers, to the extent that supplies are available.

**8.503 Exception.**

The requirements of this subpart do not apply to contracts or subcontracts in which the helium was acquired by the contractor prior to award of the contract or subcontract.

**8.504 Procedures.**

The contracting officer must forward the following information to the Bureau of Land Management within 45 days of the close of each fiscal quarter:

- (a) The name of any company that supplied a major helium requirement.
- (b) The amount of helium purchased.
- (c) The delivery date(s).
- (d) The location where the helium was used.

**8.505 Contract clause.**

Insert the clause at 52.208-8, Required Sources for Helium and Helium Usage Data, in solicitations and contracts if it is anticipated that performance of the contract involves a major helium requirement.

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

3. Revise the clause heading and section 52.208-8 to read as follows:

**52.208-8 Required Sources for Helium and Helium Usage Data.**

As prescribed in 8.505, insert the following clause:

**Required Sources for Helium and Helium Usage Data (Apr 2002)***(a) Definitions.*

*Bureau of Land Management*, as used in this clause, means the Department of the Interior, Bureau of Land Management, Amarillo Field Office, Helium Operations, located at 801 South Fillmore Street, Suite 500, Amarillo, TX 79101-3545.

*Federal helium supplier* means a private helium vendor that has an in-kind crude helium sales contract with the Bureau of Land Management (BLM) and that is on the BLM Amarillo Field Office's Authorized List of Federal Helium Suppliers available via the Internet at [http://www.nm.blm.gov/www/amfo/amfo\\_home.html](http://www.nm.blm.gov/www/amfo/amfo_home.html).

*Major helium requirement* means an estimated refined helium requirement greater than 200,000 standard cubic feet (scf) (measured at 14.7 pounds per square inch absolute pressure and 70 degrees Fahrenheit temperature) of gaseous helium or 7510 liters of liquid helium delivered to a helium use location per year.

*(b) Requirements*—(1) Contractors must purchase major helium requirements from Federal helium suppliers, to the extent that supplies are available.

(2) The Contractor shall provide to the Contracting Officer the following data within 10 days after the Contractor or subcontractor receives a delivery of helium from a Federal helium supplier—

- (i) The name of the supplier;
- (ii) The amount of helium purchased;
- (iii) The delivery date(s); and
- (iv) The location where the helium was used.

*(c) Subcontracts.* The Contractor shall insert this clause, including this paragraph (c), in any subcontract or order that involves a major helium requirement.

(End of clause)

[FR Doc. 02-5824 Filed 3-19-02; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 12, 19, and 52**

[FAC 2001-06; FAR Case 2001-003; Item VI]

RIN 9000-AJ32

**Federal Acquisition Regulation; HUBZone Program Applicability**

**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 that amends the Federal Acquisition Regulation (FAR) to simplify current FAR language that expands the applicability of the HUBZone Program to all agencies covered by the FAR after September 30, 2000.

**DATES:** *Effective Date:* April 4, 2002.

**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. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAC 2001-06, FAR case 2001-003.

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

This final rule amends and simplifies language at FAR Parts 12, 19, and 52. Current FAR language expands the applicability of the HUBZone Program to all agencies covered by the FAR after September 30, 2000. Initially, procurements under the HUBZone Program applied to a limited list of Federal agencies. Under Section 602(b) of the HUBZone Act of 1997 (Title VI of Pub. L. 105-135), this initial limited applicability expired on September 30, 2000.

The purpose of the program is to provide Federal contracting assistance for qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in these areas. The program provides for set-asides, sole-source awards, and price evaluation preferences for HUBZone small business concerns and establishes goals for awards to such concerns.

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**

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 12, 19, 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 2001-06, FAR case 2001-003), 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 12, 19, and 52**

Government procurement.

Dated: March 6, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

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

1. The authority citation for 48 CFR parts 12, 19, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 12.301 by revising the introductory text of paragraph (b) and (b)(2) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(b) Insert the following provisions in solicitations for the acquisition of commercial items, and clauses in solicitations and contracts for the acquisition of commercial items:

\* \* \* \* \*

(2) *The provision at 52.212-3, Offeror Representations and Certifications—Commercial Items.* This provision provides a single, consolidated list of certifications and representations for the acquisition of commercial items and is attached to the solicitation for offerors to complete and return with their offer. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard that are expected to exceed the threshold at 4.601(a). Use the provision with its Alternate II in solicitations for acquisitions for which small disadvantaged business procurement mechanisms are authorized on a regional basis;

\* \* \* \* \*

**PART 19—SMALL BUSINESS PROGRAMS**

**19.307 [Amended]**

3. Amend section 19.307 by removing paragraph (a)(2); by redesignating paragraph (a)(3) as (a)(2); in the newly designated paragraph (a)(2) by removing "Alternate II" and adding "Alternate I" in its place; and in paragraph (c) by removing "and contracts".

4. Revise section 19.1302 to read as follows:

**19.1302 Applicability.**

The procedures in this subpart apply to all Federal agencies that employ one or more contracting officers.

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

5. Amend section 52.212-3 by revising the date of the provision; by adding paragraph (c)(10); by revising the introductory text of Alternate I; by redesignating paragraph (c)(10) of Alternate I as (c)(11); and by removing Alternate III. The revised and added text reads as follows:

**52.212-3 Offeror Representations and Certifications—Commercial Items.**

\* \* \* \* \*

**Offeror Representations and Certifications—Commercial Items (Apr 2002)**

\* \* \* \* \*

(c) \* \* \*

(10) *HUBZone small business concern.* [Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.] The offeror represents, as part of its offer, that—

(i) It [ ] is, [ ] is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material change in ownership and control, principal place of ownership, or HUBZone employee percentage has occurred since it was certified by the Small Business Administration in accordance with 13 CFR part 126; and

(ii) It [ ] is, [ ] is not a joint venture that complies with the requirements of 13 CFR part 126, and the representation in paragraph (c)(10)(i) of this provision is accurate for the HUBZone small business concern or concerns that are participating on the joint venture. [The offeror shall enter the name or names of the HUBZone small business concern or concerns that are participating in the joint venture: \_\_\_\_\_.] Each HUBZone small business concern participating in the joint venture shall submit a separate signed copy of the HUBZone representation.

\* \* \* \* \*

*Alternate I (Apr 2002).* As prescribed in 12.301(b)(2), add the following paragraph (c)(11) to the basic provision:

\* \* \* \* \*

6. Amend section 52.219-1 by revising the date of the provision; by adding paragraph (b)(6); by removing Alternate I and redesignating Alternate II as Alternate I; and by revising the introductory text of the newly designated Alternate I to read as follows:

**52.219-1 Small Business Program Representations.**

\* \* \* \* \*

**Small Business Program Representations (Apr 2002)**

\* \* \* \* \*

(b) \* \* \*

(6) [Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.] The offeror represents, as part of its offer, that—

(i) It [ ] is, [ ] is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material change in ownership and control, principal office, or HUBZone employee percentage has occurred since it was certified by the Small Business Administration in accordance with 13 CFR part 126; and

(ii) It [ ] is, [ ] is not a joint venture that complies with the requirements of 13 CFR part 126, and the representation in paragraph (b)(6)(i) of this provision is accurate for the HUBZone small business concern or concerns that are participating in the joint venture. [The offeror shall enter the name or names of the HUBZone small business concern or concerns that are participating in the joint venture: \_\_\_\_\_.] Each HUBZone small business concern participating in the joint venture shall submit a separate signed copy of the HUBZone representation.

\* \* \* \* \*

*Alternate I (Apr 2002).* As prescribed in 19.307(a)(2), add the following paragraph (b)(7) to the basic provision:

\* \* \* \* \*

[FR Doc. 02-5825 Filed 3-19-02; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 52**

[FAC 2001-06; FAR Case 1999-612; Item VII]

RIN 9000-A195

**Federal Acquisition Regulation; Application of Labor Clauses**

**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 revising the clause, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items), to clarify the application of labor clauses below the simplified acquisition threshold. The Councils also revised the Equal Opportunity clause to incorporate the exception for work performed outside the United States.

**DATES:** *Effective Date:* April 4, 2002.

**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. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-06, FAR case 1999-612.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule—  
1. Moves the Prohibition of Segregated Facilities clause from the list at paragraph (b), to the list at paragraph (a), of the clause at 52.213-4 and clarifies the existing requirements of 41 CFR 60-1.8, promulgated by the Department of Labor under E.O. 11246. The Prohibition of Segregated Facilities clause must be included in contracts whenever the Equal Opportunity clause (FAR 52.222-26) is included.

2. Moves the Equal Opportunity clause from the list at paragraph (b), to the list at paragraph (a), of the clause at 52.213-4 because the clause must be included in almost all contracts, even those under \$10,000, in accordance with the requirements at FAR 22.802(a)(1)

and 22.807(b). Even though included, the clause is inapplicable unless the aggregate value of contracts and subcontracts awarded to the contractor exceeds \$10,000 in a year.

3. Makes other revisions to paragraphs (b)(1)(i), (b)(1)(v), and (b)(1)(vii) of the clause at FAR 52.213-4, and paragraph (a) of the clause at FAR 52.222-26, relating to geographic applicability of labor clauses, to comply with the current regulations at FAR 22.603, 22.807(b)(2), 22.1001, 22.1003-2, and 22.1408(a)(1).

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 64298, October 26, 2000. Two respondents submitted public comments. One respondent is in favor of the rule, while the other commenter believes the 52.222-36 clause change creates a double standard, strongly favoring Americans, while making non-Americans working outside the United States susceptible to abuses by contractors. The Councils believe that the comment is outside the scope of the rule. The clause at 52.222-36 does not apply to employees recruited outside the United States for work performed outside the United States. This has been in the FAR since this FAR subpart was written in 1984. It is in the Department of Labor regulation which is the source of the FAR subpart (see 41 CFR 60-741.4(a)(4)). The concept is that the country in which the work is performed has the sovereignty to write its own laws regarding affirmative action of those disabled workers. This case confirms that this long-standing exception applies to items whether commercial or noncommercial. Accordingly, the comments resulted in no change to the 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.*, because this rule only clarifies the existing requirements.

### 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: March 6, 2002.

Al Matera,

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 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Amend section 52.213-4 by—
  - a. Revising the date of the clause;
  - b. Redesignating paragraphs (a)(1)(ii) and (a)(1)(iii) as (a)(1)(iv) and (a)(1)(v), respectively, and adding new paragraphs (a)(1)(ii) and (a)(1)(iii);
  - c. Removing paragraphs (b)(1)(ii) and (b)(1)(iii), and redesignating paragraphs (b)(1)(iv) through (b)(1)(xiii) as (b)(1)(ii) through (b)(1)(xi), respectively; and
  - d. Revising paragraph (b)(1)(i) and newly designated paragraphs (b)(1)(iii) and (b)(1)(v).

The added and revised text reads as follows:

#### 52.213-4 Terms and Conditions Simplified Acquisitions (Other Than Commercial Items).

\* \* \* \* \*

#### Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Apr 2002)

- (a) \* \* \*
- (1) \* \* \*
- (ii) 52.222-21, Prohibition of Segregated Facilities (Feb 1999) (E.O. 11246).
- (iii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

\* \* \* \* \*

- (b) \* \* \*
- (1)
  - (i) 52.222-20, Walsh-Healey Public Contracts Act (Dec 1996) (41 U.S.C. 35-45) (Applies to supply contracts over \$10,000 in the United States, Puerto Rico, or the U.S. Virgin Islands).

\* \* \* \* \*

- (iii) 52.222-36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793). (Applies to contracts over \$10,000, unless the work is to be performed outside the United States by employees recruited outside the United States.) (For purposes of this clause, *United States* includes the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana

Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.)

\* \* \* \* \*

(v) 52.222-41, Service Contract Act of 1965, As Amended (May 1989) (41 U.S.C. 351, *et seq.*) (Applies to service contracts over \$2,500 that are subject to the Service Contract Act and will be performed in the United States, District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, or the outer continental shelf lands).

\* \* \* \* \*

3. Amend section 52.222-26 by—
  - a. Revising the date of the clause;
  - b. Removing the paragraph designation and the introductory text of paragraph (b);
  - c. Redesignating paragraph (a) as paragraph (b) and revising the introductory text; and
  - d. Adding a new paragraph (a).
 The added and revised text reads as follows:

#### 52.222-26 Equal Opportunity.

\* \* \* \* \*

#### Equal Opportunity (Apr 2002)

(a) *Definition.* *United States*, as used in this clause, means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

(b) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of \$10,000, the Contractor shall comply with paragraphs (b)(1) through (b)(11) of this clause, except for work performed outside the United States by employees who were not recruited within the United States. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

\* \* \* \* \*

[FR Doc. 02-5826 Filed 3-19-02; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 1, 5, 6, 9, 31, and 52

[FAC 2001-06; 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 in order to update references and make editorial changes.

**DATES:** *Effective Date:* April 4, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 2001-06, Technical Amendments.

**List of Subjects in 48 CFR Parts 1, 5, 6, 9, 31, and 52**

Government procurement.

Dated: March 6, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 5, 6, 9, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 5, 6, 9, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM**

**1.404 [Amended]**

2. Amend section 1.404 in paragraph (c) by removing “Associate” and adding “Assistant” in its place.

**PART 5—PUBLICIZING CONTRACT ACTIONS**

**5.207 [Amended]**

3. Amend section 5.207(c)(4) in paragraph 6. of “Format Item and Explanation/Description of Entry” by removing “5.207(g)” and adding “5.207(h)” in its place.

**PART 6—COMPETITION REQUIREMENTS**

**6.302-5 [Amended]**

4. Amend section 6.302-5 in paragraph (b)(2) by removing the word “Handicapped” and adding “Disabled” in its place.

**PART 9—CONTRACTOR QUALIFICATIONS**

**9.104-3 [Amended]**

5. Amend section 9.104-3 in paragraph (c) by removing “(see *Affiliates* and *Concerns* in 19.101)” and adding “(see *Concern* in 19.001 and *Affiliates* in 19.101)” in its place.

**PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**

**31.101 [Amended]**

6. Amend section 31.101 in the next-to-the-last sentence by removing “Associate” and adding “Assistant” in its place.

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

**52.219-19 [Amended]**

7. Amend section 52.219-19 in the introductory text by removing “19.1007(a)” and adding “19.1008(a)” in its place.

**52.219-20 [Amended]**

8. Amend section 52.219-20 in the introductory text by removing “19.1007(b)” and adding “19.1008(b)” in its place.

[FR Doc. 02-5827 Filed 3-19-02; 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 (Public Law 104-121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001-06 which amend 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 2001-06 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, contact the analyst whose name appears in the table below.

**LIST OF RULES IN FAC 2001-06**

Item	Subject	FAR case	Analyst
I .....	Commercial Items—Standard Form 1449 .....	2000-012	Moss.
II .....	Definitions for “Contract Action” and “Contracting Action” .....	2000-402	Moss.
III .....	Definitions for Sealed Bid and Negotiated Procurements .....	2000-403	DeStefano.
IV .....	Procurement Integrity Rewrite .....	1998-024	DeStefano.
V .....	Acquisition of Helium .....	2000-008	Nelson.
VI .....	HUBZone Program Applicability .....	2001-003	Cundiff.
VII .....	Application of Labor Clauses .....	1999-612	Nelson.
VIII .....	Technical Amendments.		

**Item I—Commercial Items—SF 1449 (FAR Case 2000-012)**

Standard Form 1449, Solicitation/Contract/Order for Commercial Items, is prescribed by the FAR for the acquisition of commercial items. This final rule makes several minor revisions

to the form, including the addition of a block to indicate that the acquisition is a HUBZone set-aside, the substitution of a NAICS code for the SIC code, the notation that award is made only on the offeror’s items specifically listed in block 29, and the addition of several

blocks in the area of the form used as a receiving report by the Government. All of the changes involve blocks that are completed by the Government.

**Item II—Definitions for “Contract Action” and “Contracting Action” (FAR Case 2000–402)**

This final rule amends the FAR to provide for consistent use of the term “contract action.” The rule changes the term “contracting action” to “contract action” throughout the FAR and makes other editorial changes to clarify the text.

**Item III—Definitions for Sealed Bid and Negotiated Procurements (FAR Case 2000–403)**

This final rule amends the FAR to clarify definitions that are used for sealed bid and negotiated procurements. The final rule—

- Moves the definitions of “bid sample” and “descriptive literature” from FAR Part 14 to FAR 2.101 because the definitions apply to more than one FAR part, *e.g.*, parts 14 and 15;
- Amends those definitions and the definition of “offer” in accordance with plain language guidelines;
- Revises applicable provisions in FAR Part 52 to conform with the new definitions;

- Adds a new definition for “solicitation” at FAR 2.101; and
- Provides definitions for “bid” and “bidder” in FAR Part 28 because, as used in that part, the terms address sealed bid and negotiated acquisitions.

The rule clarifies terminology used in FAR 15.201(f), 15.609(e), and 35.007(g). Where we mean an entity that is actively seeking a contract, we use the term “prospective offeror.” However, those cites describe processes that are set up to ensure fair and open competition. Therefore, any interested party is able to participate, including parties that the Government has not yet identified. Therefore, the rule uses the more general term “potential offeror.”

**Item IV—Procurement Integrity Rewrite (FAR Case 1998–024)**

This final rule amends FAR parts 2, 3, 4, 9, 15, and 52 to rewrite the procurement integrity coverage (the

implementation of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (more commonly referred to as the Procurement Integrity Act)) in plain language.

FAR 3.104 implements prohibitions, restrictions, and other requirements of the Procurement Integrity Act that are placed on certain agency officials that participate in Federal agency procurements. However, other statutes and regulations also govern the conduct of Government employees. While specific guidance pertaining to the Procurement Integrity Act at FAR 3.104 does not implement these other statutes and regulations, the rule does add guidance to alert these agency officials that they should seek advice from agency ethics officials before engaging in certain activities that could have serious consequences, including criminal prosecution.

These revisions to FAR 3.104 do not change either the requirements of the Procurement Integrity Act or change, in any manner, who is covered by, or the activities covered in, Office of Government Ethics regulations interpreting conflict of interest statutes.

**Item V—Acquisition of Helium (FAR Case 2000–008)**

This final rule revises FAR Subpart 8.5 and the clause at 52.208–8 to implement the Department of the Interior final rule regarding helium contracts that was published in the **Federal Register** at 63 FR 66760, December 3, 1998. The final rule—

- Changes the definitions;
- Eliminates the requirement for certain contractors and subcontractors to submit helium forecasts; and
- Establishes the requirement that contractors and subcontractors under contracts with a major helium requirement must report purchases of helium from Federal helium suppliers.

**Item VI—HUBZone Program Applicability (FAR Case 2001–003)**

The HUBZone Act of 1997 expanded the applicability of the HUBZONE

Program to all agencies covered by the FAR after September 30, 2000, and is currently reflected in the FAR. This rule amends the FAR to simplify the existing language at FAR parts 12, 19, and 52.

**Item VII—Application of Labor Clauses (FAR Case 1999–612)**

This final rule affects all contracting officers who use the FAR. The rule—

- Moves the Prohibition of Segregated Facilities clause from the list at paragraph (b), to the list at paragraph (a), of the clause at 52.213–4 and clarifies the existing requirements of 41 CFR 60–1.8, promulgated by the Department of Labor under E.O. 11246. The Prohibition of Segregated Facilities clause must be included in contracts whenever the Equal Opportunity clause (FAR 52.222–26) is included.

- Moves the Equal Opportunity clause from the list at paragraph (b), to the list at paragraph (a), of the clause at 52.213–4 because the clause must be included in almost all contracts, even those under \$10,000, in accordance with the requirements at FAR 22.802(a)(1) and 22.807(b). Even though included, the clause is inapplicable unless the aggregate value of contracts and subcontracts awarded to the contractor exceeds \$10,000 in a year.

- Makes other revisions to the clause at FAR 52.222–26, Equal Opportunity, to include a definition of “United States” and incorporate the exception for work performed outside the United States.

**Item VIII—Technical Amendments**

These amendments update sections and make editorial changes at FAR 1.404, 5.207, 6.302–5, 9.104–3, 31.101, 52.219–19, and 52.219–20.

Dated: March 6, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 02–5828 Filed 3–19–02; 8:45 am]

**BILLING CODE 6820–EP–P**