



POLICY FLASH 2008-18

POLICY FLASH 2008-18

DATE: January 29, 2008

TO: Procurement Directors

FROM: Office of Procurement and Assistance Policy, MA-61
Office of Procurement and Assistance Management

SUBJECT: Federal Acquisition Circular 2008-18

SUMMARY: The General Services Administration has issued Federal Acquisition Circular 2005-23. This Circular can be found at page 73214 of the December 26, 2007 Federal Register. The Circular covers three subjects for which interim or final rules have been issued amending the Federal Acquisition Regulation. A description of each revision is contained in the attachment. None of these necessitates a revision of the DEAR. One of the revisions dealing with the Electronic Product Environmental Assessment Tool (EPEAT) replaces coverage presently contained in Acquisition Letter 2007-08 which is hereby cancelled.

This Flash 2008-18 will be available online within a day, at the following website:
http://www.management.energy.gov/policy_guidance/policy_flashes.htm .

Questions may be directed to Richard Langston at (202) 287-1339 or
Richard.Langston@hq.doe.gov.



Michael P. Fischetti, Director
Office of Procurement
and Assistance Policy

Attachment

1. Electronic Products Environmental Assessment Tool (EPEAT) — This coverage requires the use of the Electronic Products Environmental Assessment Tool (EPEAT) when acquiring personal computer products such as desktop and laptop computers or monitors. Despite its lengthy name, it is an easy tool to use. It features a Home Page <http://www.epeat.net> where all equipment meeting the voluntary consensus standard is listed and ranked bronze, silver or gold depending on how many of the environmental standards are met. Agencies are to acquire only products meeting at least the bronze rating and are encouraged to acquire products meeting the silver rating when there are sufficient EPEAT silver rated products available to meet agency needs. EPEAT applies equally to situations where contractors will supply personal computer equipment through service contracts. The contract clause at 52.223-16 is to be used in such instances. The basic clause requires equipment meeting at least the bronze rating. Alternate I of the clause should be used if there are adequate numbers of suppliers and products meet the Government's silver rating.

2. Contracts with Religious Entities — This case provides that when awarding a contract containing the Equal Employment Opportunity clause to a religious entity; that portion of the clause regarding employment of individuals of a particular religion to perform work connected with the carrying on of the contractor's activities do not apply to a contractor that is a religious corporation, association, educational institution or society. The full text of this case was in the March 22, 2007 *Federal Register* at page 13586. The text of the Equal Employment clause has been revised to accommodate this exception if the clause is dated "(Mar 2007)" or later.

3. Performance-Based Payments — This case provides for the use of performance-based payments under certain fixed price contracts for non-commercial acquisitions. This process includes a solicitation provision at 52.232-28, *Invitation to Propose Performance-Based Payments*, and a contract clause at 52.232-32 *Performance-Based Payments*.

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Part 13

[FAC 2005-16; FAR Case 2005-029; Item
II; Docket 2006-0020, Sequence 21]

RIN 9000-AK46

Federal Acquisition Regulation; FAR
Case 2005-029, Termination or
Cancellation of Purchase OrdersAGENCIES: 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 correct the inadvertent omission of an appropriate reference pertaining to the termination for cause procedures for purchase orders that have been accepted in writing.

DATES: *Effective Date:* March 22, 2007.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael Jackson, Procurement Analyst, at (202) 208-4949. Please cite FAC 2005-16, FAR case 2005-029. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation to amend FAR 13.302-4 by reinstating the appropriate coverage for termination for cause of commercial purchase orders that have been accepted in writing by the contractor, current references to FAR 12.403(d) and FAR 52.212-4(l) as stated in 13.302-4(a) address termination for convenience. The current FAR language at 13.302-4(a) was established under FAC 97-3, published in the *Federal Register* at 62 FR 64912 on December 9, 1997, and became effective on February 9, 1998. This change constituted a complete rewrite and reorganization of FAR Part 13. Previously, FAR Part 13 identified both termination for cause as well as for convenience as the termination methods available to contracting officers. Furthermore, FAR 12.403 permits the Government to

terminate a contract for commercial items either for the convenience of the Government or for cause, and makes no distinction based on the dollar value of the commercial item contract, nor the contractual method utilized to procure the commercial item. Therefore, this final rule amends FAR Part 13.302-4(a) by reinstating the appropriate coverage for and references to termination for cause of commercial purchase orders.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 71 FR 14445 on March 22, 2006. The 60-day comment period for the proposed rule ended May 22, 2006. One respondent provided a comment. This comment is discussed below.

Public Comment

Comment: The commenter suggests that the words "in writing by the contractor" be deleted. The commenter asserts that the beginning of performance of work under a purchase order should be recognized as contractor acceptance of the purchase order, which in most cases, begins on the date of award.

Response: The scope of this case is the correction of an administrative error to re-establish the FAR language for termination for cause procedures for purchase orders that have been accepted in writing. To revise the case now to include all purchase orders, whether accepted in writing or not, would exceed the scope of what was published in the proposed rule. The Councils recognize that this issue requires additional review and will set up a separate case to address it.

Summary of Changes

FAR 13.302-4(a) is revised to reinstate references to procedures for termination for cause as well as termination for convenience under FAR 12.403 and 52.212-4(l) or (m).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not change the Government's existing termination rights but merely clarifies those rights by correcting an inadvertent error in the FAR.

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 13

Government procurement.

Dated: March 15, 2007

Ralph De Stefano,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR part 13 as set forth below:

**PART 13—SIMPLIFIED ACQUISITION
METHODS**

1. The authority citation for 48 CFR part 13 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Amend section 13.302-4 by revising paragraphs (a)(1) and (b)(2) to read as follows:

**13.302-4 Termination or cancellation of
purchase orders.**

(a) * * *

(1) 12.403 and 52.212-4(l) or (m) for commercial items; or

* * * * *

(b) * * *

(2) If the contractor does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, the contracting officer shall process the action as a termination prescribed in paragraph (a) of this subsection.

[FR Doc. 07-1356 Filed 3-21-07; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 2005-16; FAR Case 2006-019; Item
III Docket 2006-0020, Sequence 12]

RIN 9000-AK66

Federal Acquisition Regulation; FAR
Case 2006-019, Contracts with
Religious EntitiesAGENCIES: Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 11246, as amended, Equal Employment Opportunity, to incorporate the exemption for religious entities prescribed in E.O. 13279.

DATES: *Effective Date:* March 22, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before May 21, 2007 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-16, FAR case 2006-019, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for any document by first selecting the proper document types and selecting "Federal Acquisition Regulation" as the agency of choice. At the "Keyword" prompt, type in the FAR case number (for example, FAR Case 2006-019) and click on the "Submit" button. Please include any personal and/or business information inside the document.

You may also search for any document by clicking on the "Advanced search/document search" tab at the top of the screen, selecting from the agency field "Federal Acquisition Regulation", and typing the FAR case number in the keyword field. Select the "Submit" button.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-16, FAR case 2006-019, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775. Please cite FAC 2005-16, FAR case 2006-019. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

This rule amends FAR Part 22 to implement Executive Order (E.O.) 11246, as amended, to incorporate the exemption for religious entities prescribed in E.O. 13279. E.O. 11246, as amended, prohibits Government contractors and subcontractors, and Federally assisted construction contractors and subcontractors from discriminating in employment, and requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex, or national origin. Section 4 of E.O. 13279 amended Section 204 of E.O. 11246 to exempt religious corporations, associations, educational institutions and societies from certain nondiscrimination requirements. E.O. 11246, as amended, permits religious entities to consider employment of individuals of a particular religion to perform work connected with carrying on the entity's activities. Religious entities are not exempt from other requirements of the Executive order.

The Department of Labor (DOL) implemented the exemption at 41 CFR part 60-1, Obligations of Contractors and Subcontractors, in the *Federal Register* at 68 FR 56392 on September 30, 2003. The FAR incorporates the DOL exemptions at 41 CFR part 60-1 at FAR 22.807. This rule adds the exemption for religious entities to FAR 22.807(b) and the associated clause at FAR 52.222-26, Equal Opportunity, to maintain consistency with DOL rules. Under FAR 22.807(b), the exemption applies even though a contract or subcontract contains the clause at FAR 52.222-26. When awarding a contract to a religious entity that contains the clause at FAR 52.222-26, Equal Opportunity, the requirements of the clause with respect to employment of individuals of a particular religion to perform work connected with the carrying on of the contractor's activities do not apply to a contractor that is a religious corporation, association, educational institution, or society.

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 interim rule is not expected to 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 aligns the FAR with the DOL exemption for consistency and clarity. The DOL stated in the *Federal Register* at 68 FR 56392 on September 30, 2003, that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 22 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 2005-16, FAR case 2006-019), 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.* The rule does not affect any certification, representation, or other proposal submission requirements.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to ensure compliance with Executive Order 11246 and consistency with the Department of Labor regulations. Contracting officers need to be aware of the exemption for religious entities and to understand when and how to apply it. This will avoid confusion and potential disagreements between the Government and religious entities competing for Federal contracts. The Executive order was published on December 16, 2002 and the DOL regulations went into effect on October 30, 2003. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: March 15, 2007.

Ralph De Stefano,
Director, Contract Policy Division.

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

■ 1. The authority citation for 48 CFR parts 22 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 2. Amend section 22.807 by adding paragraph (b)(7) to read as follows:

22.807 Exemptions

* * * * *

(b) * * *

(7) *Contracts with religious entities.* Pursuant to E.O. 13279, Section 202 of E.O. 11246, shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in the order.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-5 [Amended]

- 3. Amend section 52.212-5 by—
- a. Revising the date of the clause to read "(MAR 2007)"; and
- b. Removing from paragraphs (b)(17) and (e)(1)(ii) "(APR 2002)" and adding "(MAR 2007)" in its place.

52.213-4 [Amended]

- 4. Amend section 52.213-4 by—
- a. Revising the date of the clause to read "(MAR 2007)";
- b. Removing from paragraph (a)(1)(iii) "(APR 2002)" and adding "(MAR 2007)" in its place; and
- c. Removing from paragraph (a)(2)(vi) "(SEPT 2006)" and adding "(MAR 2007)" in its place.
- 5. Amend section 52.222-26 by—
- a. Revising the date of the clause to read "(MAR 2007)";
- b. Redesignating paragraphs (b)(1) through (b)(11), and (c) as paragraphs (c)(1) through (c)(11), and (d), respectively; removing paragraph (b) introductory text and adding paragraphs (b)(1) and (b)(2); and

■ c. Removing from newly designated paragraph (c)(10) "paragraphs (b)(1) through (11) of".

The revised text reads as follows:

52.222-26 Equal Opportunity.

* * * * *

(b)(1) 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 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.

(2) If the Contractor is a religious corporation, association, educational institution, or society, the requirements of this clause do not apply with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the Contractor's activities (41 CFR 60-1.5).

* * * * *

52.244-6 [Amended]

- 6. Amend section 52.244-6 by—
- a. Revising the date of the clause to read "(MAR 2007)"; and
- b. Removing from paragraph (c)(1)(ii) "(MAY 2002)" and adding "(MAR 2007)" in its place.

[FR Doc. 07-1357 Filed 3-21-07; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2005-16; FAR Case 2006-012; Item IV; Docket 2006-0020, Sequence 24]

RIN 9000-AK51

Federal Acquisition Regulation; FAR Case 2006-012, Contract Terms and Conditions Required to Implement Statute or Executive Orders—Commercial Items

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to update the required contract clauses that implement provisions of law or executive orders for acquisitions of commercial items.

DATES: *Effective Date:* March 22, 2007.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208-4949. Please cite FAC 2005-16, FAR case 2006-012. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

In accordance with Section 8002 of Public Law 103-355 (41 U.S.C. 264, note), contract clauses applicable to acquisitions of commercial items are limited, to the maximum extent practicable, to clauses that are—

- (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or
- (2) Determined to be consistent with customary commercial practice.

The FAR clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, incorporates, by reference, the contract clauses that the contracting officer may select to implement provisions of law or executive orders for acquisitions of commercial items. The FAR clause at 52.219-16, Liquidated Damages—Subcontracting Plan, is a contract clause that is required to implement 15 U.S.C. 637(d)(4)(F)(i). However, the FAR clause 52.219-16 is not included in the list of clauses for commercial contracts in FAR 52.212-5. The rule incorporates the FAR clause 52.219-16 in the list of clauses for commercial contracts that the contracting officer may select.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 42344, July 26, 2006. The Councils received no comments on the proposed rule. Therefore, the Councils have adopted the proposed rule as final without change.

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