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Part III

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 2, 3, 12 et al.
Federal Acquisition Regulation; Final Rules and Small Entity Compliance Guide

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009–0012, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–30; Introduction

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

ACTION: Summary presentation of 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) 2005–30. 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.regulations.gov*.

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

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–30 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–30

Item	Subject	FAR case	Analyst
I	Federal Procurement Data System (FPDS)	2004–038	Woodson.
II	Commercially Available Off-the-Shelf (COTS) Items	2000–305	Jackson.
III	Exemption of Certain Service Contracts from the Service Contract Act (SCA)	2001–004	Woodson.
IV	Public Disclosure of Justification and Approval Documents for NoncompetitiveContracts-Section 844 of the National Defense AuthorizationAct for Fiscal Year 2008 (Interim).	2008–003	Woodson.
V	SAFETY Act: Implementation of DHS Regulations	2006–023	Chambers.
VI	Electronic Products Environmental Assessment Tool (EPEAT)	2006–030	Clark.
VII	Combating Trafficking in Persons	2005–012	Woodson.
VIII	Trade Agreements—New Thresholds	2007–016	Murphy.
IX	Technical Amendment		

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 2005–30 amends the FAR as specified below:

Item I—Federal Procurement Data System (FPDS) (FAR Case 2004–038)

This final rule amends the Federal Acquisition Regulation (FAR) Subpart 4.6 to revise the process for reporting contract actions to the Federal Procurement Data System (FPDS). The rule establishes FPDS as the single authoritative source of all procurement data for a host of applications and reports, such as the Central Contractor Registration (CCR), the Electronic Subcontracting Reporting System (eSRS), the Small Business Goaling Report (SRGR), and Resource Conservation and Recovery Act (RCRA) data. The rule requires Contracting Officers to verify the accuracy of contract award data prior to reporting the data in FPDS. The rule does not require any reporting by the vendor community, as the FPDS reporting requirement is accomplished by Government contracting activities.

Item II—Commercially Available Off-the-Shelf (COTS) Items (FAR Case 2000–305)

This final rule amends the Federal Acquisition Regulation (FAR) to implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items. A new FAR section 12.103 outlines the treatment of COTS items. This rule will reduce the burden on contractors that provide commercially available off-the-shelf EPA-designated products that contain recovered materials and contractors that provide construction material or end products that are COTS items manufactured in the United States. Contracting officers will need to become acquainted with the new definition of ''commercially available off-the-shelf item'' and understand the revised definitions of ''domestic end product'' and ''domestic construction material.''

Item III—Exemption of Certain Service Contracts from the Service Contract Act (SCA). (FAR Case 2001–004)

This rule finalizes, with changes, the interim rule that was published in the **Federal Register** at 72 FR 63076 on November 7, 2007. This rule is required to implement the U.S. Department of Labor's final rule published in the **Federal Register** at 66 FR 5327 on January 18, 2001, amending 29 CFR Part 4. This rule revises the current Service Contract Act (SCA) exemption in the FAR and adds an SCA exemption for contracts for certain additional services that meet specific criteria. The rule also adds to the Annual Representations and Certifications FAR clause at 52.204–8, the conditions under which each listed provision applies, or for the more complex cases, a check-off for the contracting officer to indicate whether the provision is applicable to the solicitation. The rule encourages broader participation of Government procurement by companies doing business in the commercial sector, and reinforces the Government's commitment to reduce Government-unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards.

Item IV—Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (Interim) (FAR Case 2008–003)

This interim rule amends FAR 6.305 to require agencies to make available for public inspection within 14 days after contract award the justification required

by 6.303–1, on the website of the agency and at the Governmentwide Point of Entry (*www.fedbizopps.gov*). In the case of a contract award permitted under FAR 6.302–2, the rule requires that the justification be posted within 30 days after contract award. The rule requires that contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. This rule implements Section 844 of the National Defense Authorization Act for Fiscal Year 2008.

Item V—SAFETY Act: Implementation of DHS Regulations (FAR Case 2006–023)

This final rule converts the interim rule published in the **Federal Register** at 72 FR 63027, November 7, 2007 to a final rule with changes. This final rule implements the SAFETY Act in the FAR. The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of ''risk management'' and a system of ''litigation management.'' The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of antiterrorism technologies from developing, deploying, and commercializing technologies that could save lives. Examples of Qualified Anti-Terrorism Technologies (QATT) identified by DHS include—

- Vulnerability assessment and countermeasure and counter-terrorism planning tools;
- First responder interoperability solution;
- Marine traffic management system;
- Security services, guidelines, systems, and standards;
- Vehicle and cargo inspection system;
- X-ray inspection system;
- Trace explosives detection systems and associated support services;
- Maintenance and repair of screening equipment;
- Risk assessment platform;
- Explosive and weapon detection equipment and services;
- Biological detection and filtration systems;
- Passenger screening services;
- Baggage screening services;
- Chemical, biological, or radiological agent release detectors;
- Vehicle barriers;
- First responder equipment; and
- Architectural and engineering ''hardening'' products and services.

Item VI—Electronic Products Environmental Assessment Tool (EPEAT) (FAR Case 2006–030)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, without change, the interim rule that amended the Federal Acquisition Regulation (FAR) to require use of the Electronic Products Environmental Assessment Tool (EPEAT) when acquiring personal computer products such as desktops, notebooks (also known as laptops), and monitors pursuant to the Energy Policy Act of 2005 and Executive Order 13423, ''Strengthening Federal Environmental, Energy, and Transportation Management.'' The interim rule revised Subpart 23.7, and prescribed a clause at 52.223–16 (also included in 52.212–5 for acquisition of commercial items) in all solicitations and contracts for the acquisition of personal computer products, services that require furnishing of personal computer products for use by the Government, and services for contractor operation of Government owned facilities.

Item VII—Combating Trafficking in Persons (FAR Case 2005–012)

This final rule implements Section 3(b) of the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 (Combating Trafficking In Persons). TVPRA addresses the victimization of countless men, women, and children in the United States and abroad. The United States Government believes that its contractors can help combat trafficking in persons. The statute, codified at 22 U.S.C. 7104(g), requires that contracts contain a clause allowing the agency to terminate the contract if a contractor, contractor employees, subcontractor, or subcontractor employees engage in severe forms of trafficking in persons or procures a commercial sex act during the period of performance of the contract, or uses forced labor in the performance of the contract. The rule provides that the contracting officer may consider whether the contractor had a Trafficking in Persons awareness program at the time of a violation as a mitigating factor when determining remedies; and a website where the contractor may obtain additional information about Trafficking in Persons and examples of awareness programs.

Item VIII—Trade Agreements—New Thresholds (FAR Case 2007–016)

This final rule converts the interim rule published in the **Federal Register** at 73 FR 10962 on February 28, 2008, and amended at 73 FR 16747 on March 28, 2008, to a final rule without change.

The rule adjusts the thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements as determined by the United States Trade Representative, according to a formula set forth in the agreements.

Item IX—Technical Amendment

An editorial change is made at FAR 15.101–2.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-30 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 2005-30 is effective February 17, 2009, except for Items VIII and IX, which are effective **January 15, 2009**.

Dated: December 22, 2008.

Shay D. Assad,

Director, Defense Procurement.

Dated: December 24, 2008.

David A. Drabkin,

Senior Procurement Executive & Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, U.S. General Services Administration.

Dated: December 22, 2008.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E9–553 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 4, 12, and 52

[FAC 2005–30; FAR Case 2004–038, Item I;Docket 2008–0001; Sequence 6]

RIN 9000–AK94

Federal Acquisition Regulation; FAR Case 2004–038, Federal Procurement Data System (FPDS)

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 adopted as final, with one minor change, the interim rule amending the Federal Acquisition Regulation (FAR) to revise the process for reporting contract actions to the Federal Procurement Data System (FPDS). This final rule revises the definition of indefinite delivery vehicle at FAR 4.601.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2004–038.

SUPPLEMENTARY INFORMATION:

A. Background

As of October 2003, all agencies were to begin reporting FAR-based contract actions to the modified system. During Fiscal Year 2004, members of the interagency Change Control Board, as well as departmental teams working on the migration of data from the old to new system, recognized both the opportunity to standardize reporting processes and the need to revise the FAR to provide current and clear reporting requirements.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 73 FR 21773, on April 22, 2008. The interim rule established the Government's commitment for Federal Procurement Data System (FPDS) data to serve as the single authoritative source of all procurement data for a host of applications and reports, such as the Central Contractor Registration (CCR), the Electronic Subcontracting Reporting System (eSRS), the Small Business Goaling Report (SBGR), and Resource Conservation and Recovery Act (RCRA) data. The public comment period closed on June 23, 2008. Four respondents submitted comments on the interim rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided below:

1. One respondent commented that FAR 4.602(a) through (c) contains little value for a reader consulting the FAR for guidance on what to do and when or how to do it. The respondent recommends deleting 4.602 and renumbering remaining paragraphs.

Response: The Councils disagree with the comment. FAR section 4.602 was added to provide general information about contract reporting. The section identifies FPDS as the Government's web-based tool for reporting contract actions. In addition, it provides a list of the many uses of the data provided by FPDS and cites the FPDS web site. The Councils consider this type of information to be very useful for the acquisition community and indicates the degree of importance placed on reporting contract actions. Language regarding procedures and reporting actions (what to do and when or how to do it) may be found at FAR 4.605 and 4.606. Therefore, FAR 4.602 remains unchanged.

2. One respondent commented that FAR 4.603(a) seemed to be needless and out of place. FPDS preceded Federal Funding and Transparency Act of 2006 (FFATA) by many years and does not meet the public access requirements articulated in FFATA. The respondent recommends deleting this section and renumbering remaining subparagraphs.

Response: The Councils disagree with the comment. FAR 4.603(a) is a Federal contract policy statement indicating that the FFATA requires that all Federal award data must be publicly accessible. FPDS data is made accessible to the public, satisfying the certain basic requirements of FFATA. Therefore, this paragraph remains unchanged.

3. One respondent stated that FAR 4.601 defines indefinite delivery vehicle (IDV). Since IDV is more encompassing than an indefinite delivery contract (IDC), the respondent recommends finding another word for ''vehicle'' or changing the definition to read ''Indefinite delivery vehicle (IDV) means an indefinite delivery contract or agreement that has one or more…''

Response: The Councils agree that the definition should be clarified. As indicated at FAR 4.606(a)(ii), examples of IDVs, for the purposes of the FPDS, include task and delivery order contracts (including Governmentwide acquisition contracts and multi-agency contracts), GSA Federal supply schedules, Blanket Purchase Agreements, Basic Ordering Agreements, or any other agreement or contract against which individual orders or purchases may be placed. Accordingly, the Councils revised the definition of ''Indefinite delivery vehicle (IDV)'' at FAR 4.601 to include the words ''or agreement.''

4. One respondent recommends that references to generic DUNS be removed from FAR 4.605(b)(1) and (2). To prevent generic DUNS abuse, the FPDS Change Control Board voted to not post generic DUNS on the FPDS website. Each Agency would be responsible for communicating what generic DUNS, if any, should be used.

Response: The Councils disagree with the comment. The Councils understand agencies responsibilities associated with deciding which generic DUNS number to use, however, a DUNS number is required to complete a contract action report in FPDS. FAR procedures at 4.605(b) permit the use of generic DUNS numbers and do not interfere with agency responsibilities, as agreed to by the FPDS Change Control Board. A generic DUNS number may be used under the circumstances referenced at FAR 4.605(b)(1). FAR procedures at 4.605(b) remain unchanged.

5. One respondent submitted a comment in reference to FAR Case 2005–040, Electronic Subcontracting Reporting System (eSRS).

Response: This comment is not relevant to FAR Case 2004–038 and was referred to the FAR Small Business Team for disposition.

6. One respondent submitted a comment in reference to the **Federal Register** notice, Background, paragraph 5, stating that reporting only the appropriated portions of contract actions would be extremely impractical and result in data mismatches between automated contracting writing systems and FPDS. The respondent indicated that they have many actions that have mixed funding and it would be difficult for contracting staff to identify whether funding was appropriated or non-appropriated. In order to comply with the rule, data would have to be manually entered into FPDS.

Response: The Councils disagree with the comment. FAR 4.606(b)(2) states that agencies may submit actions for any non-appropriated fund (NAF) or NAF portion of a contract action using a mix of appropriated and non-appropriated funding, after contacting the FPDS

Program Office. It should be noted that reporting non-appropriated funds may impact certain reports generated using FPDS data regarding appropriated funds. FAR language remains unchanged.

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 contract reporting is not accomplished by the vendor community, only by Government contracting entities.

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 1, 2, 4, 12, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 1, 2, 4, 12, and 52, which was published in the **Federal Register** at 73 FR 21773, April 22, 2008, as a final rule with the following change:

PART 4—ADMINISTRATIVE MATTERS

■ 1. The authority citation for 48 CFR part 4 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).

4.601 [Amended]

■ 2. Amend section 4.601 by removing from the introductory paragraph of the definition ''Indefinite delivery vehicle (IDV)'' the word ''contract'' and adding ''contract or agreement'' in its place.

[FR Doc. E9–556 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 23, 25, and 52

[FAC 2005–30; FAR Case 2000–305; Item II; Docket 2009-0001; Sequence 1]

RIN 9000–AJ55

Federal Acquisition Regulation; FAR Case 2000–305, Commercially Available Off-the-Shelf (COTS) 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 implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2000–305.

SUPPLEMENTARY INFORMATION:

A. Background

Section 35 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 431) requires that the Federal Acquisition Regulation (FAR) include a list of provisions of law that are inapplicable to contracts for the acquisition of commercially available off-the-shelf (COTS) items. Certain laws cannot be exempt from the acquisition of COTS and they include laws that—

- Provide for criminal or civil penalties;
- Specifically refer to 41 U.S.C. 431 and the laws state that it applies to COTS;
- Provide for a bid protest procedure or small business preference listed at 41 U.S.C. 431(a)(3); or
- Are applicable because the Administrator of OFPP makes a written determination that it would not be in the best interest of the United States to exempt such COTS contracts from the applicability of the laws.

In order to implement section 4203 of the Clinger-Cohen Act of 1996, DoD, GSA, and NASA published an advanced notice of proposed rule (ANPR) in the **Federal Register** at 68 FR 4874, January 30, 2003. The ANPR listed provisions that may be inapplicable to the acquisition of COTS items, and requested public comment. (A prior ANPR had been issued under FAR Case 96–308.) The Councils published a proposed rule at 69 FR 2448, January 15, 2004. The comment period closed on March 15, 2004. The Councils received comments from 56 respondents, of which 3 were duplicates. The comments were thoroughly examined by the FAR Acquisition Law Team, Civilian Agency Acquisition Council (CAAC), and Defense Acquisition Regulations Council (DARC).

B. Definition of COTS.

The Councils received several comments on the definition of COTS.

1. Include services/IT in the definition. One respondent suggested that the definition of COTS item should delete the words ''of supply'' from the definition. The respondent states that this is not part of the statutory definition. Further, three respondents commented that definition of COTS should specifically include services. Another respondent suggested additional language in the definition of COTS to address software and other information technology products.

Response: The statute defines ''COTS item'' as an item that ''Is a commercial item as described in section 4(12)(A).'' ''Commercial item'' is defined at 41 U.S.C. 403(12). Paragraph (A) of that definition reads as follows:

''Any item, other than real property, that is of a type customarily used by the general public or by non-governmental purposes, and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease or license to the general public.''

Paragraphs (F) and (G) of the definition deal with commercial services. These paragraphs were not referenced in the statutory definition of a COTS item. Services are therefore necessarily excluded from the definition. To make the definition clearer, the reference to the definition of commercial item has been revised to point to the first paragraph of the definition of commercial item.

The Councils have clarified that the words ''of supply'' include

Program Office. It should be noted that reporting non-appropriated funds may impact certain reports generated using FPDS data regarding appropriated funds. FAR language remains unchanged.

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 contract reporting is not accomplished by the vendor community, only by Government contracting entities.

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 1, 2, 4, 12, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 1, 2, 4, 12, and 52, which was published in the **Federal Register** at 73 FR 21773, April 22, 2008, as a final rule with the following change:

PART 4—ADMINISTRATIVE MATTERS

■ 1. The authority citation for 48 CFR part 4 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).

4.601 [Amended]

■ 2. Amend section 4.601 by removing from the introductory paragraph of the definition ''Indefinite delivery vehicle (IDV)'' the word ''contract'' and adding ''contract or agreement'' in its place.

[FR Doc. E9–556 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 23, 25, and 52

[FAC 2005–30; FAR Case 2000–305; Item II; Docket 2009-0001; Sequence 1]

RIN 9000–AJ55

Federal Acquisition Regulation; FAR Case 2000–305, Commercially Available Off-the-Shelf (COTS) 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 implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2000–305.

SUPPLEMENTARY INFORMATION:

A. Background

Section 35 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 431) requires that the Federal Acquisition Regulation (FAR) include a list of provisions of law that are inapplicable to contracts for the acquisition of commercially available off-the-shelf (COTS) items. Certain laws cannot be exempt from the acquisition of COTS and they include laws that—

- Provide for criminal or civil penalties;
- Specifically refer to 41 U.S.C. 431 and the laws state that it applies to COTS;
- Provide for a bid protest procedure or small business preference listed at 41 U.S.C. 431(a)(3); or
- Are applicable because the Administrator of OFPP makes a written determination that it would not be in the best interest of the United States to exempt such COTS contracts from the applicability of the laws.

In order to implement section 4203 of the Clinger-Cohen Act of 1996, DoD, GSA, and NASA published an advanced notice of proposed rule (ANPR) in the **Federal Register** at 68 FR 4874, January 30, 2003. The ANPR listed provisions that may be inapplicable to the acquisition of COTS items, and requested public comment. (A prior ANPR had been issued under FAR Case 96–308.) The Councils published a proposed rule at 69 FR 2448, January 15, 2004. The comment period closed on March 15, 2004. The Councils received comments from 56 respondents, of which 3 were duplicates. The comments were thoroughly examined by the FAR Acquisition Law Team, Civilian Agency Acquisition Council (CAAC), and Defense Acquisition Regulations Council (DARC).

B. Definition of COTS.

The Councils received several comments on the definition of COTS.

1. Include services/IT in the definition. One respondent suggested that the definition of COTS item should delete the words ''of supply'' from the definition. The respondent states that this is not part of the statutory definition. Further, three respondents commented that definition of COTS should specifically include services. Another respondent suggested additional language in the definition of COTS to address software and other information technology products.

Response: The statute defines ''COTS item'' as an item that ''Is a commercial item as described in section 4(12)(A).'' ''Commercial item'' is defined at 41 U.S.C. 403(12). Paragraph (A) of that definition reads as follows:

''Any item, other than real property, that is of a type customarily used by the general public or by non-governmental purposes, and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease or license to the general public.''

Paragraphs (F) and (G) of the definition deal with commercial services. These paragraphs were not referenced in the statutory definition of a COTS item. Services are therefore necessarily excluded from the definition. To make the definition clearer, the reference to the definition of commercial item has been revised to point to the first paragraph of the definition of commercial item.

The Councils have clarified that the words ''of supply'' include

''construction material''. Although the definition of ''construction materials'' states that they are ''supplies'', FAR Part 25 distinguishes between Buy American Act—Supplies (FAR Subpart 25.1) and Buy American Act—Construction materials (FAR Subpart 25.2). Therefore, this clarification is beneficial. The OFPP memorandum, dated February 14, 2008, specifically mentions waiver of the component test at 41 U.S.C. 10a (supply) and 10b (construction.)

Since the only laws waived are the component test of the Buy American Act and the recycled material estimate and certification, and no laws relating to FAR Part 27 have been waived, it is unnecessary to specifically mention information technology (IT) or software in the definition of COTS item.

2. ''Without modification''. One respondent considers the phrase ''without modification'' to be too restrictive. Some COTS products may require some type of modification to suit the intended use of the product.

Response: The phrase ''without modification'' is required by statute. However, the Councils have added ''under a contract or subcontract at any tier'' to clarify that whether an item is a COTS item is determined at the point of sale to the next higher tier subcontractor. This is consistent with the DoD definition of ''COTS item'' as applied to the waiver of specialty metals restrictions when acquiring COTS items. If a COTS item is accepted by the next high tier without modification, then any waiver applicable to COTS items is applicable to this item at the time of acceptance, even if it is subsequently modified. Although this distinction is not necessary in this particular rule, because both laws being waived apply only at the level of the prime contract, it is beneficial to keep this definition clear and consistent, in case a law is waived in the future that applies at the subcontract level. This intent to address COTS items at the subcontract level is demonstrated in section 804 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), which states in paragraph (b) (10 U.S.C. 2533b(h)) that ''This section does not apply to contracts or subcontracts for the acquisition of commercially available off-the-shelf items, as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))…''.

3. ''Sold in substantial quantities.'' One respondent requests that this should be clarified, that it is not necessary that the contractor itself sells substantial quantities. Multiple vendors may sell the item in substantial quantities in the commercial marketplace.

Response: This definition is statutory. There is nothing in the definition that implies that it is the contractor that must sell the item in substantial quantities in the commercial marketplace. The way the definition reads, the substantial quantities test does apply to the item, as suggested by the respondent.

4. Incorporate definition of COTS into FAR 52.202–1, Definitions. One respondent recommended that the definition of COTS item should be incorporated into FAR 52.202–1, Definitions, because the proposed rule added a cross reference in FAR 52.244–6 to the definition of COTS item at FAR 52.202–1.

Response: This comment was correct at the time, but has been overtaken by events. First, the final rule does not make the proposed change to FAR 52.244–6. In addition, the clause at FAR 52.202–1 was rewritten under another case, so that it no longer contains a list of definitions. Rather, it refers to where definitions can be found and provides guidance as to which definitions apply, when a term is defined in more than one place.

5. Subset of commercial items. The proposed rule included in the definition of COTS item the statement that COTS items are a subset of commercial items. Although no public comments were received on this issue, the Councils decided that it is redundant to state that COTS items are a subset of commercial items when the definition itself requires that COTS items meet the definition of the first paragraph of the definition of commercial item. This information that COTS items are a subset of commercial items is now provided at FAR 12.505, rather than in the definition.

C. Implementation of COTS in FAR Part 12.

The draft final rule modifies FAR Subparts 12.1, 12.3, and 12.5 as proposed, to address COTS items, and adds the section 12.505. However, because only 2 laws are being waived, section 12.505 has been modified to include only those 2 laws, while stating that all laws waived for contracts or subcontracts for the acquisition of commercial items are also waived for COTS (because it is a subset). This more clearly identifies the differences that apply to COTS items.

The rule does not make any change to FAR 12.504, based on the recommendation of SBA. An extraneous proposal to delete 15 U.S.C. 644(d), not directly related to this case, has been removed. SBA states that, although FASA attempted to eliminate labor surplus areas for purposes of subcontracting, the drafters of FASA missed the reference to subcontracting in 15(d) of the Small Business Act. Therefore, until this error is corrected, it is better to leave it on the list of laws that are inapplicable to subcontracts for the acquisition of COTS items.

D. Determination by OFPP.

After considering the analysis and recommendations as to laws that should be waived for the acquisition of COTS items, the Administrator for the Office of Federal Procurement Policy, made a determination on February 14, 2008, of the laws applicable and laws inapplicable to the acquisition of COTS items.

1. Laws Waived. The Administrator of OFPP exercised the authority to wholly or partially waive the following laws:

a. Buy American Act. A partial waiver of the Buy American Act (BAA)(41 U.S.C. 10a and 10b), limited to the Act's domestic components test was granted.

b. Estimate of Percentage of Recovered Material Act. The Estimate of Percentage of Recovered Material Act (42 U.S.C. 6962(c)(3)(A)) was waived in its entirety.

2. Waiver still under consideration. A partial waiver of the following law is under consideration and a determination and findings will be made on this law at a later date:

Rights in Technical Data (41 U.S.C. 418a and 10 U.S.C. 2520), specifically waiver of—

•Unlimited Government rights in data for operation, maintenance, installation, or training; and

• The Government's right to make unlimited copies.

3. Laws already inapplicable or modified for the acquisition of commercial items. No further modification was made to any of the following laws, which have already been determined inapplicable or modified for the acquisition of commercial items:

a. Walsh-Healey, 41 U.S.C. 43.

b. Contingent Fees, 41 U.S.C. 254(a) and 10 U.S.C. 2306(b).

c. Minimum response time, 41 U.S.C. 416(a) (3) and (6).

d. Drug Free Workplace, 41 U.S.C. 701.

e. Limitation on the use of appropriated funds, 31 U.S.C. 1354(a).

f. Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701.

g. Anti-Kickback Act of 1986, 41 U.S.C. 57 (a) and (b), and 58.

h. Truth in Negotiations Act, 41 U.S.C. 254(d) and 10 U.S.C. 2306a.

i. Cost Accounting Standards, 41 U.S.C. 422.

4. Law not subject to waiver.

Limitation on appropriated funds to influence certain Federal contracting and financial transactions (31 U.S.C. 1352).

5. Laws that will not be waived because it is not in the best interest of the Government. A determination was made that the following laws will not be waived for the acquisition of COTS because it is not in the best interest of the Government:

a. Trade Agreements Act (19 U.S.C. 2501 and 19 U.S.C. 2512);

b. Restrictions on Advance Payments (31 U.S.C. 3324).

c. Employment Reports for Veterans (38 U.S.C. 4212(d)(l)).

d. Validation of Proprietary Data Restrictions (41 U.S.C. 253d and 10 U.S.C. 2321).

e. Prohibition on Limiting Subcontractor Direct Sales (41 U.S.C. 253g and 10 U.S.C. 2402).

f. Cargo Preference, 10 U.S.C. 2631(a) and 46 U.S.C. 1241(b).

g. Affirmative Action for Workers with Disabilities, 29 U.S.C. 793.

h. Equal opportunity for Special Disabled Veterans, 38 U.S.C. 4212.

i. Examination of records by the Comptroller General, 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c).

j. Fly American Act, 49 U.S.C. 40118 (but see 12.503).

E. Discussion and analysis of laws considered for waiver.

1. Laws Waived.

a. Buy American Act (41 U.S.C. 10a and 10b), component test. Ten respondents specifically endorse waiver of the application of the Buy American Act (BAA) to COTS and 4 respondents endorse the waiver as part of a broad endorsement of the waivers in general, without specific identification or comment. Two respondents oppose the waiver of the BAA as a whole.

Some respondents state that the BAA makes it increasingly difficult for U.S. companies to compete for Federal business. These laws are out of place in the contemporary international market for commercial items. Companies must source products globally in order to be competitive in the worldwide marketplace. Therefore, companies must choose between being competitive in the global market and being competitive in the Government market. The BAA usually does not influence COTS manufacturers because revenue derived from Government sales is typically a very small percentage of overall revenue for COTS.

• Therefore, Federal agencies are often denied access to the most productive, cost-effective technology.

• BAA restrictions may also hamper the Government's ability to fully implement federal policies. It may hinder Government access to technology compliant with Section 508 of the Rehabilitation Act of 1973 (accessible to employees with disabilities) and the most energy-efficient products, as required by E.O. 13101 and 13123.

Some respondents are concerned that the Government-unique requirement to track where components are being manufactured imposes a severe administrative burden, especially on small business. It requires contractors to establish and maintain costly and labor intensive management systems. Tracking the place of manufacture and component value is not necessary for the general origin labeling requirements applicable generally in the U.S. commercial market place. BAA compliance is a major procurement requirement that adds complexity and cost to the delivery of goods to the Government. The increased cost of ensuring compliance with the BAA keeps some firms out of the market completely and affects the price of products sold to the Government.

Another issue for respondents is that application of the regulations relating to the BAA is very complex and difficult. The certification requirements potentially expose manufacturers to civil false claims and other legal sanctions, even when they have taken extraordinary steps to comply with the BAA.

Some respondents contend that Congress mandates the elimination, where possible, of barriers to the Government's ability to procure commercial items.

Federal agencies contend that it is difficult and causes delay to try to obtain case-by-case waivers of the BAA.

On the other hand, two respondents were concerned that a permanent waiver of the BAA should not be granted without reciprocity. These respondents believed that the Government needs these provisions to stay in general effect so that possibility of waiver will provide incentive to encourage other countries to provide reciprocal access. Agencies can waive the BAA on a case-by-case basis or for a class of items when it is in the public interest to do so.

Response: The Councils concur with the respondents on the especially burdensome nature of the component test. Today's markets are globally integrated with foreign components often indistinguishable from domestic components. Manufacturers' component purchasing decisions are based on factors such as cost, quality, availability, and maintaining the state of the art, not the country of origin, making it much more difficult in today's market for a manufacturer to guarantee the source of its components over the term of a contract. It is even more difficult for a dealer to determine and guarantee the source of the components included in products on the shelf. The difficulty in tracking the country of origin of components is a disincentive for firms to become defense contractors, limiting the ability of the Government to purchase products already in the commercial distribution systems. In today's globally integrated market, it is expensive for manufacturers to distinguish between foreign and domestic components. Requiring them to do so results in increased costs of procurements and impedes the ability to obtain the latest advances in commercial technology.

The rationale provided against waiver of the BAA as a whole is resolved by waiving only the component test of the BAA. The component test of the BAA has already been waived for all acquisitions subject to the World Trade Organization Government Procurement Agreement (WTO GPA). By waiving only the component test of the BAA for COTS items, but still requiring manufacture in the United States, the Government can preserve an incentive to encourage other countries to provide reciprocal access, while reducing the significant administrative burden on contractors and the associated increased cost to the Government.

A determination was made that a waiver of the components test would allow a COTS item to be treated as a domestic end product if it is manufactured in the U.S., without tracking the origin of the components. Waiving only the component test of the BAA for COTS items and still requiring the end product to be manufactured in the U.S., reduces significantly the administrative burden on contractors and the associated cost to the Government. The U.S. Trade Representative's Office was consulted and did not oppose the partial waiver of the BAA. The component test of the BAA was waived because it is in the best interest of the U.S. to do so.

The draft final rule modifies FAR Part 25 and associated clauses to implement waiver of the component test of the BAA:

• Indication of the new waiver at FAR 25.101 (Buy American Act—Supplies, General) and FAR 25.201, (Buy

American Act—Construction Materials, Policy).

• Changes to the definition of ''domestic end product'' and ''domestic construction material'' at FAR 25.003 and in the associated clauses, to include COTS end products or construction materials manufactured in the United States for which the component test of the Buy American Act has been waived; and

• The following FAR provisions and clauses need only minor modifications, to incorporate the new definitions, make discussions of components applicable only to items other than COTS items, and clarify that now a United States end product that does not qualify as a domestic end product is an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product'':

• 52.225–1 Buy American Act—Supplies.

• 52.225–2 Buy American Act Certificate.

• 52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

• 52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

• 52.225–9 Buy American Act—Construction Materials.

• 52.225–10 Notice of Buy American Act Requirement—Construction Materials.

• 52.225–11 Buy American Act—Construction Materials under Trade Agreements, and Alternate I.

• 52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

Conforming changes are also required for—

• 52.212–3 Offeror Representations and Certifications—Commercial Items;

• 52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items; and

• 52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

b. Certification and Estimate of Percentage of Recovered Material (42 U.S.C. 6962 (c)(3)(A)). There were no specific comments supporting waiver of the Estimate of Percentage of Recovered Materials. However, ten respondents supported waiver as part of broad general support for the proposed rule. One respondent specifically opposed to waiver of 42 U.S.C. 6962(c)(3)(A), Estimate of Percentage of Recovered Material, because the respondent feels that it may preclude contractors from having to indicate on their products the percent of recycled materials contained therein. Information on the recovered material content is necessary in order for agencies to carry out the intent of the Resource Conservation and Recovery Act (RCRA) and Executive order (E.O.) 13101.

Response: Both the Environmental Protection Agency (EPA) and the Office of the Federal Environmental Executive (OFEE) agree that requiring pre-award certification from offerors and a written estimate of percentage of recovered materials from the contractor after contract completion are unnecessary requirements for COTS. These requirements are a paperwork exercise and are not consistent with buying COTS items from the commercial market place. The recycled content statement on the product packaging serves as the certification and the estimate. The Chief Acquisition Officer and Senior Procurement Executive at EPA and the OFEE were not opposed to waiving the requirement for certification and estimation for COTS items. This does not waive any of the other RCRA requirements. The Government will still acquire competitively, in a cost-effective manner, products that meet reasonable performance requirements and that are composed of the highest percentage of recovered materials practicable.

A determination was made that waiver of this law is in the best interest of the Government because the law's requirements are not consistent with the acquisition of COTS items in the commercial marketplace.

The only necessary changes to implement this waiver are—

i. Modification of the clause prescription at FAR 23.406 to exclude application to COTS items (as proposed); and

ii. Modification of FAR 52.212–5(b)(25)(i) and (ii), to indicate that FAR 52.223–9 is not applicable to the acquisition of COTS items.

2. Waiver still under consideration. Rights in Technical Data (41 U.S.C. § 418a and 10 U.S.C. § 2320).

Ten respondents supported waiver as part of broad general support for the proposed rule (Respondents No. 9, 11, 19, 20, 26, 28, 32, 34, 38, and 40). No respondents opposed the waiver. However, the Councils did not reach consensus on this waiver. The Department of the Treasury opposed waiver of this provision. The proposed waiver of the data rights statutes is based on the premise that, because COTS items are developed at private expense, there would be no Government rights in technical data associated therewith. The Councils do not agree entirely with this premise. For example, FAR 52.227–14 provides for unlimited rights in form, fit and function data; and in manuals and training materials necessary for installation, operation, maintenance, and repair; regardless of whether such data is developed at Government expense. The fact that items delivered under a contract are COTS does not diminish the Government's need to operate and repair them, and form, fit, and function data could be critical if a COTS item is integrated into a Government system and must subsequently be replaced.

The Councils agree that the relevant statutes do not focus only on data related to technologies developed exclusively at the Government's expense - they also cover development in whole or in part at private expense, including commercial item technologies (this is especially clear in the DoD statute, 10 U.S.C. 2320). Further, it is not accurate to conclude that the possibility of Government funding for (elements of) COTS technologies is always ''irrelevant.'' The statutory schemes have numerous elements that are designed to protect important rights and proprietary interests of contractors (and subcontractors), especially in cases of privately developed or commercial technologies.

For example, the Government is prohibited from requiring contractors to provide the Government with detailed design data, and from requiring the contractors to relinquish proprietary rights in data related to proprietary or commercial technologies, as a condition of contract award (see 418a(a), and 2320(a)(2)(F)). Additionally, the DoD scheme specifically and expressly addresses the rights in data related to technologies developed in whole or in part at private expense (2320(a)(2)(B) & (C)), and the civilian statutes requires the regulations to address these funding scenarios (418a(c)(1)). Both statutory schemes also recognize the special requirements under the Small Business Innovation Research (SBIR) program, which allow the small business to treat even 100 percent Government-funded technologies as proprietary for certain periods.

Similarly, the schemes identify and protect the interests of the Government in acquiring and using data for certain important purposes, such as operation and maintenance, or emergency repair and overhaul, of the item. These protections of interests, both for the contractors/subcontractors and the Government, are equally applicable to COTS items as for other commercial items or noncommercial items (as the Department of Treasury notes).

All of these considerations demonstrate that the statutory schemes

are designed to balance Government and private interests in all such acquisitions, and thus should not be waived in their entirety for COTS item acquisitions.

3. Laws already inapplicable or modified for the acquisition of commercial items. None of the respondents commented specifically on any of these laws that are already inapplicable or modified for the acquisition of commercial items, as identified in section C.3. of this notice.

4. Law not subject to waiver.

Limitation on appropriated funds to influence certain Federal contracting and financial transactions (31 U.S.C. 1352). After publication of the proposed rule, the Councils determined that this statute is not eligible for waiver because it provides for criminal or civil penalties.

5. Laws that will not be waived because it is not in the best interest of the Government.

a. Trade Agreements Act (TAA)(19 U.S.C. 2501 and 19 U.S.C. 2512). Many of the respondents (21) endorse waiver of the application of the trade agreements prohibitions to COTS.

On the other hand, 4 respondents (including the United States Trade Representative (USTR) and the Department of Commerce) opposed the waiver.

The proponents of waiver of the purchase restrictions of the Trade Agreements Act (TAA) contend that—

i. The TAA makes it increasingly difficult for U.S. companies to compete for Federal business. These laws are out of place in the contemporary international market for commercial items. Companies must source products globally in order to be competitive in the worldwide marketplace. Therefore, companies must choose between being competitive in the global market and being competitive in the Government market. The trade agreements procurement restriction usually does not influence COTS manufacturers because revenue derived from Government sales is typically a very small percentage of overall revenue for COTS.

• Therefore, Federal agencies are often denied access to the most productive, cost-effective technology.

• TAA restrictions may also hamper the Government's ability to fully implement Federal policies. It may hinder Government access to technology compliant with Section 508 of the Rehabilitation Act of 1973 (accessible to employees with disabilities) and the most energy-efficient products, as required by E.O. 13101 and 13123.

• Although most IT and electronics manufacturing now occurs in Asia, only 4 Asian countries have signed the GPA – Hong Kong, Japan, Singapore, and the Republic of Korea. Asian countries not signatories include China, Indonesia, Malaysia, the Philippines, and Taiwan.

ii. The Government-unique requirement to track where products are being manufactured imposes a severe administrative burden. It requires contractors to establish and maintain costly and labor intensive management systems. TAA compliance is a major procurement requirement that adds complexity and cost to the delivery of goods to the Government. The increased cost of ensuring compliance with the TAA keeps some firms out of the market completely.

iii. Application of the regulations relating to trade agreements is very complex and difficult. It is often difficult to determine ''substantial transformation'' for purposes of the TAA. The certification requirements potentially expose manufacturers to civil False Claims and other legal sanctions, even when they have taken extraordinary steps to comply with the TAA.

iv. Congress mandates the elimination, where possible, of barriers to the Government's ability to procure commercial items.

v. Barring access to the U.S. Government market has not provided the leverage to open foreign government markets that U.S. trade negotiators may have envisioned when the TAA was passed. Several commenters state that of the 145 WTO member countries, only 28 countries have signed the GPA in 25 years, 23 of the signatories being original signatories.

vi. The restrictions of the TAA are not required by any treaty of international agreement, including the GPA. The commenters believe that the U.S. is the only GPA signatory to enact such market restrictions.

vii. It is difficult and causes delay to try to obtain case-by-case waivers of the trade agreements.

The opponents of waiver of the purchase restrictions of the TAA contend that—

i. A permanent waiver would significantly disadvantage U.S. suppliers, especially small businesses, without providing reciprocal market access for them. China, Malaysia, and the Philippines have not joined the GPA or provided benefits in a bilateral agreement.

ii. USTR's ability to waive the TAA purchasing restriction on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral FTAs, as well as accession to the GPA. In recent years, USTR has concluded new FTAs with Chile, Australia, Morocco, and more agreements are pending. A permanent waiver for COTS would severely undermine leverage that is critical to USTR's ability to negotiate such agreements.

iii. There is no need for a permanent waiver, because waivers can be granted on a case-by-case basis when in the national interest.

Response: The TAA essentially outlines a process for approval of trade agreements, and the relationship of trade agreements to U.S. law. A determination was made that a waiver of the prohibition on acquisitions of products from countries that have not entered into trade agreements with the United States would put U.S. suppliers, especially small businesses, at a significant disadvantage without providing reciprocal market access for them. China, Malaysia, and the Philippines have not joined the GPA or provided benefits in a bilateral agreement. USTR's ability to waive the TAA purchasing restriction on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral Free Trade Agreements (FTA), as well as consent to the GPA. In recent years, USTR has concluded new FTAs with Chile, Australia, Morocco, Bahrain, Dominican Republic-Central America, and more agreements are pending. Therefore, a permanent waiver is not in the best interests of the Government because it would severely undermine leverage that is critical to USTR's ability to negotiate such agreements. USTR can grant waivers on a case-by-case basis when in the national interest.

b. Restrictions on Advance Payments (31 U.S.C. 3324). The Councils received 10 comments that supported waiver as part of broad general support for the proposed rule and two comments specifically supporting the waiver of the restriction on advance payments, whereas one respondent specifically opposed the waiver of the restriction on advance payments.

One respondent supported waiving the restriction on the basis that it would permit the Government to follow the common business practice of ''payment due upon receipt.'' Another respondent supported waiving the restriction because it also believes that it is common business practice to make payment for IT support packages at the beginning of the term. The respondent that opposed the waiver of the statute

was concerned that contracting officers will be faced with demands for advance payments for routine COTS purchases.

Response: In addition to permitting invoicing upon delivery to the ''point of first receipt by the Government,'' the proposed rule would also have allowed invoicing upon delivery of supplies to a post office or common carrier. Consequently, the Government might be obligated to make payment before receipt.

This statute prohibits, except in certain circumstances, payment in excess of the value of supplies or services already delivered or provided. 31 U.S.C. 3324(b) provides that an advance of public money may be made only if it is authorized by a specific appropriation or other law or as authorized by the President in some circumstances. 41 U.S.C. 255(f) and 10 U.S.C. 2307(f) provide some authority for advance payments for commercial items, but treat this as Government financing and require the Government to obtain adequate security. It was determined that a permanent waiver is not necessary because 41 U.S.C. § 255(f) (as implemented by FAR 32.2, Commercial Item Purchase Financing, specifically FAR 32.202–4(a)(2)) already authorizes advance payments for commercial item acquisitions, and agencies have the authority to waive, if it is in the best of the Government.

c. Employment Reports for Veterans (38 U.S.C. 4212(d)(l)). The Councils received one comment specifically in favor of waiving the statute and 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils also received 2 responses specifically opposed to the waiver.

The respondents who favored waiver contended that waiving the statute only affects the submission of a report and data gathering. By waiving the statute, an administrative function would be eliminated but the intent to continue with the regulations to promote veteran employment would remain unchanged.

Respondents who objected to waiver of the statute feared that veteran programs would be impacted.

Response: This statute requires that each contractor that enters into a contract in excess of $100,000 for personal property and non-personal services, including construction, provide an annual report to the Secretary of Labor that includes specific information about their contractor workforce. The report requires Federal contractors and subcontractors to ''take affirmative action'' to hire and promote qualified special disabled veterans, veterans of the Vietnam-era and any veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Congress has taken a keen interest in the VETS 100 Report, as evidenced by Section 1354 of Public Law 105–339, Veterans Employment Opportunities Act of 1998, which supports this reporting requirement. A determination was made not to waive the requirement for contractors to file employment reports because it is not in the best interest of the Government to do so.

d. Validation of Proprietary Data Restrictions (41 U.S.C. 253d and 10 U.S.C. 2321). 10 respondents supported waiver as part of broad general support for the proposed rule. No respondents opposed the waiver.

Response: This statute provides an extensive procedure for due process for a Government contractor when the Government has a suspicion that technical data the contractor is claiming to be proprietary was, in fact, produced under a Government contract and was not produced at private expense. The validation scheme is also carefully structured to balance the interest of all parties, and create a uniform mechanism to determine the appropriate allocation of rights in the data. These statutes establish procedures, rights, and legal remedies regarding the validation of the asserted proprietary restrictions. A determination was made that these statutes should be available to balance the interest of all parties involved in an acquisition, including COTS.

e. Prohibition on Limiting Subcontractor Direct Sales (41 U.S.C. 253g and 10 U.S.C. 2402). Nine respondents supported waiver as part of broad general support for the proposed rule. One respondent opposed the waiver.This respondent stated that this exemption has some potential for harming small business and the Federal Government itself.

Response: This statute was enacted as part of Pub. L. 98–577, which was intended by Congress as a comprehensive solution to ''$600 toilet seats and $400 hammers.'' This provision answered the practice of major defense contractors prohibiting their subcontractors from selling directly to the Government. In the past, when the prime contractor wanted to be the source to the Government, they would charge at least a material overhead to any cost or price from the subcontractor/supplier. Waiving this Act would allow prime contractors to restrict their subcontractors from selling directly to the Government and limit opportunities for small businesses, including women-owned and minority-owned businesses. A determination was made not to waive this Act so as to ensure competition is preserved for all sectors of the economy.

f. Cargo Preference, 10 U.S.C. 2631(a) and 46 U.S.C. 1241(b). The Councils did not receive any comments specifically supporting waiver of the cargo preference laws for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule. 14 respondents specifically opposed a waiver of Cargo Preference laws for COTS, including the following Government agencies:

- U.S. Maritime Administration (MARAD)(Department of Transportation)
- MARAD, Division of Maritime Programs
- Under Secretary of Defense (Acquisition, Technology, and Logistics)
- United States Transportation Command (Department of Defense)

Opponents of the waiver of Cargo Preference laws when acquiring COTS items present the following rationale:

i. The Cargo Preference laws are vital to maintaining a viable merchant marine, including both vessels and mariners.

ii. The proposed waiver is contrary to the Government's maritime policy. The Secretary of Transportation stated in March 2004 that ''cargo preference laws are essential elements of America's national maritime policy.''

iii. Many respondents state that the COTS category represents the vast preponderance of cargo that is carried for or sponsored by the U.S. Government. The MARAD Administrator states that waiver could result in the potential loss of nearly $1.2 billion in revenue to U.S. flag vessel operators and further loss to the economy through job loss. The American Maritime Congress believes that finalization of this waiver will eventually result in more than 100 U.S.-flag vessels in the international trades leaving the U.S. flag, and points out further adverse impact on foreign exchange, and reduced Federal tax revenues.

iv. Weakening of the U.S. maritime industry will adversely impact our country's ability to respond to international crises. We need U.S.-flag vessels to transport troops, machinery, and medical and other critical supplies throughout the world during contingencies or war.

v. The waiver will put at risk two DoD programs (the Voluntary Intermodal Sealift Agreement and the Maritime Security Program) that are essential to U.S. security interests. Through these

programs, DoD has immediate access to reliable commercial maritime assets at a fraction of the cost it would incur if it had to replicate those assets (Transportation Institute). Shippers cannot dedicate valuable assets to the defense and other governmental needs of the United States unless they can rely on a steady flow of cargoes.

vi. DoD needs a viable merchant marine to provide a pool of trained mariners from which DoD crews Defense reserve ships.

vii. U.S.-flag commercial vessels are forced to operate in an international shipping arena that is dominated by state owned and controlled merchant fleets. They are financially disadvantaged due to higher labor costs, vessel standards, and tax disadvantages. Therefore, the U.S.-flag vessels require the help of the U.S. Government to compete.

viii. Waiving the Cargo Preference laws at this time would be inequitable, because shipping companies have relied upon the present laws to take irrevocable business actions.

ix. The American Shipbuilding Association is further concerned that this waiver would adversely impact the defense shipbuilding industry, which in turn, will threaten America's ability to build a Navy and impact the national security of the United States.

x. The FAR Council already made the determination that waiver of Cargo Preference laws for all commercial subcontracts was not in the best interest of the Government. 41 U.S.C. 430 requires that provisions of law described in 41 U.S.C. 430(c) shall be included on the list of inapplicable provisions of law to subcontracts for the procurement of commercial items unless the FAR Council makes a written determination that such exemption would not be in the best interest of the Government. On May 1, 1996, the Administrator of OFPP signed a memorandum stating the policy that the waiver of Cargo preference for commercial subcontracts ''is not intended to waive compliance with the Cargo Preference Laws for ocean cargos clearly destined for eventual military or Government use.'' This memorandum was the result of extensive negotiations between representatives from the national Economic Council, OFPP, DoD, MARAD, and the maritime industry. In 2002, a formal determination was signed by all members of the FAR Council that it would be in the best interest of the Government to limit the waiver of the Cargo preference laws, in accordance with the OFPP memorandum, dated May 1, 1996, as implemented in the FAR through FAR Case 1999–024.

Response: 10 U.S.C. 2631(a), Transportation of Supplies by Sea (The Cargo Preference Act of 1904), requires the use of only U.S.-flag vessels for ocean transportation of supplies owned by, or destined for use by for the Army, Navy, Air Force, or Marine Corps unless those vessels are not available at fair and reasonable rates. 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (The Cargo Preference Act of 1954), requires that Government agencies acquiring, either within or outside the United States, supplies that may require ocean transportation shall ensure that at least 50 percent of the gross tonnage of these supplies (computed separately for dry bulk carriers, dry cargo liners, and tankers) is transported on privately owned U.S.-flag commercial vessels to the extent that such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels. The Cargo Preference laws are vital to maintaining a viable merchant marine, including both vessels and mariners and are essential elements of America's national maritime policy. Therefore, a determination was made that it is not in the best interest of the Government to waive this Act.

g. Affirmative Action for Workers with Disabilities, 29 U.S.C. 793. The Councils did not receive any specific comments in favor of waiving the statute. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 2 responses specifically opposed to waiver, *i.e.*—

•Department of Veterans Affairs

• U.S. Department of Labor

ANALYSIS: The Department of Veterans Affairs (VA) objected to waiver on the grounds that, in meeting its mission to support veterans, including those who with service related disabilities, the VA purchases mostly COTS items and would consider it unfair for the VA to purchase supplies from companies that would not be required to comply with the statute.

The Department of Labor stated that ''The relatively minor burdens imposed on contractors by Section 503 of the Rehabilitation Act of 1973, (29 U.S.C. § 793) are justified by the significant benefits the law provides for disabled job applicants and workers. The Census Bureau estimates that approximately 18.6 million American workers have disabilities. Section 503 requires, for example, that contractors recruit qualified applicants with disabilities for job openings, develop anti-disability harassment policies, and refrain from discriminating against qualified individuals with disabilities. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's *New Freedom Initiative*, designed to ensure that Americans with disabilities have the opportunity to learn and develop skills and to engage in productive work.''

Response: A determination was made that the requirements of the affirmative action provision are justified by the significant benefits the law provides for disabled job applicants and workers. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's New Freedom Initiative.

h. Equal opportunity for Special Disabled Veterans, 38 U.S.C. 4212. The Councils did not receive any specific comments in favor of waiving the statute. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 3 responses specifically opposed to waiver, including—

• Department of Veterans Affairs

• U.S. Department of Labor

The Department of Veterans Affairs raised objections to waiver on the grounds that, in meeting its mission to support veterans, including those with service related disabilities, the VA purchases mostly COTS items and would consider it unfair for the VA to purchase supplies from companies that would not be required to comply with the statute.

The Department of Labor objects to waiving the statute on the basis that the relatively minor burdens imposed by the affirmative action provision are justified by the significant direct benefits for individual protected veterans. Waiving the law would reduce possible job opportunities for veterans.

Another respondent stated that ''At a time when our nation is at war and our veterans are returning home…every effort should be made to ensure their employment rather than limit their opportunities''.

Response : It was determined that the affirmative action provision is justified by the significant direct benefits for individual protected veterans, and we must make every effort to ensure their employment.

i. Examination of records by the Comptroller General, 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c). The Councils did not receive any comments specifically supporting waiver of the examination of records by the Comptroller General for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule.

The Councils received comments from 2 respondents opposed the waiver.

One respondent objected to waiver of the examination of records by the Comptroller General because this is the last remaining general contractual audit authority applicable to commercial items. If this authority is removed, the Government will have no routine audit authority. The respondent cites legislative history that Congress did not intend to eliminate this authority.

Another respondent also strongly objects to waiver of this authority, stating that removal would improperly restrict the authority of the Comptroller General's ability to review and examine contractor records related to the expenditure of public funds.

Response: This is the only general contractual audit authority applicable to commercial items. Thus it was determined that although access to contractor records will not generally be necessary because of the protection provided by competitive procedures of the marketplace, the Comptroller General should have the ability to examine records if the need arises.

j. Fly American Act, 49 U.S.C. 40118. The Councils did not receive any comments specifically supporting waiver of the cargo preference laws for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 2 responses specifically opposed to the waiver of the Fly American Act for acquisition of COTS, *i.e.*—

• United States Transportation Command

• Under Secretary of Defense (Acquisition, Technology, and Logistics)

Opponents of the waiver of the Fly American Act when acquiring COTS items present the following rationale:

i. The Fly American Act is vital to maintaining a viable U.S. air carrier industry, which is heavily relied on by DoD during contingencies or war.

ii. Weakening of the U.S. air industry will adversely impact our country's ability to move forces and equipment during contingencies or war.

Response: The Fly American Act is not applicable to subcontracts for the acquisition of commercial items. The requirement for use of a clause is not applicable to prime contracts for the acquisition of commercial items, but the requirements of the Act still apply. A determination was made that the Fly American Act is vital for maintaining a viable U.S. air carrier industry, which is heavily relied upon by DoD during contingencies or war.

F. Other public comments.

1. Recommend an Alternate I to proposed clause 52.212–XX, for paperless writing systems. DoD uses a process called Automatic Clause Selection, rather than having the contracting officer check off applicable clauses from the list.

Response: The final rule will not include the new clause 52.212–XX, but will continue to use FAR clause 52.212–5. Furthermore, DoD already has a deviation in place for this clause that meets the needs of a paperless system.

2. Limit the imposition of non-commercial terms and conditions. Multiple respondents were concerned about the proliferation of Government-unique clauses in contracts for the acquisition of COTS items, and want limitations imposed on the authority of the contracting officer to include clauses that are not commonly used with COTS items being procured in the marketplace.

Response: This suggestion is outside the scope of the case.

3. DFARS 212.504 still applies for DoD procurements. This respondent wants to ensure that for DoD COTS procurement, 10 U.S.C. 2320 and 2321 (dealing with technical data rights), which are listed at DFARS 212.504, are still waived.

Response: This is outside the scope of this case.

4. Use of ''et seq.''. Several respondents were concerned that in some cases the statutory references followed by ''*et seq.*'' were too broad.

Response: This issue has been resolved in the final rule. The term ''*et seq.*'' is not used in the statutory references for laws to be waived in the final rule.

5. Significant rule. Several respondents were concerned that the proposed rule would satisfy the economic impact threshold for a major rule and clearly meets the threshold requirements to be classified as a significant rule.

Response: The statutes that were of particular concern to these respondents (Cargo Preference) have not been waived. Therefore, the comments are no longer relevant.

6. Comments no longer applicable. There are several comments not specifically addressed in this **Federal Register** notice, because they are no longer applicable, due to other changes in the final rule.

7. E-verify. The councils note that the FAR 2.101 definition of ''Commercially available off the shelf (COTS) item'' differs from the COTS definition in 22.1801. Pursuant to the FAR treatment of definitions, the COTS definition is 22.1801 is solely applicable to issues arising under Subpart 22.18 and associated clause (FAR case 2007–013).

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.

G. 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 relieves burdens rather than imposes burdens. Only 2 laws have been waived, and the relief to small business is not considered to be of significant economic impact.

H. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the final rule will result in reduced burdens under OMB Control number 9000–0024 (52.225–2), 9000–0130 (52.225–4), 9000–0134 (52.223–9), and 9000–0141 (52.225–9 and 52.225–11). The Councils anticipate the following reductions:

OMB Control No.	Current respondents	Current responses	Current hours	Revised respondents	Revised responses	Revised hours
9000–0024	3,707 x 15 =	55,605 x 0.109 =	6,061	3,521 x 15	52,815 x .109	5,757 hrs
9000–0130	1,140 x 5 =	5,700 x .117 =	667	1083 x 5 =	5415 x .117 =	634 hrs
9000–0134	64,350 x 1 =	64,350 x .325 =	20,913	64 x 1	64 x .325	21 hrs
9000–0141	500 x 2 =	1,000 x 2.5 =	2,500	450 x 2 =	900 x 2.5 =	2,250 hrs

A Paperwork Burden Act Change to pertinent existing burdens has been submitted to the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 3, 12, 23, 25, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 12, 23, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 3, 12, 23, 25, 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Commercially available off-the-shelf (COTS) item (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 3. Revise section 3.503–2 to read as follows:

3.503–2 Contract clause.

The contracting officer shall insert the clause at 52.203–6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold, except when contracts are for the acquisition of commercially available off-the-shelf items. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Add section 12.103 to read as follows:

12.103 Commercially available off-the-shelf (COTS) items.

COTS items are defined in 2.101. Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS. Section 12.505 lists the laws that are not applicable to COTS (in addition to 12.503 and 12.504); the components test of the Buy American Act, and the two recovered materials certifications in Subpart 23.4, do not apply to COTS.

12.301 [Amended]

■ 5. Amend section 12.301 in the first sentence of paragraph (b)(4) by removing ''executive orders'' and adding ''Executive orders'' in its place;

■ 6. Revise the heading of Subpart 12.5 to read as follows.

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items

■ 7. Revise section 12.500 to read as follows:

12.500 Scope of subpart.

(a) As required by sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 430 and 431), this subpart lists provisions of law that are not applicable to—

(1) Contracts for the acquisition of commercial items;

(2) Subcontracts, at any tier, for the acquisition of commercial items; and

(3) Contracts and subcontracts, at any tier, for the acquisition of COTS items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

■ 8. Amend section 12.502 by adding paragraph (c) to read as follows:

12.502 Procedures.

* * * * *

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to contracts and subcontracts for the acquisition of COTS items.

■ 9. Add section 12.505 to read as follows:

12.505 Applicability of certain laws to contracts for the acquisition of COTS items.

COTS items are a subset of commercial items. Therefore, any laws listed in sections 12.503 and 12.504 are also inapplicable or modified in their applicability to contracts or subcontracts for the acquisition of COTS items. In addition, the following laws are not applicable to contracts for the acquisition of COTS items:

(a)(1) 41 U.S.C. 10a, portion of first sentence that reads ''substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,'' Buy American Act—Supplies, component test (see 52.225–1 and 52.225–3).

(2) 41 U.S.C. 10b, portion of first sentence that reads ''substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,'' Buy American Act—Construction Materials, component test (see 52.225–9 and 52.225–11).

(b) 42 U.S.C. 6962(c)(3)(A), Certification and Estimate of Percentage of Recovered Material.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 10. Amend section 23.406 by revising the introductory text of paragraph (c); and removing from paragraph (d) ''Insert'' and adding ''Except for the acquisition of commercially available off-the-shelf items, insert'', in its place. The revised text reads as follows:

23.406 Solicitation provisions and contract clauses.

* * * * *

(c) Except for the acquisition of commercially available off-the-shelf items, insert the provision at 52.223–4, Recovered Material Certification, in solicitations that—

* * * * *

PART 25—FOREIGN ACQUISITION

■ 11. Amend section 25.003 by revising the definitions ''Domestic construction material'' and ''Domestic end product'' to read as follows:

25.003 Definitions.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

* * * * *

■ 12. Revise section 25.100 to read as follows:

25.100 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C 431.

(b) It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(1) The supply contract exceeds the micro-purchase threshold; or

(2) The supply portion of a contract for services that involves the furnishing of supplies (*e.g.*, lease) exceeds the micro-purchase threshold.

■ 13. Amend section 25.101 by revising paragraph (a)(2) to read as follows:

25.101 General.

(a) * * *

(2) The cost of domestic components must exceed 50 percent of the cost of all the components. In accordance with 41 U.S.C. 431, this component test of the Buy American Act has been waived for acquisitions of COTS items (see 12.505(a)).

* * * * *

■ 14. Revise section 25.200 to read as follows:

25.200 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 431.

(b) It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 15. Amend section 52.212–3 by—

■ a. Revising the date of clause;

■ b. Revising paragraph (f)(1); and

■ c. Revising paragraph (g)(1)(i) and the last sentence of paragraph (g)(1)(iii).

The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(f) * * *

(1) The offeror certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.'' The terms ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Supplies.''

* * * * *

(g)(1) * * *

(i) The offeror certifies that each end product, except those listed in paragraph (g)(1)(ii) or (g)(1)(iii) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms ''Bahrainian or Moroccan end product,'' ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act-Free Trade Agreements-Israeli Trade Act.''

* * * * *

(iii) * * * The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.''

* * * * *

(End of provision)

■ 16. Amend section 52.212–5 by revising the date of the clause and paragraph (b)(27); by removing from paragraph (b)(30) ''(June 2003)'' and adding ''(FEB 2009)'' in its place; and by removing from paragraph (b)(31)(i) ''(Aug 2007)'' and adding ''(FEB 2009)'' in its place. The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

____ (b)(27)(i) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Items (May 2008) (42 U.S.C. 6962(c)(3)(A)(ii)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

____ (ii) Alternate I (May 2008) of 52.223–9 (42 U.S.C. 6962(i)(2)(C)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

* * * * *

(End of clause)

52.213–4 [Amended]

■ 17. Amend section 52.213–4 by removing from the clause heading ''(Dec 2008)'' and adding ''(FEB 2009)'' in its place; and by removing from paragraph (b)(1)(ix) ''(June 2003)'' and adding ''(FEB 2009)'' in its place.

■ 18. Amend section 52.225–1 by revising the date of the clause; by adding in paragraph (a), in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic end product''; and by revising paragraph (b) to read as follows:

52.225–1 Buy American Act—Supplies.

* * * * *

BUY AMERICAN ACT—SUPPLIES (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

* * * * *

(b) The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)).

* * * * *

(End of clause)

■ 19. Amend section 52.225–2 by revising the date of the provision and paragraph (a) to read as follows:

52.225–2 Buy American Act Certificate.

* * * * *

BUY AMERICAN ACT CERTIFICATE (FEB 2009)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.'' The terms ''commercially available off-the-shelf (COTS) item, '' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Supplies.''

* * * * *

(End of provision)

■ 20. Amend section 52.225–3 by revising the date of the clause; in paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic end product''; and by revising paragraph (c) to read as follows:

52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

* * * * *

(c) *Delivery of end products.* The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer has determined that FTAs (except the Bahrain and Morocco FTAs) and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.'' If the Contractor specified in its offer that the Contractor would supply a Free Trade Agreement country end product (other than a Bahrainian or Moroccan end product) or an Israeli end product, then the Contractor shall supply a Free Trade Agreement country end product (other than a Bahrainian or Moroccan end product), an Israeli end product or, at the Contractor's option, a domestic end product.

* * * * *

(End of clause)

■ 21. Amend section 52.225–4 by revising the date of the provision and paragraphs (a) and (c) to read as follows:

52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT CERTIFICATE (FEB 2009)

(a) The offeror certifies that each end product, except those listed in paragraph (b) or (c) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms ''Bahrainian or Moroccan end product,'' ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act.''

* * * * *

(c) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act.'' The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.''

Other Foreign End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

_____ _____

_____ _____

_____ _____

[List as necessary]

* * * * *

(End of provision)

■ 22. Amend section 52.225–9 by revising the date of the clause; in paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material''; and by revising paragraph (b)(1) to read as follows:

52.225–9 Buy American Act—Construction Materials.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Domestic preference.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

* * * * *

(End of clause)

■ 23. Amend section 52.225–10 by revising the date of the provision and paragraph (a) to read as follows:

52.225–10 Notice of Buy American Act Requirement—Construction Materials.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''domestic construction material,'' and ''foreign construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Buy American Act—Construction Materials'' (Federal Acquisition Regulation (FAR) clause 52.225–9).

* * * * *

(End of provision)

■ 24. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material'';

■ c. Revising paragraph (b)(1); and

■ d. Revising the date of Alternate I and in paragraph (b)(1) adding a new second sentence to read as follows:

52.225–11 Buy American Act—Construction Materials Under Trade Agreements.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated county construction materials.

* * * * *

Alternate I (FEB 2009). * * *

* * * * *

(b) *Construction materials.* (1) * * * In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). * * *

* * * * *

■ 25. Amend section 52.225–12 by revising the date of the provision and revising paragraph (a) to read as follows:

52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''designated country construction material,'' ''domestic construction material,'' and ''foreign construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Buy American Act—Construction Materials Under Trade Agreements'' (Federal Acquisition Regulation (FAR) clause 52.225–11).

* * * * *

(End of provision)

[FR Doc. E9–551 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–30; FAR Case 2001–004; Item III; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

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 adopted as final, with changes, the interim rule which amended the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add an SCA exemption for contracts for certain

52.225–9 Buy American Act—Construction Materials.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Domestic preference.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

* * * * *

(End of clause)

■ 23. Amend section 52.225–10 by revising the date of the provision and paragraph (a) to read as follows:

52.225–10 Notice of Buy American Act Requirement—Construction Materials.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''domestic construction material,'' and ''foreign construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Buy American Act—Construction Materials'' (Federal Acquisition Regulation (FAR) clause 52.225–9).

* * * * *

(End of provision)

■ 24. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material'';

■ c. Revising paragraph (b)(1); and

■ d. Revising the date of Alternate I and in paragraph (b)(1) adding a new second sentence to read as follows:

52.225–11 Buy American Act—Construction Materials Under Trade Agreements.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated county construction materials.

* * * * *

Alternate I (FEB 2009). * * *

* * * * *

(b) *Construction materials.* (1) * * * In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). * * *

* * * * *

■ 25. Amend section 52.225–12 by revising the date of the provision and revising paragraph (a) to read as follows:

52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''designated country construction material,'' ''domestic construction material,'' and ''foreign construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Buy American Act—Construction Materials Under Trade Agreements'' (Federal Acquisition Regulation (FAR) clause 52.225–11).

* * * * *

(End of provision)

[FR Doc. E9–551 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–30; FAR Case 2001–004; Item III; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

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 adopted as final, with changes, the interim rule which amended the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add an SCA exemption for contracts for certain

additional services that meet specific criteria.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2001–004.

SUPPLEMENTARY INFORMATION:

A. Background

The Wage and Hour Division of the U.S. Department of Labor's (DoL) Employment Standards Administration, issued a final rule, published in the **Federal Register** at 66 FR 5327, January 18, 2001, amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the SCA. The Councils opened FAR Case 2001–004 to implement the DoL rule.

The Councils published an interim rule in the **Federal Register** at 72 FR 63076 on November 7, 2007. The public comment period closed on January 7, 2008. The Councils received comments from 4 commenters (one commenter submitted 4 separate responses).

1. Non-statutory certifications.

The respondent is concerned about additional non-statutory certifications.

Response: These certifications are imposed by the Secretary of Labor as a condition for the Secretary granting the exemptions. The certifications are found in DoL regulations at 29 CFR 4.123(e)(1)(ii)(D) and (e)(2)(ii)(G). The FAR rule implements the DoL requirements for certification by the prime contractor with respect to compliance with the DoL conditions for exemption from the SCA. The certification at FAR 52.222–48 was already required. In accordance with FAR 1.107, the Administrator of the Office of Federal Procurement Policy approved this non-statutory certification and the new non-statutory certification at FAR 52.222–52 because these certifications provide the basis for determining applicability of the SCA to the acquisition. When certain conditions are met, the certifications are necessary in order to exempt contracts for maintenance, calibration, or repair of certain equipment (FAR 52.222–48) and contracts for certain services (FAR 52.222–52) from the application of the SCA. The certifications are necessary to encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce the Government's commitment to reduce Government—unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards. Without the certifications from the contractor, the DoL conditions for exemption would not be met, and all contractors would be required to comply with the SCA and, if the contract exceeds $2,500, the appropriate DoL wage determination.

2. *Existing conditions for exemption for contracts for maintenance, calibration or repair of certain equipment (22.1003–4(c)(2)).* Paragraph 22.1003–4(c)(2)(i) sets forth the condition that ''the items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.''

One respondent questions if this means that the condition can be met only if the contractor that sold or traded the equipment is also the contractor performing the ''maintenance, calibration, or repair services?''

Response: The respondent's interpretation is correct. This is existing FAR text that comes from the DoL rule at 29 CFR 4.123(e)(1)(ii)(A).

3. *DoL determination after award (22.1003–4(c)(4)(ii)).*

One respondent suggests that the wording at FAR 22.1003–4(c)(4)(ii) should be the same as the wording at FAR 22.1003–4(d)(4)(ii).

Response: Since the FAR at 22.1003–4(c)(4)(ii) and 22.1003–4(d)(4)(ii) is based on the DoL rule at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.123(e)(2)(iii), and there is no discrepancy between these two paragraphs in the DoL rule, then they should read the same in the FAR rule. The suggested changes have been made to make the FAR paragraphs read the same, except that the run-on sentence has been corrected in 22.1003–4(d)(4)(ii), rather than repeating it in 22.1003–4(c)(4)(ii).

4. New exemptions for contracts for certain services (22.1003–4(d)(1)). Paragraph 22.1003–4(d)(1)(i) provides exemption for ''Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).''

• One respondent wants it indicated with more certainty, that aircraft maintenance services are covered.

• One respondent requests a definition of ''maintenance services.''

• One respondent wants to know what does ''similar facility'' mean? Is a contractor owned and operated facility, such as a depot or hangar outfitted for commercial aircraft maintenance and repair work a similar facility? The respondent suggests using the phrase ''Government facility performing automobile maintenance or repair services'' instead of ''Government motor pool or similar facility.''

Response:

• Specifically listing aircraft maintenance services as an example provides complete certainty. This specifically reflects the DoL regulations at 29 CFR 4.123(e)(2)(i).

• ''Maintenance services'' is a widely used commercial term that should not require further definition. Since the FAR is implementing the DoL rule, the Councils decided not provide a definition that might inadvertently change the intent of the DoL rule.

• The FAR is implementing the DoL rule. The suggested rewrite would change the meaning of the DoL rule.

5. *Inconsistencies between wording of new exemptions and existing exemptions (22.1003–4(c)(1) and (d)(1)).* For example, 22.1003–4(d)(1)(i) refers only to ''Automobile or other vehicle (*e.g.*, aircraft) maintenance services'' as qualifying for the exemption, whereas 22.1003–4(d)(1)(iv) refers to ''maintenance, calibration, repair, and/or installation ... services for all types of equipment where the services are obtained.''

One respondent recommends making the language consistent by using the terms ''maintenance, calibration, repair, and/or installation services.''

Response: The Councils cannot change in the FAR the exemptions provided by DoL in its rule (29 CFR 4.123(e)(2)(i)(A) and (D)).

6. *Conditions for new exemptions (22.1003–4(d)(2)).*

• One respondent notes the condition in paragraph 22.1003–4(d)(2)(i) that—

''(A) The contract will be awarded on a sole-source basis; or

(B) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.''

• The respondent requests transparency in this area by announcing the relative weighting of all of the source selection factors in the Federal Business Opportunities announcement.

Response: FAR 15.101–1 states that when using a tradeoff process, the following apply:

(1) All evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solicitation; and

(2) The solicitation shall state whether all evaluation factors other than cost or price,

when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

It is outside the scope of this case to revise this policy. The information provided is sufficient to know whether the combination of other factors at least as important as price or cost in selecting the contractor.

• One respondent notes the condition in paragraph 22.1003–4(d)(2)(iv) that ''Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.'' This requirement to have the capability of tracking the percentage of time each employee spends on Government work is a problem for contractors that meet the other criteria.

Response: This condition is imposed by the DoL rule (29 CFR 4.123(e)(2)(ii)(D)). The Councils do not have the authority to change the conditions imposed by the DoL.

• One respondent notes the additional conditions that apply to the new exemptions and recommends their deletion to avoid unnecessary confusion and complexity for contractors and contracting officers.

Response: See prior response.

• One respondent considers paragraph 22.1003–4(d)(2)(vi) confusing, since it is unclear when an ''advance'' contracting officer determination of offeror compliance would be made and whether the determination will be a formal determination and finding per FAR 1.701 or something less. This respondent suggests the following replacement language:

''The Contracting Officer determines prior to award, but after receipt of offers based on the contract requirements, that the conditions for a certified exemption in paragraph (d)(2)(ii) through (v) can be met by an offeror.''

Response: This condition is from the DoL rule (29 CFR 4.123(e)(2)(ii)(F)). In the DoL rule this clearly means before the solicitation is issued, because the DoL rule continues on ''If upon receipt of offers, the contracting officer finds that he or she did not correctly determine ....'' This is implemented through the positive statement at 22.1003–4(d)(3)(ii)(B) in combination with the results at (d)(3)(iii) if the conditions are not met. The Councils have added ''before issuing the solicitation'' at (vi) to clarify the FAR rule.

• Paragraph (vii) requires the following:

''(A) The apparent successful offeror certifies that the conditions in paragraphs (d)(2)(ii) through (v) will be met; and

(B) For other than sole source awards, the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306(c)); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).''

• One respondent requests clarification of the term ''substantially all.'' One respondent is concerned about the meaning of ''substantially all'' other offerors. She runs through several scenarios, considering if there are only 2 or 3 offerors, what would ''substantially all'' mean. She recommends that only the apparently successful offeror should have to certify.

Response: This term was left undefined to provide maximum flexibility to contracting officers. The Councils acknowledge the respondent's concerns, but the FAR rule must follow the conditions set by DoL for use of these new exemptions.

• One respondent questions how far down the supply chain the SCA compliance test and certifications must go.

Response: The flowdown requirement in the clauses at 52.222–52 and 52.222–54 each require that the contractor must flow down the clause to any subcontract for services for which the exemption is being claimed.

• The same respondent also objects to use of the term ''responsive'' at subparagraph (vii)(B)(2) (also appears at subparagraph (d)(3)(ii)(B)(2)). The respondent states that this term is a legacy term of art used in the Sealed Bidding process to describe an offeror's statement of affirmative compliance with (or lack of exception to) all the terms and conditions of a formally advertised procurement. The respondent suggest the following:

''(2) Considered compliant with the Government's requirements (see FAR 15.306(a)).''

Response: The term ''responsive'' is not just a legacy term from Part 14, but is used in many other FAR parts (1, 7, 8, 9, 19, 22, 37, and 50) to describe an offer that meets the Government requirements. Although the term ''compliant'' is used in many places in the FAR, the Councils did not find any example in the FAR of an offer being described as ''compliant.''

7. *Contract award or resolicitations (new exemptions) (22.1003–4(d)(3)).* Paragraph (ii)(C) states a condition for award without the otherwise applicable SCA clauses is that ''The contracting officer has no reason to doubt the certification.''

• One respondent is concerned that there is a lack of definition or standard for ''no reason to doubt'' and that it does not appear to be in the best interests of the acquisition community to allow a decision to cancel a solicitation to hinge on the concept of doubt.

Response: The FAR rule implements the DoL rule. The DoL rule requires that ''If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the prime contract or subcontract.'' (29 CFR 4.123(e)(2)(ii)(G))

• One respondent is concerned that this resolicitation process could, in some cases, unduly increase the workload of the contracting officer.

Response: The FAR rule implements the DoL rule and follows the conditions set by DoL for use of these new exemptions.

8. *DoL determination (new exemptions) (22.1003–4(d)(4)).* One respondent states that this paragraph provides for a post-award determination of some type by the DoL, not the contracting agency, at any time during contract performance. The respondent suggests that exemption compliance over time will be challenging, and that the interim rule should provide a ''grace period'' in which the prime or the subcontractor could remedy any compliance shortfalls.

Response: The DoL regulations require that when the DoL discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the SCA did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by DoL, shall include in the contract the stipulations contained in 29 CFR 4.6 and any applicable wage determination issued by the DoL Administrator or his authorized representative through the exercise of any and all authority that may be needed including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination. With respect to any contract subject to section 10 of the Act, the DoL Administrator may require retroactive application of such wage determination (29 CFR 4.5(c)(2)).

The FAR rule implements the DoL requirements. It is up to DoL whether it

would allow time for correction of a compliance shortfall. The DoL regulations do not contemplate such a process.

9. *Exceptions (new exemptions) (FAR 22.1003–4(d)(5)).*

Paragraph (5)(iii) provides that the new exemptions do not apply to solicitations and contracts that are subject to section 4(c) of the SCA.

One respondent interprets this to mean that any contract that has now or ever contained SCA clauses can never be exempt in future contracts from the SCA.

Response: Section 4(c) of the SCA reads as follows:

(c) Predecessor contracts; employees' wages and fringe benefits No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

Section 4(c) is different from the regular wage determination and this provision applies to a situation where collective bargaining agreement union agreements are involved. Many SCA covered contracts involve annual, recurring procurements of the same services. When a collective bargaining agreement governs the wage rates and fringe benefits of service workers employed to perform work called for by an incumbent SCA covered contract, the wage determination to be issued for the successor contract must reflect the wage and fringe benefit provisions of the predecessor, contractor's collective bargaining agreement, including any accrued or prospective increases contained therein.

The successor contractor obligation to comply with the provisions of the collective bargaining agreement under Section 4(c) of the SCA extend only for the immediate successor contract period of performance. Thus, if the predecessor contractor was signatory to a collective bargaining agreement, the successor contractor would be required to comply with those provisions but would not be required to enter into a collective bargaining agreement. At the end of that first period of performance, the successor contractor would be subject to a general wage determination and Section 4(c) would no longer be in effect.

10. Incorrect references (22.1003–5 and 22.1003–6).

Several respondents pointed out that the references at 22.1003–5 and 22.1003–6 to ''22.1003(c)(1) and (d)(1)(iv)'' should both read ''22.1003–4(c)(1) and (d)(1)(iv).''

Response: The Councils concur. The draft final rule has been amended.

11. *Prescriptions for use of provisions and clauses (22.1006).*

One respondent had several suggestions to clarify the prescriptions for the use of provisions and clauses.

1. Certification provision 52.222–48 will not be in solicitation if ORCA is used, so use of SCA clause in contract can not be tied to presence of certification provision in solicitation. The same concern applies to 52.222–52, if it is incorporated into ORCA.

The respondent suggests several solutions for drafting the prescriptions.

Response: The Councils recognize the problem, and have adopted a different solution. The FAR drafting conventions prohibit prescribing a clause in more than one place, and normally there is a separate prescription for each provision or clause.

There is a widespread problem, extending beyond this single case, that there is no indication in FAR 52.204–8 as to which representations or certifications are applicable to the particular solicitation. This is unlike FAR 52.212–3, which either gives the criteria for applicability, or requires that the contracting officer indicate the applicability of some of the representations and certifications (*e.g.*, FAR 52.212–3(k)). Because it is essential that the contracting officer have the ability to indicate the applicability of FAR 52.222–48 or 52.222–52 to a solicitation, the Councils have agreed to an overall fix to the FAR clause at 52.204–8, indicating for each representation or certification either its general applicability, if that is sufficient, or in more complex cases, requiring the contracting officer to specifically indicate if the representation or certification is applicable.

Once this is accomplished, the inclusion of the clauses at FAR 52.222–51 and 52.222–53 can be tied to either the inclusion of 52.222–48 or 52.222–52 in the solicitation, or the indication of the applicability of the comparable certification in 52.204–8(c)(2) or 52.212–3(k).

2. Paragraph 22.1006(a)(2) does not directly contradict FAR 22.1003–4(c)(3) or (d)(3), but it is not totally consonant. One states that the contracting officer includes the SCA clause if the contracting officer determines it is appropriate to do so. The other states that the SCA clause is excluded, if the contracting officer determines that is it appropriate to do so.

Response: The Councils have revised FAR 22.1006(a)(2) to put it in terms of excluding the SCA clause when the contracting officer determines that the SCA does not apply, consistent with DoL regulations and other parts of the rule.

3. Reference at FAR 22.1003–4(d)(3)(iii) should be 22.1006(e)(3) not (e)(4).

Response: The Councils have made the correction.

4. Language at FAR 22.1006(e)(1) prescribing the use of 52.222–48 is unclear and at (e)(3), prescribing the use of 52.222–52 is unclear. One respondent interprets it as potentially applying to all contracts that contain the SCA clause, not just the targeted services.

Response: The phrase ''but the contract may be exempt from the Service Contract Act in accordance with 22.1003–4(c) 'or (d)''' was intended to target the specific services. If this is not sufficiently clear, the Councils have made the following revision. The use of ''and'' instead of ''but'' makes it clear that both conditions must be met.''

''(e)(1) The contracting officer shall insert the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that include the clause at 52.222–41, Service Contract Act of 1965 and the contract may be exempt from the Service Contract Act in accordance with 22.1003–4(c).''

* * * * *

(3) The contracting officer shall insert the provision at 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that include the clause at 52.222–41, Service Contract Act of 1965 and the contract may be exempt from the Service Contract Act in accordance with 22.1003–4(d).''

12. *Provisions and clauses*:

a. FAR 52.212–3, 52.222–48, 52.222–51, and 52.222–53. ''Or subcontractor in the case of an exempt subcontract.''

One respondent requests that the language that is included parenthetically in paragraph (a)(1) of the provisions at FAR 52.222–52, also be included in the provisions at 52.212–3(k)(1)(i) and 52.222–48(a)(1) as well as the clauses at 52.222–51(a) and 52.222–53(a).

Response: The Councils concur with inclusion of the phrase in the

provisions, because it is possible that a subcontractor may be exempt, and the term ''offeror'' does not include ''subcontractor.''

However, the Councils do not agree with inclusion of the parenthetical phrase in the clauses, because FAR 22.1001 defines ''contractor'' to include a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

b. *FAR 52.212–5, correction of paragraph reference.*

One respondent points out the oversight to revise the paragraph reference in paragraph (e)(1) of the FAR clause 52.212–5.

Response: The Councils have made the correction.

c. *FAR 52.222–53, order of paragraphs.*

One respondent recommends reversal of paragraphs FAR 52.222–53(e)(1) and (e)(2) in order to put the more likely situation first—*i.e.*, award on the basis of other factors in addition to cost or price and that cost or price is of equal or lesser importance than the other factors. Further, the same respondent states that there is one particular type of service that allows award only on a sole source basis (FAR 22.1003–4(d)(1)(iv)-Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis. Therefore, the respondent recommends that FAR paragraph 52.222–53(e)(2) address only this type of services.

Response: The Councils concur with the reversal of the paragraphs. However, the Councils do not agree that the new paragraph (e)(2) should address only the service at FAR 22.1003–4(d)(1)(iv). The DoL criteria allow any of the subcontract services to be purchased on a sole source basis (29 CFR 4.123((e)(2)(ii)(B)), not just the maintenance, etc. services that must be purchased sole source. Therefore the Councils have revised the subject paragraphs as follows:

''(e)(1) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor for exempt services shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost; or

(2) A subcontract for exempt services shall be awarded on a sole source basis.''

13. *FAR Matrix.*

One respondent identified that the FAR matrix incorrectly referred to FAR 52.222–48 as a clause and states that it will go in section I. Although the matrix correctly identifies 52.222–52 as a provision, it incorrectly states that it will go in Section I. The same commenter also objects that these provisions should not be incorporated by reference because it requires a fill-in.

Response: Partially Concur. FAR 52.222–48 and 52.222–52 are provisions and belong in Section K. The FAR Matrix will be revised. The Councils disagree that a provision requiring a fill-in should not be incorporated by reference. See FAR 52.104(d).

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) that is summarized as follows:

This rule finalizes an interim rule with changes, to amend the Federal Acquisition Regulation to implement Department of Labor (DoL) regulation 29 CFR 4.123, Administrative limitations, variance, tolerances, and exemptions. Paragraph (e) of that regulations provides exemption for contracts for certain services that meet specific criteria.

The objective of the DoL final rule was to be more commercial-like, encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce our commitment to reduce Government-unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards.

This final rule will have a positive economic impact on the small contractors and subcontractors that meet the exemption criteria to be exempt from the SCA for certain services, because it may provide additional opportunities for work on Federal projects; enable these contractors to compete in a more commercial-like environment, and alleviate the burden of complying with Government-unique terms and conditions for these types of contracts.

Pursuant to Section (4)(b) of the SCA, the Secretary of Labor may grant reasonable exemptions to the provisions of the SCA, but only in special circumstances where the exemption is necessary and proper in the public interest, and is in accord with the remedial purposes of the Act to protect prevailing labor standards.

There were no comments in response to the initial regulatory flexibility analysis.

This final rule will apply to all large and small entities that seek award of Federal service contracts in the service categories identified. The Councils relied on the DoL regulatory flexibility analysis (66 FR 5339), which determined that a majority of contracts affected by the proposed exemption would likely be performed by small businesses. FPDS does not provide an accurate estimate of the contracts potentially covered by the exemption, but DoL estimates that the total value of the exempt contracts could be relatively small, and that the SCA would no longer apply to only a relatively small number of contracts that currently contain SCA wage determination provisions.

The rule imposes no reporting, recordkeeping, or other information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* This rule implements the Department of Labor Rule (66 FR 5327), which stated in the preamble that the DoL rule contained no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The DoL preamble stated further, that although offerors are required to certify that the criteria for exemption are met, the certifications can be submitted as part of the bid process and offerors are not required to maintain records to support the certification.

There are no practical alternatives that will accomplish the objectives of this rule. However, the exemption is expected to have a positive impact on small entities, because it does not contain any new reporting or recordkeeping or other compliance requirements applicable to small business. Rather, the exemption would relieve small businesses and other contractors from the requirements of the SCA on certain contracts.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) does not apply because the final rule does not impose or remove information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* This final rule implements the DoL rule published in the **Federal Register** at 66 FR 5327, January 18, 2001, which stated in the preamble that the DoL rule contained no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The DoL preamble stated further, that although offerors are required to certify that the criteria for exemption are met, the certifications can be submitted as part of the bid process and offerors are not required to maintain records to support the certification.

List of Subjects in 48 CFR Parts 4, 15, 17, 22, and 52

Government procurement.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 4, 15, 17, 22, and 52 which was published in the **Federal Register** at 72 FR 63076 on November 7, 2007, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 4, 15, 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 4—ADMINISTRATIVE MATTERS

4.1201 [Amended]

■ 2. Amend section 4.1201 in paragraph (c) by removing ''52.204–8(c)'' and adding ''52.204–8(d)'' in its place.

■ 3. Amend section 4.1202 by—

■ a. Revising the introductory text;

■ b. Redesignating paragraphs (r) through (bb) as (s) through (cc) respectively; and

■ c. Adding new paragraph (r).

The revised and added text reads as follows:

4.1202 Solicitation provision and contract clause.

Except for commercial item solicitations issued under FAR Part 12, insert in solicitations the provision at 52.204–8, Annual Representations and Certifications. The contracting officer shall check the applicable provisions at 52.204–8(c)(2). When the clause at 52.204–7, Central Contractor Registration, is included in the solicitation, do not include the following representations and certifications:

* * * * *

(r) 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

15.102 [Amended]

■ 4. Amend section 15.102 in paragraph (b) by removing ''52.204–8(c)'' and adding ''52.204–8(d)'' in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

■ 5. Amend section 22.1003–4 by—

■ a. Removing from paragraph (c)(3)(iii) ''22.1006(a)(2)'' and adding ''22.1006(a)'' in its place;

■ b. Revising paragraph (c)(4)(ii);

■ c. Revising paragraph (d)(2)(i) and revising the first sentence in paragraph (d)(2)(vi);

■ d. Removing from paragraph (d)(3)(i) ''22.1006(a)(2)'' and adding ''22.1006'' in its place, and revising paragraph (d)(3)(iii); and

■ e. Revising paragraph (d)(4)(ii).

■ The revised text reads as follows:

22.1003–4 Administrative limitations, variations, tolerances, and exemptions.

* * * * *

(c) * * *

(4) * * *

(ii) If the Department of Labor determines that any conditions in paragraph (c)(2) of this subsection have not been met with respect to a subcontract, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

(d) * * *

(2) * * *

(i) (A) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost; or

(B) The contract will be awarded on a sole source basis.

* * * * *

(vi) The contracting officer (or contractor with respect to a subcontract) determines in advance before issuing the solicitation, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions in paragraph (d)(2)(ii) through (v) of this subsection.

* * *

* * * * *

(3) * * *

(iii) If the conditions in paragraph (d)(3)(ii) of this subsection are not met, then the contracting officer shall resolicit, amending the solicitation by removing the exemption provision from the solicitation as prescribed at 22.1006(e)(3). The contract will include the applicable Service Contract Act clause(s) as prescribed at 22.1006 and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1007).

* * * * *

(4) * * *

(ii) If the Department of Labor determines that any conditions in paragraph (d)(2) of this subsection have not been met with respect to a subcontract, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

* * * * *

22.1003–5 [Amended]

■ 6. Amend section 22.1003–5 in paragraph (k) by removing ''22.1003(c)(1)'' and adding ''22.1003–4(c)(1)'' in its place.

22.1003–6 [Amended]

■ 7. Amend section 22.1003–6 in paragraph (b)(2) by removing ''22.1003(c)(1)'' and adding ''22.1003–4(c)(1)'' in its place.

■ 8. Amend section 22.1006 by revising paragraphs (a) and (e) to read as follows:

22.1006 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.222–41, Service Contract Act of 1965, in solicitations and contracts (except as provided in paragraph (a)(2) of this section) if the contract is subject to the Act and is—

(i) Over $2,500; or

(ii) For an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be $2,500 or less.

(2) The contracting officer shall not insert the clause at 52.222–41 (or any of the associated Service Contract Act clauses as prescribed in this section for possible use when 52.222–41 applies) in the resultant contract if—

(i) The solicitation includes the provision at—

(A) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification;

(B) 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification; or

(C) Either of the comparable certifications is checked as applicable in the provision at 52.204–8(c)(2)(v) or (vi) or 52.212–3(k); and

(ii) The contracting officer has made the determination, in accordance with paragraphs (c)(3) or (d)(3) of subsection 22.1003–4, that the Service Contract Act does not apply to the contract. (In such case, insert the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, or 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in

the contract, in accordance with the prescription at paragraph (e)(2)(ii) or (e)(4)(ii) of this subsection).

* * * * *

(e)(1) The contracting officer shall insert the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that—

(i) Include the clause at 52.222–41, Service Contract Act of 1965; and

(ii) The contract may be exempt from the Service Contract Act in accordance with 22.1003–4(c).

(2) The contracting officer shall insert the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements—

(i) In solicitations that include the provision at 52.222–48, or the comparable provision is checked as applicable in the clause at 52.204–8(c)(2)(v) or 52.212–3(k)(1); and

(ii) In resulting contracts in which the contracting officer has determined, in accordance with 22.1003–4(c)(3), that the Service Contract Act does not apply.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, the contracting officer shall insert the provision at 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that—

(A) Include the clause at 52.222–41, Service Contract Act of 1965; and

(B) The contract may be exempt from the Service Contract Act in accordance with 22.1003–4(d).

(ii) When resoliciting in accordance with 22.1003–4(d)(3)(iii), amend the solicitation by removing the provision at 52.222–52 from the solicitation.

(4) The contracting officer shall insert the clause at 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements—

(i) In solicitations that include the provision at 52.222–52, or the comparable provision is checked as applicable in 52.204–8(c)(2)(vi) or 52.212–3(k)(2); and

(ii) In resulting contracts in which the contracting officer has determined, in accordance with 22.1003–4(d)(3), that the Service Contract Act does not apply.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraphs (b)(1) and (b)(2) ''paragraph (c)'' wherever it occurs, and adding ''paragraph (d)'' (four times) in its place; and

■ c. Redesignating paragraph (c) as paragraph (d), adding new paragraph (c), and revising the second sentence in newly designated paragraph (d).

■ The revised and added text reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (FEB 2009)

* * * * *

(c)(1) The following representations or certifications in ORCA are applicable to this solicitation as indicated:

(i) 52.203–2, Certificate of Independent Price Determination. This provision applies to solicitations when a firm-fixed-price contract or fixed-price contract with economic price adjustment is contemplated, unless—

(A) The acquisition is to be made under the simplified acquisition procedures in Part 13;

(B) The solicitation is a request for technical proposals under two-step sealed bidding procedures; or

(C) The solicitation is for utility services for which rates are set by law or regulation.

(ii) 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions. This provision applies to solicitations expected to exceed $100,000.

(iii) 52.204–3, Taxpayer Identification. This provision applies to solicitations that do not include the clause at 52.204–7, Central Contractor Registration.

(iv) 52.204–5, Women-Owned Business (Other Than Small Business). This provision applies to solicitations that—

(A) Are not set aside for small business concerns;

(B) Exceed the simplified acquisition threshold; and

(C) Are for contracts that will be performed in the United States or its outlying areas.

(v) 52.209–5, Certification Regarding Responsibility Matters. This provision applies to solicitations where the contract value is expected to exceed the simplified acquisition threshold.

(vi) 52.214–14, Place of Performance—Sealed Bidding. This provision applies to invitations for bids except those in which the place of performance is specified by the Government.

(vii) 52.215–6, Place of Performance. This provision applies to solicitations unless the place of performance is specified by the Government.

(viii) 52.219–1, Small Business Program Representations (Basic & Alternate I). This provision applies to solicitations when the contract will be performed in the United States or its outlying areas.

(A) The basic provision applies when the solicitations are issued by other than DoD, NASA, and the Coast Guard.

(B) The provision with its Alternate I applies to solicitations issued by DoD, NASA, or the Coast Guard.

(ix) 52.219–2, Equal Low Bids. This provision applies to solicitations when contracting by sealed bidding and the contract will be performed in the United States or its outlying areas.

(x) 52.222–22, Previous Contracts and Compliance Reports. This provision applies to solicitations that include the clause at 52.222–26, Equal Opportunity.

(xi) 52.222–25, Affirmative Action Compliance. This provision applies to solicitations, other than those for construction, when the solicitation includes the clause at 52.222–26, Equal Opportunity.

(xii) 52.222–38, Compliance with Veterans' Employment Reporting Requirements. This provision applies to solicitations when it is anticipated the contract award will exceed the simplified acquisition threshold and the contract is not for acquisition of commercial items.

(xiii) 52.223–1, Biobased Product Certification. This provision applies to solicitations that require the delivery or specify the use of USDA-designated items; or include the clause at 52.223–2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts.

(xiv) 52.223–4, Recovered Material Certification. This provision applies to solicitations that are for, or specify the use of, EPA-designated items.

(xv) 52.225–2, Buy American Act Certificate. This provision applies to solicitations containing the clause at 52.225–1.

(xvi) 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate. (Basic, Alternate I, and Alternate II) This provision applies to solicitations containing the clause at 52.225–3.

(A) If the acquisition value is less than $25,000, the basic provision applies.

(B) If the acquisition value is $25,000 or more but is less than $50,000, the provision with its Alternate I applies.

(C) If the acquisition value is $50,000 or more but is less than $67,826, the provision with its Alternate II applies.

(xvii) 52.225–6, Trade Agreements Certificate. This provision applies to solicitations containing the clause at 52.225–5.

(xviii) 52.225–20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

(xix) 52.226–2, Historically Black College or University and Minority Institution Representation. This provision applies to—

(A) Solicitations for research, studies, supplies, or services of the type normally acquired from higher educational institutions; and

(B) For DoD, NASA, and Coast Guard acquisitions, solicitations that contain the clause at 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

(2) The following certifications are applicable as indicated by the Contracting Officer:

[*Contracting Officer check as appropriate.*]

____(i) 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.

_____(ii) 52.219–21, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program.

_____(iii) 52.219–22, Small Disadvantaged Business Status.
_____(A) Basic.
_____(B) Alternate I.
_____(iv) 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products.
_____(v) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.
_____(vi) 52.222–52 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.
_____(vii) 52.223–9, with its Alternate I, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).
_____(viii) 52.223–13, Certification of Toxic Chemical Release Reporting.
_____(ix) 52.227–6, Royalty Information.
_____ (A) Basic.
_____ (B) Alternate I.
_____(x) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

(d) * * * After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically that apply to this solicitation as indicated in paragraph (c) of this provision have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [*offeror to insert changes, identifying change by clause number, title, date*]. * * *

* * * * *

[End of provision]

■ 10. Amend section 52.212–3 by revising the date of the provision and paragraph (k)(1)(i) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(k) * * *

[ ](1) * * *

(i) The items of equipment to be serviced under this contract are used regularly for other than Governmental purposes and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontract) in substantial quantities to the general public in the course of normal business operations;

* * * * *

[End of provision]

■ 11. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Revising paragraph (c)(6);
■ c. Removing from paragraph (e)(1) ''in paragraphs (e)(1)(i) through (xi) of this paragraph'' and adding ''in this paragraph (e)(1)'' in its place; and
■ d. Revising paragraph (e)(1)(x).
■ The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(C) * * *

(6) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements (FEB 2009) (41 U.S.C. 351, *et seq.*).

* * * * *

(e)(1) * * *

(x) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services-Requirements (FEB 2009)(41 U.S.C. 351, *et seq.*).

* * * * *

[End of clause]

■ 12. Amend section 52.222–48 by revising the date of the provision and paragraph (a)(1) to read as follows:

52.222–48 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

* * * * *

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT CERTIFICATION (FEB 2009)

* * * * *

(a) * * *

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontractor) in substantial quantities to the general public in the course of normal business operations;

* * * * *

[End of provision]

■ 13. Amend section 52.222–53 by revising the date of the clause and paragraph (e) to read as follows:

52.222–53 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements.

* * * * *

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES— REQUIREMENTS (FEB 2009)

* * * * *

(e)(1) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor for exempt services shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost; or

(2) A subcontract for exempt services shall be awarded on a sole source basis.

* * * * *

[End of clause]

[FR Doc. E9–532 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, and 24

[FAC 2005–30; FAR Case 2008–003; Item IV; Docket 2008–0001, Sequence 08]

RIN 9000–AL13

Federal Acquisition Regulation; FAR Case 2008–003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 844 of the National Defense Authorization Act for Fiscal Year 2008 ''Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts'' (FY08 NDAA). Section 844 of the FY08 NDAA stipulates the requirements regarding the public availability of justification and approval documents after the award of Federal contracts, except for information exempt from public disclosure.

DATES: *Effective Date*: February 17, 2009.

Applicability Date: This interim rule applies to all contracts awarded from a 6.303–1 justification and approval document on or after the effective date.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before March 16,

_____(iii) 52.219–22, Small Disadvantaged Business Status.
_____(A) Basic.
_____(B) Alternate I.
_____(iv) 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products.
_____(v) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.
_____(vi) 52.222–52 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.
_____(vii) 52.223–9, with its Alternate I, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).
_____(viii) 52.223–13, Certification of Toxic Chemical Release Reporting.
_____(ix) 52.227–6, Royalty Information.
_____ (A) Basic.
_____ (B) Alternate I.
_____(x) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

(d) * * * After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically that apply to this solicitation as indicated in paragraph (c) of this provision have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [*offeror to insert changes, identifying change by clause number, title, date*]. * * *

* * * * *

[End of provision]

■ 10. Amend section 52.212–3 by revising the date of the provision and paragraph (k)(1)(i) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(k) * * *

[ ](1) * * *

(i) The items of equipment to be serviced under this contract are used regularly for other than Governmental purposes and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontract) in substantial quantities to the general public in the course of normal business operations;

* * * * *

[End of provision]

■ 11. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Revising paragraph (c)(6);
■ c. Removing from paragraph (e)(1) ''in paragraphs (e)(1)(i) through (xi) of this paragraph'' and adding ''in this paragraph (e)(1)'' in its place; and
■ d. Revising paragraph (e)(1)(x).
■ The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(C) * * *

(6) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements (FEB 2009) (41 U.S.C. 351, *et seq.*).

* * * * *

(e)(1) * * *

(x) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services-Requirements (FEB 2009)(41 U.S.C. 351, *et seq.*).

* * * * *

[End of clause]

■ 12. Amend section 52.222–48 by revising the date of the provision and paragraph (a)(1) to read as follows:

52.222–48 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

* * * * *

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT CERTIFICATION (FEB 2009)

* * * * *

(a) * * *

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontractor) in substantial quantities to the general public in the course of normal business operations;

* * * * *

[End of provision]

■ 13. Amend section 52.222–53 by revising the date of the clause and paragraph (e) to read as follows:

52.222–53 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements.

* * * * *

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES— REQUIREMENTS (FEB 2009)

* * * * *

(e)(1) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor for exempt services shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost; or

(2) A subcontract for exempt services shall be awarded on a sole source basis.

* * * * *

[End of clause]

[FR Doc. E9–532 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, and 24

[FAC 2005–30; FAR Case 2008–003; Item IV; Docket 2008–0001, Sequence 08]

RIN 9000–AL13

Federal Acquisition Regulation; FAR Case 2008–003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 844 of the National Defense Authorization Act for Fiscal Year 2008 ''Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts'' (FY08 NDAA). Section 844 of the FY08 NDAA stipulates the requirements regarding the public availability of justification and approval documents after the award of Federal contracts, except for information exempt from public disclosure.

DATES: *Effective Date*: February 17, 2009.

Applicability Date: This interim rule applies to all contracts awarded from a 6.303–1 justification and approval document on or after the effective date.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before March 16,

2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–30, FAR case 2008–003, by any of the following methods:

• Regulations.gov: *http://www.regulations.gov*.Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2008–003'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2008–003. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2008–003'' on your attached document.

• Fax: 202–501–4067.

• Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4035, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–30, FAR case 2008–003, 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: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–30, FAR case 2008–003. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

The National Defense Authorization Act for Fiscal Year 2008, Section 844 ''Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts ''amends 10 U.S.C. 2304 and 41 U.S.C. 253 regarding procurements made under subsection (c) (*i.e.*, other than competitive procedures) to require public availability of the justification and approval documents after contract award except for information exempt from public disclosure under 5 U.S.C. 552. The provisions of Section 844 require the head of an executive agency to make certain justification and approval documents relating to the use of noncompetitive procedures in contracting available on the website of an agency and through a governmentwide website selected by the Administrator for Federal Procurement Policy within 14 days of contract award. In the case of noncompetitive contracts awarded on the basis of unusual and compelling urgency, the documents must be posted within 30 days of contract award. The Competition in Contracting Act (Public Law 98–369) already requires that such justification and approval documents be made available for public inspection, subject to the exemptions from public disclosures provided in the Freedom of Information Act (5 U.S.C. 552).

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 does not revise or change existing regulations pertaining to small business concerns seeking Government contracts. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 5, 6, and 24 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 2005–30, FAR case 2008–003), in all 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.*

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 because the provision of the National Defense Authorization Act for Fiscal Year 2008, Section 844 was enacted on January 28, 2008. The Councils believe that the interim rule in the FAR will provide contracting officers the relevant regulatory guidance needed when addressing requirements outlined in this notice. The rule will also benefit industry by increasing transparency and accountability in federal contracting. This interim rule is applicable to all contracts awarded from a 6.303–1 justification and approval document on or after the effective date of this rule. 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 5, 6, and 24

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, and 24 as set forth below:

1. The authority citation for 48 CFR parts 5, 6, and 24 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 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.301 by adding paragraph (d) to read as follows:

5.301 General.

* * * * *

(d) Justifications for other than full and open competition must be posted in accordance with 6.305.

■ 3. Add section 5.406 to read as follows:

5.406 Public disclosure of justification and approval documents for noncompetitive contracts.

Justifications for other than full and open competition must be posted in accordance with 6.305.

PART 6—COMPETITION REQUIREMENTS

■ 4. Revise section 6.305 to read as follows:

6.305 Availability of the justification.

(a) Except for paragraph (b) of this section, the agency shall make publicly available within 14 days after contract award the justification required by 6.303–1 as required by 10 U.S.C. 2304(f)(4) and 41 U.S.C. 253(f)(4)—

(1) At the GPE *www.fedbizopps.gov*; and

(2) On the website of the agency, which may provide access to the justifications by linking to the GPE.

(b) In the case of a contract award permitted under 6.302–2, the

justification shall be posted within 30 days after contract award.

(c) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed.

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 5. Amend section 24.203 by adding after the second sentence and at the end of paragraph (b) new sentences to read as follows:

24.203 Policy.

* * * * *

(b) * * * Other exemptions include agency personnel practices, and law enforcement. * * * A Freedom of Information Act guide and other resources are available at the Department of Justice website under FOIA reference materials: *http://www.usdoj.gov/oip*.

[FR Doc. E9–555 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

[FAC 2005–30; FAR Case 2006–023; Item V; Docket 2007–0001; Sequence 8]

RIN 9000–AK75

Federal Acquisition Regulation; FAR Case 2006–023, SAFETY Act: Implementation of DHS Regulations

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert the interim rule that published in the **Federal Register** at 72 FR 63027, November 7, 2007 to a final rule. The final rule amends the Federal Acquisition Regulation (FAR) to implement the Department of Homeland Security (DHS) regulations on the SAFETY Act.

DATES: Effective Date: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2006–023.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 72 FR 63027, November 7, 2007. Seven respondents submitted comments on the interim rule. All respondents generally supported the concepts of the FAR interim rule, but provided suggestions to improve clarity and better achieve the implementation of the SAFETY Act.

1. Definitions.

a. Pre-qualification designation notice (50.201 and associated clauses). In the definition ''pre-qualification designation notice'' one respondent suggested that the word ''successful'' prior to ''offeror'' be deleted because the interim rule allows all offerors to submit streamlined SAFETY Act applications, not just the successful offeror.

Response: The Councils have accepted this suggestion and the definition of ''pre-qualification designation notice'' has been modified throughout the final rule.

b. ''Block designation and ''block certification.'' One respondent was concerned that there is no definition of the terms ''block designation'' and block certification.''

Response: These definitions were embedded within the definition of ''SAFETY Act designation'' and ''SAFETY Act certification.'' These terms are now separately defined, to make it easier to locate the definitions.

2. General (50.203(a)).

The respondent suggested that because SAFETY Act protections extend to purchasers and users of technologies that the phrase in 50.203(a)(2) be amended to reflect this.

Response: Paragraph (a)(2) of the interim rule reads as follows:

''(2) Provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain.''

Risk management and litigation management are addressed in section 864 and 863 of the SAFETY Act respectively, and in 6 CFR 25.5 and 25.7 of the DHS regulations. The required amount of liability insurance purchased by the seller must provide protection for contractors, subcontractors, suppliers, vendors, and customers of the Seller, as well as contractors, subcontractors, suppliers, and vendors of the customer, to the extent of their potential liability for involvement in the manufacture, qualification, sale, use, or operation of the QATT. See Section 864 of the SAFETY Act. Accordingly, the phrase, ''and others in the supply and distribution chain,'' accurately reflects this required coverage. Therefore, no change has been made to the rule as a result of this comment.

3. Policy (50.204).

a. Benefits to the Government. The respondent thought that because the SAFETY Act also benefits the Government with respect to its potential liability, the requiring activities should not only encourage contractors to submit SAFETY Act applications, but also support these applications.

Response: The subject of any benefit the Government may ultimately enjoy with respect to a decreased liability is one that cannot be addressed in the context of this FAR case. The implications are too far reaching and would require a thorough analysis of many of the Government's waivers of sovereign immunity. However, to the extent that one of the criteria for the Department of Homeland Security (DHS) to determine whether to issue a designation is a determination made by a Federal, State, or local official that the technology is appropriate for preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might cause, the FAR case has been amended to specifically reflect this possibility in 50.204(a) by changing the paragraph to read:

50.204 Policy.

(a) Agencies should—

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections and, if appropriate, formally relay this determination to DHS for purposes of supporting contractor application(s) for SAFETY Act protections in relation to criteria (b)(viii) of 6 CFR 25.4, *Designation of Qualified Anti-Terrorism Technologies*;

b. Authorities and responsibilities. One respondent wanted to clarify that determination of whether the SAFETY Act is applicable is within the exclusive purview and discretion of DHS. The respondent therefore recommended that the policy at 50.204(a)(1) should be revised to replace ''should'' with ''shall consult with DHS to...''

justification shall be posted within 30 days after contract award.

(c) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed.

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[FR Doc. E9–555 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

[FAC 2005–30; FAR Case 2006–023; Item V; Docket 2007–0001; Sequence 8]

RIN 9000–AK75

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Response: The Councils have accepted this suggestion and the definition of ''pre-qualification designation notice'' has been modified throughout the final rule.

b. ''Block designation and ''block certification.'' One respondent was concerned that there is no definition of the terms ''block designation'' and block certification.''

Response: These definitions were embedded within the definition of ''SAFETY Act designation'' and ''SAFETY Act certification.'' These terms are now separately defined, to make it easier to locate the definitions.

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3. Policy (50.204).

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Response: The subject of any benefit the Government may ultimately enjoy with respect to a decreased liability is one that cannot be addressed in the context of this FAR case. The implications are too far reaching and would require a thorough analysis of many of the Government's waivers of sovereign immunity. However, to the extent that one of the criteria for the Department of Homeland Security (DHS) to determine whether to issue a designation is a determination made by a Federal, State, or local official that the technology is appropriate for preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might cause, the FAR case has been amended to specifically reflect this possibility in 50.204(a) by changing the paragraph to read:

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(a) Agencies should—

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections and, if appropriate, formally relay this determination to DHS for purposes of supporting contractor application(s) for SAFETY Act protections in relation to criteria (b)(viii) of 6 CFR 25.4, *Designation of Qualified Anti-Terrorism Technologies*;

b. Authorities and responsibilities. One respondent wanted to clarify that determination of whether the SAFETY Act is applicable is within the exclusive purview and discretion of DHS. The respondent therefore recommended that the policy at 50.204(a)(1) should be revised to replace ''should'' with ''shall consult with DHS to...''

Response: It is not necessary in every circumstance to consult with DHS to determine whether the SAFETY Act is applicable. The procedures make it clear that in questionable cases the agency shall consult with DHS (50.205–1(a)).

c. Soliciting contingent offer. Another respondent thought that the language of 50.204(b) concerning not soliciting offers contingent upon SAFETY Act designation or certification before contract award was incongruous with normal acquisition procedures to solicit offers before award.

Response: ''Before contract award'' refers to ''SAFETY Act designation or certification'' not to ''shall not solicit offers.'' This can be clarified by adding a connecting word as follows:

''Agencies shall not solicit offers contingent upon SAFETY Act award designation or certification occurring before contract award, unless...''

d. Responsibility to take action. One respondent requested that the policy should address another responsibility, the responsibility to take action once the determinations are made.

Response: The additional language requested by the respondent is not appropriate in the Policy section. These actions are addressed under FAR 50.205 procedures.

4. SAFETY Act considerations (50.205–1).

a. SAFETY Act Applicability (50.205–1(a)).

i. Several respondents questioned the use of the phrase ''requiring activity'' and some thought it reasonable to include a definition for ''requiring activities.''

Response: The use of this phrase is consistent with other uses in the FAR and defining the term is outside the scope of this case.

ii. One respondent wondered if the statement that ''Requiring activities shall review requirements to identify potential technologies'' means that all requirements must be so reviewed. This respondent considered that it would be helpful if the FAR provided some guidance as to the types of requirements that must be so reviewed, and points to the summary of items at the beginning of FAC 2005–021, which provided examples of the goods and services to which FAR Subpart 50.2 applies.

Response: The Councils do not agree that it is advisable to provide such a list in the regulations. Any such list would never be complete, and could imply that technologies not on the list would not be covered by the SAFETY Act. There are some limited examples in the definition of Qualified Anti-Terrorism Technology (QATT), particularly of services and analyses that may be considered technology. In addition, examples of QATT are to be found on the SAFETY Act website identified at FAR 50.203(c) (e.g., see SAFETY Act 101 Briefing and Active Procurement List).

iii. One respondent recommended that the requiring activity's determination of the existence of a block designation or certification through discussions with DHS, must be mandatory (*i.e.*, change ''should'' to ''shall''). In the same sentence, the respondent recommended changing ''address through preliminary discussions'' to ''ascertain through discussions''. The respondent considered that this change will ensure that if a block designation or certification exists, it will be used in the procurement process.

Response: The Councils do not concur with the change from ''should'' to ''shall'' because the FAR does not direct requiring activities.

However, the Councils do concur with the change from ''address through preliminary discussions'' to ''ascertain through discussions,'' as being more precise. The existence of block designation or certification must be ascertained at this time, not at some time in the future. Therefore, these discussions are not preliminary.

iv. One respondent recommended that the discussion not be limited to ''block designations'' or ''block certifications.'' The respondent stated that DHS regulations provide coverage for ''designated technology,'' ''certified technology,'' and for Developmental Testing and Evaluation Designation for any technology that is being developed. Each of these additional technology designations should be ''on the table'' when a Federal agency is considering whether a technology is appropriate for SAFETY Act coverage.

Response: The block designations and block certifications are checked first because they are broader in scope, covering a class of technologies. There may be a block designation or block certification already in effect that can cover the planned acquisition.

Although ''designated technology'' and ''certified technology'' are specific to a particular technology, these designations are still ''on the table.'' FAR 50.205–1(a)(2) directs the agencies to proceed to 50.205–2, pre-qualification designation notice, if a block designation or block certification does not exist.

With regard to the ''developmental testing and evaluation designation,'' the DHS regulations established this category to cover an anti-terrorism technology that is being developed, but that requires additional developmental testing and evaluation (6 CFR 25.4(f)). However, the determination to use this type of designation is one that DHS may apply to a technology at its sole discretion. The pre-qualification designation notice process does not expressly include permitting a developmental testing and evaluation designation, but rather is limited to stating presumptively or affirmatively that a technology is a QATT. Therefore, while a developmental testing and evaluation designation may result from any application, the FAR language accurately reflects the different streamlined application process and streamlined review times made available to various vendors.

v. One respondent also suggested that the language in 50.205–1(a)(1), ''the requiring activity shall inform the contracting officer to notify offerors'', should be rewritten as ''the requiring activity shall request that the contracting officer notify offerors.''

Response: The Councils have accepted this suggestion as being simpler and clearer.

b. Early consideration of the SAFETY Act.

i. One respondent recommended a cross reference to 7.105(b)(19) be placed in 50.205(b).

Response: The Councils concur.

ii. The same respondent also requested that the regulations should provide guidance on the lead time required for SAFETY Act coverage determinations.

Response: The regulation states at 50.205–1(b) that processing times for issuing determinations on all types of SAFETY Act applications vary depending on many factors, including the influx of applications to DHS and the technical complexity of individual applications. This statement continues to be true, and more specific guidance is not possible.

c. Reciprocal waiver of claims (d). One respondent supported the statement in the rule that the Government is not a customer from which a contractor must request a reciprocal waiver.

Response: None required.

5. Prequalification Designation Notice (PQDN) (50.205–2).

a. PQDN after contract award. One respondent thought that the Pre-Qualification Designation Notices (PQDNs) were not limited to any particular time in the acquisition cycle and therefore, thought that PQDNs should also be available after contract award.

Response: In reviewing the DHS regulations on the issuance of PQDNs,

there is nothing to indicate that the procedure relates to anything other than the future procurement of a technology. See 6 CFR 25.6(g)(2). Further, the time periods of seeking a PQDN and a contractor then applying under the streamlined rules versus simply having the contractor apply for SAFETY Act protections would not justify such a procedure. It would be far simpler for contractors to apply for SAFETY Act protections themselves. The period for an expedited review is 60 days. The review period for a PQDN is also 60 days. When added together, this is equal to the 120 days for an entire SAFETY Act application. Of course, DHS may issue Block Designations and/or Certifications and, therefore, if contractors or requiring activities are interested in having DHS consider whether to issue a Block Designation or Certification, then they should write the Under Secretary of Science and Technology of DHS for this purpose.

b. Specification changes after PQDN. One respondent thought that the FAR case needed to be clarified with respect to specifications or statements of work changing after a PQDN had been issued.

Response: To the extent, that there may be confusion based on the wording in the interim rule, 50.205–2(a) has been amended to read:

(a) Requiring activity responsibilities. (1) If the requiring activity determines that the technology to be acquired may qualify for SAFETY Act protection, the requiring activity is responsible for requesting a pre-qualification designation notice from DHS. Such a request for a pre-qualification designation notice should be made once the requiring activity has determined that the technology specifications or statement of work are established and are unlikely to undergo substantive modification. DHS will then ...

c. Mandatory. With regard to the same paragraph (50.205–1(a)(1)), the respondent requested that the language should be mandatory, changing ''the requiring activity is responsible for requesting'' to ''the requiring activity shall request.''

Response: The FAR provides direction to the contracting officer and the contracting chain of command in an agency. The requiring activities do not look to the FAR for direction.

d. Streamlined methodology for technology already being sold to Government. Several respondents felt that there should be a streamlined methodology to apply and obtain SAFETY Act protections if contractors are already selling existing technologies to the Government.

Response: The DHS rules for applying for SAFETY Act protection do not provide for a *streamlined* methodology to apply and obtain SAFETY Act protection outside of the acquisition process. The FAR cannot provide for any additional methodology without DHS changing its rules on the manners in which to seek SAFETY Act protections. It should be emphasized though that contractors may, like any sellers of technologies, submit an application for SAFETY Act protections at any time. While the timelines for a traditional application are longer, the timelines are not expected to exceed an additional two months.

6. Contingent offers (50.205–3 and Alt I to 52.250–3 and 52.250–4).

a. Market research (50.205–3(a)(3)). One respondent thought the language in 50.205–3(a)(3) was unclear because this subparagraph did not specifically state who would perform the ''market research.'' The respondent thought the requirement for market research should be deleted because it would be difficult for contracting officers to obtain reliable information and because market research will be subjective and can result in widely divergent and inequitable implementation of the contingent and presumptive SAFETY Act clauses. Prior to submission of an offer, a company may not be in a position to make a categorical decision as to whether to supply technology without SAFETY Act coverage.

Response: FAR Part 10 clearly requires that the market research be performed by the contracting officer. Therefore, no change is required to this subparagraph.

It is Government policy to allow contingent offers only if market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections. With regard to subjectivity and widely divergent implementation, it is believed that the direction in FAR Part 10 provides enough guidance so as to protect against such a situation. However, it is recognized, as with any process, different employees will pursue a matter differently. This cannot be avoided.

b. Block certification. One respondent would prefer that the regulations not limit contracting officers from authorizing offers contingent on obtaining a SAFETY Act certification unless a block certification applies to the solicitation. (Also at 50.205–4(b).)

This respondent also recommended that the wording should be ''applies to the technology'' rather than ''applies to the solicitation.''

Response: DHS would not grant SAFETY Act certification unless a block certification existed, or unless the offeror already has applied for a SAFETY Act designation. Otherwise, DHS would first grant a designation, and subsequently grant a certification after the technology is proven, or simultaneously grant a designation and a certification, if requested by the applicant. In any event, a SAFETY Act designation will be part of any SAFETY Act protections conferred to a contractor. In virtually every circumstance, the Government will consider that to be sufficient protection to proceed to award.

The Councils have changed the wording at 50.205–3(b) and 50.205–4(b) to read ''applies to the class of technology to be acquired under the solicitation.''

c. No conditions. Several respondents suggested, with respect to accepting contingent offers, that no conditions or very limited conditions should be placed on a contracting officer's ability to accept contingent offers.

Response: Without analyzing the long-standing precedent of the Government not accepting contingent offers of any kind, the conditions placed on the acceptance of an offer contingent upon an offeror obtaining SAFETY Act designation or certification are very reasonable. The dual nature of the SAFETY Act application processes and the source selection processes makes it inherently risky for the Government to accept contingent offers. However, in light of the importance of using the SAFETY Act effectively, it was deemed worthwhile to accept the risk of permitting contingent offers, but only if certain conditions applied. Accordingly, this case had to mitigate the Government's risk in allowing contingent offers by including such conditions.

d. Right of the Government to award. Several respondents were concerned that paragraphs (f)(2) and (f)(3) of Alternate I to 52.250–3 and 50.250–4 are in conflict with each other, or at best, unclear.

Response: The Councils have rewritten paragraphs (f)(2) and (f)(3) to clarify that the right of the Government to award prior to resolution of the offeror's application for SAFETY Act designation would be an award on another offer, not the contingent offer.

7. Provision prescriptions (50.206).

a. 52.250–2, SAFETY Act Coverage Not Applicable.

i. One respondent recommended clarifying the coverage in FAR 50.206(a)(2) by adding before the period in the sentence the following phrase: ''and no block designation or block

certification applies to the technology to be acquired. See 50.205–1(a).''

Response: It would not be possible to get to this point if there were a block designation or block certification. The first consideration to be checked under the procedures at FAR 50.205–1(a) is whether or not there is a block designation or block certification. It is only if one does not exist that the agency would enter into discussions with DHS as to whether this technology might be a good candidate for a PQDN.

ii. The respondent also considered this clause prescription to be unclear, questioning whether 52.250–2 would be included if the agency based its determination of non-applicability of the SAFETY Act on its own, without DHS consultation, and wanting the FAR to make this clear. The respondent also reiterates that inclusion of a list of examples of items to which the SAFETY Act may be applicable would be helpful in determining whether to include the provision in the solicitation.

Response: The Councils consider that the FAR has made it very clear that this clause would only be used after consultation with DHS—either as specified in FAR 50.206(a)(1) or (a)(2). As stated in section 4.a, there are various sources of examples of products that may be suitable for SAFETY Act protection. However, whenever there is any possibility of applicability, DHS must be consulted.

b. 52.250–3, SAFETY Act Block Designation/ Certification. One respondent stated that it would be helpful to provide information on how to ascertain whether or not DHS has issued a block designation or certification.

Response: When DHS grants a block designation or block certification, it will be listed on the SAFETY Act website (see 50.203(c)). Even though there are currently no block designations or certifications, DHS has been requested to provide a place on the website now, so that it can be verified that there are currently no block designations or block certifications. The website is currently operational.

c. 52.250–3 and -4, Alternate II. One respondent recommended revision of 50.206(b)(3) and (c)(3) so that contracting officers can only increase the 15 day time period for submission of SAFETY Act applications, not decrease it. For some companies, it may not be feasible to submit an application in less than 15 days.

Response: The Councils concur and have revised the text accordingly.

8. ''SAFETY Act Coverage not applicable'' (52.250–2).

Two respondents thought that this provision should be eliminated. One respondent thought that the provision at 52.250–2 could lead to unintended consequences by not specifically limiting the provision to the products or services being acquired under the solicitation. The respondent felt that the wording of the provision might lead potential SAFETY Act applicants to believe that their technologies would never be appropriate for SAFETY Act protection. The respondent believed that this provision conflicts with the SAFETY Act, which confers exclusive authority on DHS to determine whether SAFETY Act application should be approved or denied. Another respondent stated that an offeror should still be precluded from seeking SAFETY Act coverage. If the provision is not removed, the respondent suggested narrowing of the applicability of the statements of inapplicability.

Response: Offerors should be informed if DHS has advised the agency that the SAFETY Act is not applicable or has denied approval of a pre-qualification designation notice. However, to the extent that the wording of the provision might cause some confusion, the Councils have reworded the provision as follows:

''The Government has determined that for purposes of this solicitation the product(s) or service(s) being acquired by this action are neither presumptively nor actually entitled to a pre-determination that the products or services are qualified anti-terrorism technologies as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444. This determination does not prevent sellers of technologies from applying for SAFETY Act protections in other contexts. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See Federal Acquisition Regulation subpart 50.2.''

9. SAFETY Act Prequalification Designation Notice (52.250–4). One respondent suggested that the language in 52.250–4(d) be amended to more accurately reflect the difference between a determination granting a SAFETY Act application and solicitation specifications.

Response: The language in 52.250–4(d) has been amended to more accurately reflect these differences. This amended language is set forth as follows:

(d) All determinations by DHS are based on factors set forth in the SAFETY Act, and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, state, local, or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for technologies submitted for DHS review are based on the factors identified in 6 CFR Section 25.4(b).

10. Alternate II to 52.250–3 and 52.250–4.

a. Insurance requirements and ''good faith''. One respondent suggested that the contractor should have the flexibility to negotiate the insurance requirements based on DHS's grant of a designation or certification.

One respondent wanted the insurance requirement in the FAR removed for a different reason, as well as the requirement that the offeror pursues its application in ''good faith.'' The respondent is concerned that DHS has the exclusive statutory and regulatory authority for implementing the SAFETY Act, including establishment and enforcement of requirements for securing designation or certification, and provides consequences if the company does not agree to the insurance requirements. Furthermore, only DHS can address the question of whether a seller is pursuing an application in ''good faith.''

Response: The respondent's comment cannot be addressed through regulations in the FAR. The insurance required by DHS is based in statute and the implementing DHS regulations. Any flexibility with regard to DHS's required amounts of insurance is a part of DHS's analysis when reviewing a particular SAFETY Act application and is not a subject of negotiation during a contract award.

Although the Councils concur that DHS is the agency that imposes the insurance requirements and can determine if an application is being pursued in good faith, nevertheless, it would be irresponsible to award a contract to an offeror with a presumption that designation will be received, if these conditions are not met.

b. Limited scope of SAFETY Act applications. Paragraph (f)(2) of Alternate II to 52.250–3 and 52.250–4 requires the offeror to file a SAFETY Act designation (or SAFETY Act certification) application, limited to the scope of the applicable block designation (or certification) or pre-qualification designation notice, in order to be eligible for award. The respondent was concerned that this limitation could have harsh results, precluding award where an offeror's technology may provide a more robust solution than definitively required. The

respondent considered that the potential exclusion of technologies outweighs the need to expedite the procurement process.

Response: Alternate II puts the Government in the unusually risky position of awarding a contract presuming that SAFETY Act coverage will be granted after award, and agreeing to negotiate an equitable adjustment if that does not occur. The Government only agrees to this alternate when certain conditions are met, including the fact that DHS has already issued a block designation or a block certification, or a pre-qualification designation notice for the solicited technology. Considering the risk involved in these circumstances, the Government cannot afford the additional risk that would be generated if the offeror then proposes a technology that is outside or beyond the scope of the technologies that have been already block designated or certified by DHS or reviewed and either affirmatively or presumptively endorsed by DHS as technologies that meet the criteria of the SAFETY Act. Without these assurances in advance, the Government cannot afford the risk of presuming that SAFETY Act designation or certification will be granted after contract award.

c. Before or after award. One respondent questioned why the clause at FAR 52.250–4, Alternate II, paragraph (f)(1) addresses submission of proposals presuming SAFETY Act coverage ''before or after'' award, but the heading at 50.205–4 states ''presuming SAFETY Act designation or certification after contract award.''

Response: At the time proposals are submitted, it is not yet known if SAFETY Act coverage will be received before or after award. If SAFETY Act coverage is received before award, there is no issue. However, if award must be made and SAFETY Act coverage has not yet been granted, then the special conditions must apply because award must be made based on the presumption that SAFETY Act coverage will be granted after award.

11. SAFETY Act—Equitable Adjustment (52.250–5).

a. Several respondents suggested that as part of the equitable adjustment clause at 52.250–5 the contractor should be allowed to stop work unilaterally.

Response: This suggestion is contrary to long standing Government procurement law and procedures and therefore, will not be considered further as part of this case. The contractor is not forced to submit an offer.

b. One respondent had a concern that under Alternate II, award can be made and delivery required, prior to receipt of SAFETY Act coverage. The respondent suggested modification of 52.250–5 to allow delayed delivery, without penalty, until SAFETY Act coverage is granted.

Response: This suggestion is inconsistent with the reasons for using this Alternate. The reason for proceeding to award under this alternate is based on a presumption of receiving SAFETY Act coverage after award. Therefore, the risk would have to be weighed against the urgency to award a contract. If delay would be acceptable, then there is no need to accept the risk of awarding a contract based on a contingency. In this case, it would be better to use Alternate I instead of Alternate II, and not make the award until the issue of SAFETY Act coverage is resolved.

c. One respondent wanted clarification of the meaning of ''a dispute in accordance with the ''Disputes'' clause of this contract.''

Response: The Councils consider that ''in accordance with the 'Disputes' clause of this contract'' in paragraph (d)(3) of the clause is sufficiently clear.

12. Comments on Subpart 50.1.

a. One respondent made the statement that the changes in FAR 50.102–3 to the procedures for an Agency to exercise the authority under paragraph 1A of E.O. 10789 would reduce the number of indemnifications granted.

Response: This may well be true. However, these procedures implemented as part of this rule reflect the transfer and delegation of certain functions to, and other responsibilities vested in, the Secretary of DHS, which stem directly from Executive Order 13286 and therefore, cannot be changed by this case.

b. The respondent also commented on other sections in Subpart 50.1.

Response: The interim rule republished existing language because of the massive renumbering of the sections. Renumbering is not a substantive change. The intention of this rulemaking was to take comments solely relating to the Safety Act. Therefore, comments on sections containing existing language where only the numbering was changed are outside the scope of this case.

13. *SAFETY Act Block Designation/Certification (52.250–3).* Two respondents suggested that the SAFETY Act Certification is not a certification provided by the contractor and thus the provisions of the case should be placed in Section L of contracts and not Section K.

Response: This comment is accepted and the appropriate changes will be made in the clause matrix. A SAFETY Act Certification is a certification issued by DHS, not by the offerors.

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 imposes no burdens on businesses. Instead, it allows businesses to more easily take advantage of a Department of Homeland Security regulation published June 8, 2006, at 6 CFR part 25. The Department of Homeland Security certified in their rule that there would be no significant impact on a substantial number of small entities. The Councils did not receive any comments on the Regulatory Flexibility Act or a perceived burden on small business.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply. These changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 1640–0001 through 1640–0006, under applications made to OMB by the Department of Homeland Security.

List of Subjects in 48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

Government procurement.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 which was published in the **Federal Register** at 72 FR 63027 on November 7, 2007, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, 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 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

■ 2. Amend section 50.201 by—
■ a. Adding, in alphabetical order, the definitions ''Block certification'' and ''Block designation'';
■ b. Amending the definition ''Pre-qualification designation notice'' by removing the word ''successful''; and
■ c. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation''.
■ The added and revised text reads as follows:

50.201 Definitions.

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.8 and 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

■ 3. Amend section 50.203 by adding a sentence to the end of paragraph (c) to read as follows:

50.203 General.

* * * * *

(c) * * * Included on this website are block designations and block certifications granted by DHS.

■ 4. Amend section 50.204 by revising paragraph (a)(1); and amending paragraph (b) by removing the word ''certification'' and adding ''certification occurring'' in its place. The revised text reads as follows:

50.204 Policy.

(a) * * *

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections and, if appropriate, formally relay this determination to DHS for purposes of supporting contractor application(s) for SAFETY Act protections in relation to criteria (b)(viii) of 6 CFR 25.4, Designation of Qualified Anti-Terrorism Technologies;

* * * * *

■ 5. Amend section 50.205–1 by revising the introductory text of paragraph (a) and paragraph (a)(1); and amending paragraph (b) by removing the word ''possible'' and adding ''possible (see FAR 7.105(b)(19)(v))'' in its place. The revised text reads as follows:

50.205–1 SAFETY Act Considerations.

(a) *SAFETY Act applicability.* Requiring activities should review requirements to identify potential technologies that prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might cause, and may be appropriate for SAFETY Act protections. In questionable cases, the agency shall consult with DHS. For acquisitions involving such technologies, the requiring activity should ascertain through discussions with DHS whether a block designation or block certification exists for the technology being acquired.

(1) If one does exist, the requiring activity should request that the contracting officer notify offerors.

* * * * *

■ 6. Amend section 50.205–2 by adding a new sentence after the first sentence in paragraph (a)(1) to read as follows:

50.205–2 Pre-qualification designation notice.

(a)(1) * * * Such a request for a pre-qualification designation notice should be made once the requiring activity has determined that the technology specifications or statement of work are established and are unlikely to undergo substantive modification. * * *

* * * * *

■ 7. Amend section 50.205–3 by revising paragraph (b) to read as follows:

50.205–3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.

* * * * *

(b) Contracting officers shall not authorize offers contingent upon obtaining a SAFETY Act certification (as opposed to a SAFETY Act designation), unless a block certification applies to the class of technology to be acquired under the solicitation.

■ 8. Amend section 50.205–4 by revising paragraph (b) to read as follows:

50.205–4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.

* * * * *

(b) Contracting officers shall not authorize offers presuming that SAFETY Act certification will be obtained (as opposed to a SAFETY Act designation), unless a block certification applies to the class of technology to be acquired under the solicitation.

50.206 [Amended]

■ 9. Amend section 50.206 in paragraphs (b)(3) and (c)(3) by removing the word ''alter'' and adding the word ''increase'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.250–2 by revising the date of the provision and the provision to read as follows:

52.250–2 SAFETY Act Coverage Not Applicable.

* * * * *

SAFETY ACT COVERAGE NOT APPLICABLE (FEB 2009)

The Government has determined that for purposes of this solicitation the product(s) or service(s) being acquired by this action are neither presumptively nor actually entitled to a pre-determination that the products or services are qualified anti-terrorism technologies as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444. This determination does not prevent sellers of technologies from applying for SAFETY Act protections in other contexts. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See Federal Acquisition Regulation subpart 50.2.

(End of provision)

■ 11. Amend section 52.250–3 by—
■ a. Revising the date of the provision;
■ b. In paragraph (a) by—
■ 1. Adding, in alphabetical order, the definitions ''Block certification'' and ''Block designation''; and
■ 2. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation'';
■ c. Revising paragraph (d);
■ d. Amending paragraph (e) by removing the word ''room'' and adding the word ''Room'' in its place;
■ e. In Alternate I by revising the date of the alternate and paragraphs (f)(2) and (f)(3); and
■ f. In Alternate II by revising the date of the alternate; and amending paragraph (f)(2)(iii) by removing the

word ''any'' and adding ''the offeror's'' in its place.

■ The added and revised text reads as follows:

52.250–3 SAFETY Act Block Designation/ Certification.

* * * * *

SAFETY ACT BLOCK DESIGNATION/ CERTIFICATION (FEB 2009)

(a) * * *

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

* * * * *

(d) All determinations by DHS are based on factors set forth in the SAFETY Act and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, State, local or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for technologies submitted for DHS review are based on the factors identified in 6 CFR 25.4(b).

* * * * *

Alternate I (FEB 2009). * * *

(f)(1) * * *

(2) If an offer is submitted contingent upon receipt of SAFETY Act designation (or SAFETY Act certification, if a block certification exists) prior to contract award, then the Government may not award a contract based on such offer unless the offeror demonstrates prior to award that DHS has issued a SAFETY Act designation (or SAFETY Act certification, if a block certification exists) for the offeror's technology.

(3) The Government reserves the right to award the contract based on a noncontingent offer, prior to DHS resolution of the offeror's application for SAFETY Act designation (or SAFETY Act certification, if a block certification exists).

Alternate II (FEB 2009). * * *

* * * * *

■ 12. Amend section 52.250–4 by—

■ a. Revising the date of the provision;

■ b. In paragraph (a) by—

■ 1. Adding, in alphabetical order, the definitions ''Block certification'' and ''Block designation'';

■ 2. Removing from the definition ''Pre-qualification designation notice'' the word ''successful''; and

■ 3. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation'';

■ c. Revising paragraph (d);

■ d. In Alternate I by revising the date of the alternate and paragraphs (f)(2) and (f)(3); and

■ e. In Alternate II by revising the date of the alternate; and amending paragraph (f)(2)(iii) by removing the word ''any'' and adding ''the offeror's'' in its place.

■ The added and revised text reads as follows:

52.250–4 SAFETY Act Pre-qualification Designation Notice.

* * * * *

SAFETY ACT PRE-QUALIFICATION DESIGNATION NOTICE (FEB 2009)

(a) * * *

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

* * * * *

(d) All determinations by DHS are based on factors set forth in the SAFETY Act and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular Technology as a QATT is not a determination that the Technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, State, local or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for Technologies submitted for DHS review are based on the factors identified in 6 CFR 25.4(b).

* * * * *

Alternate I (FEB 2009). * * *

(f)(1) * * *

(2) If an offer is submitted contingent upon receipt of SAFETY Act designation prior to contract award, then the Government may not award a contract based on such offer unless the offeror demonstrates prior to award that DHS has issued a SAFETY Act designation for the offeror's technology.

(3) The Government reserves the right to award the contract based on a noncontingent offer, prior to DHS resolution of the offeror's application for SAFETY Act designation.

Alternate II (FEB 2009). * * *

* * * * *

■ 13. Amend section 52.250–5 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a) by—

■ 1. Adding the definitions ''Block certification'' and ''Block designation'' in alphabetical order; and

■ 2. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation''.

■ The added and revised text reads as follows:

52.250–5 SAFETY Act—Equitable Adjustment.

* * * * *

SAFETY ACT—EQUITABLE ADJUSTMENT (FEB 2009)

(a) * * *

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

* * * * *

[FR Doc. E9–577 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 23, 39, and 52

[FAC 2005–30; FAR Case 2006–030; Item VI; Docket 2007–0001, Sequence 9]

RIN 9000–AK85

Federal Acquisition Regulation; FAR Case 2006–030, Electronic Products Environmental Assessment Tool (EPEAT)

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 adopt as final, without change, the interim rule published in the **Federal Register** at 72 FR 73215 on December 26, 2007. The interim rule amended the Federal Acquisition Regulation (FAR) to provide regulations for purchasing environmentally preferable products and services when acquiring personal computer products such as desktops, notebooks (also known as laptops), and monitors with use of Electronic Products Environmental Assessment Tool (EPEAT) pursuant to the Energy Policy Act of 2005 and Executive Order 13423, ''Strengthening Federal Environmental, Energy, and Transportation Management.''

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2006–030.

SUPPLEMENTARY INFORMATION:

A. Background

The EPEAT is a system to help purchasers in the public and private sectors evaluate, compare, and select desktop computers, notebooks and monitors based on their environmental attributes. The EPEAT also provides a clear and consistent set of performance criteria for the design of products, and provides an opportunity for manufacturers to secure market recognition for efforts to reduce the environmental impact of their products.

This case was opened to amend the FAR to require the use of the EPEAT Product Registry and the IEEE (Institute of Electrical and Electronics Engineers) 1680 Standard for the Environmental Assessment of Personal Computer Products in all solicitations and contracts for personal computer desktops, laptops, and monitors. On January 24, 2007, President Bush issued Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management. Section 2(h) states that the head of each Agency shall ''ensure that the agency (i) when acquiring an electronic product to meet its requirements, meets at least 95 percent of those requirements with an Electronic Product Environmental Assessment Tool (EPEAT)-registered electronic product, unless there is no EPEAT standard for such product…''.

The Councils published an interim rule on December 26, 2007 (72 FR 73215). Two respondents submitted comments.

1. One respondent fully supports the interim rule. As a taxpayer, he considers that EPEAT is a critical step in facilitating sound purchasing policy.

Response: None required.

2. The same respondent encourages DoD to expand the use of EPEAT in all COTS purchases of related equipment, even computers that are ruggedized for operational use.

Response: DoD implementation of this rule is outside the scope of this case.

3. Another respondent considers the goals of the regulation laudable, but objects to the process by which the Development Team initiated the development of EPEAT standards. The respondent objects that the Development Team was not rightly identified as a Federal Advisory Committee at its formation, and that neither the requirements of the Federal Advisory Committee Act (FACA), nor even its spirit, were met in the development of EPEAT. The respondent considers that their industry was deprived of the proper and necessary notice of the development of the EPEAT and any associated policies regarding implementation.

Response: The development of the EPEAT is not an issue in this rulemaking. Although the Councils were not involved in the development of the standards, they have reviewed these issues with the Environmental Protection Agency (EPA) and the Office of Management and Budget (OMB). The EPA has demonstrated to the satisfaction of the Councils that the Development Team was not subject to FACA, and appropriate procedures were followed for development of voluntary consensus standards. The Councils have forwarded the respondent's concerns to EPA. If the respondent has further questions with regard to the EPEAT, key EPEAT points of contact are provided on the EPEAT Website at *http://www.epeat.net/faq.aspx#21*.

4. The same respondent expresses particular concern because this rule takes a non-governmental program that was to be used voluntarily by purchasers and now mandates its use by all Federal Government agencies. The respondent also questions the urgency for issuance of an interim rule rather than a proposed rule.

Response: With regard to mandating the use of the EPEAT for Government purchases, the rule implements the Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management. Section 2(h) states that the head of each Agency shall ''ensure that the agency (i) when acquiring an electronic product to meet its requirements, meets at least 95 percent of those requirements with an Electronic Product Environmental Assessment Tool (EPEAT)-registered electronic product, unless there is no EPEAT standard for such product''.

The rule was issued as an interim rule because the Executive Order mandating use of the EPEAT standards was already in effect. Rules that implement a statute or Executive Order are generally issued as interim rules.

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 rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it mandates standards in orders for personal computer products that will be offered for sale to the Government. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

This final rule was initiated to implement Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, Section 2(h) and the IEEE (Institute of Electrical and Electronics Engineers) 1680 Standard for the Environmental Assessment of Personal Computers, for Federal use in meeting green purchasing requirements when acquiring personal computer products.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

As of June 2008, seven of the twenty-seven vendors who have registered products on the EPEAT Product Registry reported that they are small businesses. Data are not available on how many small businesses are reselling personal computer products to the Government, but according to the EPA's Office of Small Disadvantaged Business Utilization, at the time of publication of the interim rule, there were approximately 613 Service Disabled Veteran Owned Small Businesses (SDVOSBs) selling IT hardware to the Federal Government. These small businesses were not manufacturers of IT hardware, but resold IT hardware manufactured by other companies to the Federal Government. Many of the products these resellers sold could meet the IEEE 1680 Standard, and the manufacturers of these products had the option of getting these products EPEAT registered to verify that they do meet this standard.

Because manufacturers are the parties responsible for determining if their products meet the IEEE 1680 Standard or not, there will be little to no impact on small businesses selling IT products to the Federal Government, who are selling EPEAT-registered products. In addition, the EPEAT Product Registry has been designed to encourage small business manufacturer participation. There is a sliding scale for the annual EPEAT registration fee vendors pay to have their products EPEAT registered based on the annual revenue of the vendor.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 11, 23, 39, 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.* (FAR case 2006–030), 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 11, 23, 39, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 11, 23, 39, and 52 which was published in the **Federal Register** at 72 FR 73215 on December 26, 2007, is adopted as a final rule without change.

[FR Doc. E9–549 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 22, and 52

[FAC 2005–30; FAR Case 2005–012; Item VII; Docket 2006–0020; Sequence 25]

RIN 9000–AK31

Federal Acquisition Regulation; FAR Case 2005–012, Combating Trafficking in Persons

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 adopt as final, with changes, the second interim rule published in the **Federal Register** at 72 FR 46335, August 17, 2007, amending the Federal Acquisition Regulation (FAR) to implement 22 U.S.C. 7104(g). This statute requires that contracts include a provision that authorizes the department or agency to terminate the contract, if the contractor or any subcontractor engages in trafficking in persons.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2005–012.

SUPPLEMENTARY INFORMATION:

A. Background

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, as amended by TVPRA of 2005, addresses the victimization of countless men, women, and children in the United States and abroad. In order to implement the law, DoD, GSA, and NASA published a second interim rule in the **Federal Register** at 72 FR 46335, August 17, 2007 with request for comments by October 16, 2007. Five respondents submitted comments on the second interim rule. Those comments, summarized as follows, were considered by the Councils in the formation of this final rule:

1. *Applicability to Commercial Items.* Four comments were received from three different respondents regarding the applicability of the rule to commercial items.

(a) One respondent is concerned that although the FAR Matrix indicates that FAR clause 52.222–50 is not applicable to commercial items, FAR 52.212–5 includes 52.222–50 as a clause that the contracting officer may mark as being applicable to commercial items.

Response: The Councils concur with the respondent's concern and agrees to indicate in the FAR clause matrix that clause 52.222–50 is required.

(b) One respondent believes that by making the rule applicable to commercial items, the Councils misinterpreted the separate Federal crimes created under Chapter 77 of Title 18, United States Code, as providing the necessary criminal or civil penalties for the contract violations to which the Federal Acquisition Streamlining Act was meant to apply. The respondent requests the Councils to reconsider the applicability to commercial items.

Response: The Councils note that application of the rule to all contracts for supplies and services, including those for commercial items, is consistent with the broad scope of the statutory directive and is in compliance with the Federal Acquisition Streamlining Act's (FASA) provision concerning commercial contracts. Specifically, the statutory language at 22 U.S.C. 7104(g) contained no exceptions or limitations with regard to its application to Federal contracts. While FASA governs and limits the applicability of laws to commercial items, it also provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council determines that it is not in the best interest of the Federal Government to exempt commercial item contracts, then the provision of law will apply to contracts for commercial items.

(c) Another respondent asked the Councils to give further consideration to not applying the rule to commercial items (subcontracts), indicating that the application will give rise to unintended consequences and create an effect inconsistent with Federal acquisition goals.

Response: The Councils believe that the TVPRA of 2003 and 2005 reflects Congress's intent to allow for the

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

As of June 2008, seven of the twenty-seven vendors who have registered products on the EPEAT Product Registry reported that they are small businesses. Data are not available on how many small businesses are reselling personal computer products to the Government, but according to the EPA's Office of Small Disadvantaged Business Utilization, at the time of publication of the interim rule, there were approximately 613 Service Disabled Veteran Owned Small Businesses (SDVOSBs) selling IT hardware to the Federal Government. These small businesses were not manufacturers of IT hardware, but resold IT hardware manufactured by other companies to the Federal Government. Many of the products these resellers sold could meet the IEEE 1680 Standard, and the manufacturers of these products had the option of getting these products EPEAT registered to verify that they do meet this standard.

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The rule does not duplicate, overlap, or conflict with any other Federal rules.

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Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

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[FR Doc. E9–549 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 22, and 52

[FAC 2005–30; FAR Case 2005–012; Item VII; Docket 2006–0020; Sequence 25]

RIN 9000–AK31

Federal Acquisition Regulation; FAR Case 2005–012, Combating Trafficking in Persons

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 adopt as final, with changes, the second interim rule published in the **Federal Register** at 72 FR 46335, August 17, 2007, amending the Federal Acquisition Regulation (FAR) to implement 22 U.S.C. 7104(g). This statute requires that contracts include a provision that authorizes the department or agency to terminate the contract, if the contractor or any subcontractor engages in trafficking in persons.

DATES: *Effective Date*: February 17, 2009.

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1. *Applicability to Commercial Items.* Four comments were received from three different respondents regarding the applicability of the rule to commercial items.

(a) One respondent is concerned that although the FAR Matrix indicates that FAR clause 52.222–50 is not applicable to commercial items, FAR 52.212–5 includes 52.222–50 as a clause that the contracting officer may mark as being applicable to commercial items.

Response: The Councils concur with the respondent's concern and agrees to indicate in the FAR clause matrix that clause 52.222–50 is required.

(b) One respondent believes that by making the rule applicable to commercial items, the Councils misinterpreted the separate Federal crimes created under Chapter 77 of Title 18, United States Code, as providing the necessary criminal or civil penalties for the contract violations to which the Federal Acquisition Streamlining Act was meant to apply. The respondent requests the Councils to reconsider the applicability to commercial items.

Response: The Councils note that application of the rule to all contracts for supplies and services, including those for commercial items, is consistent with the broad scope of the statutory directive and is in compliance with the Federal Acquisition Streamlining Act's (FASA) provision concerning commercial contracts. Specifically, the statutory language at 22 U.S.C. 7104(g) contained no exceptions or limitations with regard to its application to Federal contracts. While FASA governs and limits the applicability of laws to commercial items, it also provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council determines that it is not in the best interest of the Federal Government to exempt commercial item contracts, then the provision of law will apply to contracts for commercial items.

(c) Another respondent asked the Councils to give further consideration to not applying the rule to commercial items (subcontracts), indicating that the application will give rise to unintended consequences and create an effect inconsistent with Federal acquisition goals.

Response: The Councils believe that the TVPRA of 2003 and 2005 reflects Congress's intent to allow for the

termination of all U.S. contracts when specified prohibited acts take place. Although the intent of the Federal Acquisition Streamlining Act and the Clinger-Cohen Act is to limit the applicability of laws to commercial items and commercially available off-the-shelf (COTS) items, these laws also provide that if a provision of law contains criminal or civil penalties, then commercial items are not to be exempted. The Councils believe the rule corresponds to these laws and the mandate of the TVPRA.

(d) The respondent further commented that if the rule's applicability to commercial items is to be retained, that it be listed in FAR 52.244–6, Subcontracts for Commercial Items.

Response: The Councils agree with the respondent's comment to add FAR 52.222–50 at 52.244–6(c)(1), requiring flow-down to subcontracts for commercial items.

2. *Exemption.* One respondent recommended creating a general exemption from the rule where the Federal Government affirmatively contracts for services to support front-line intervention activities domestically or internationally. The respondent states that many contractors that are involved in both the health and international development arena may directly or indirectly be involved in front-line intervention contracts and even advocacy programs to increase awareness of these and related activities.

Response: The Councils note the respondent's concern as it relates to ''front-line'' intervention contracts. However, the councils are not aware of any conflict that this rule may present in relation to those efforts. The terms used throughout the rule reflect the terms used in the statute. Actions taken to help trafficking victims do not violate the rule. Therefore, the Councils do not believe that an exemption is necessary and the final rule remains unchanged.

3. *Contractor Employees.* Three comments were received regarding employees.

(a) One respondent is concerned with the term ''minimal impact or involvement in contract performance'' in the definition of employee. The respondent believes that in the acquisition of commercial items (commercially available off the shelf supplies), a contractor may not know which employees had a minimal impact on contract performance. The respondent suggests that a commercial item supplier make a ''good faith determination'' regarding the minimal impact requirement.

Response: The Councils agree that the contractor should make a first good faith determination of the employee's involvement. The Councils do not agree that use of the term ''minimal impact or involvement in contract performance'' is ambiguous. The term narrows the scope of the definition of employee and leaves the determination of impact/involvement to the contractor. The Councils do not agree that a contractor cannot determine if an employee had a ''minimal impact or involvement in contract performance'' in the acquisition of commercial items. The contractor is in the best position to know and determine what role an employee plays in the performance of a contract, major or minor. The contractor is responsible for work production as well as work assignments. In the case of a violation of the clause, the contractor can determine the employee's duties under the contract and associate those duties with performance under the contract.

(b) One respondent is concerned that as written, the rule fails to achieve the contractor-accountability provisions of the TVPRA of 2005 and requests that the Councils reinsert the requirements for contractors to obtain written notification of understanding of polices and procedures to combat human trafficking.

Response: As written, the rule requires the contractor to notify its employees and take appropriate action against employees that violate policies and procedures to combat human trafficking. The Councils appreciate the respondent's concern for ensuring that contractor employees who engage in trafficking are appropriately held accountable. However, the Councils do not believe that requiring the contractor to obtain written notification of employees' understanding of policies and procedures to combat human trafficking will ensure that no violations occur. In fact, such a requirement may impose an undue and unnecessary burden on the contractor and taxpayer. The requirement for the contractor to notify its employees of the prohibited trafficking and other behaviors, as well as the actions that may be taken for violations, satisfies the requirements of 22 U.S.C. 7104(g), to hold those engaged in trafficking accountable.

(c) Two respondents are concerned that the rule is directed to contractor employees not the contractor and requests that the rule be revised to limit it to the contractor and its employees during the performance of the contact, not to employee behavior outside work.

Response: As written, the rule reflects the statutory language prohibiting severe forms of trafficking in persons or the procurement of a commercial sex act during the period of performance of the contract. The Councils believe that limiting the rule in the manner suggested by the respondent would inadequately implement the statute since employee violations are more likely to occur after working hours. Furthermore, contractor employees are often perceived as representing the Government, and their actions reflect upon the Government's integrity and ethics. Therefore, to ensure that U.S. Government contractors do not contribute to trafficking in persons, the rule requires the contractor to notify its employees (as defined in the clause) of the U.S. zero tolerance policy, and take action against those employees who violate the U.S. policy.

4. *Scope of Contractor's Obligation.* One respondent suggested that the text of the clause at FAR 52.222–50 be revised to further elaborate on the scope of the contractor's obligations regarding what actions it may take against employees and subcontractors who violate the policy.

Response: The Councils do not believe that further elaboration is necessary. The clause is clear that contractors must notify their employees regarding the policy and the actions that may be taken for violations. The clause lists examples of actions that contractors may take, but does not limit the actions to only those listed. Furthermore, the clause already provides contractors with flexibility as to what actions they may choose to impose against either employees or subcontractors in subparagraph (c)(2) by stating that the contractor shall take ''appropriate'' action.

5. *Reporting Allegations and Employment.* Three comments were received regarding the procedures for reporting allegations and employment issues.

(a) One respondent objected to the obligation in the FAR clause 52.222–50(d)(1), which requires contractors to notify the contracting officer immediately when they learn of allegations that the policy has been violated. The respondent proposed that contractors be obligated to notify only when they have ''adequate evidence'' of a violation.

Response: The Councils believes that it is important for the contracting officer to learn immediately of alleged violations of U.S. trafficking policy. Many such allegations become a subject of interest quickly, and it is important in those situations that the contracting officer be informed. The Councils further believes that the ''adequate evidence'' standard contained in FAR 22.1704(b) properly limits the

contracting officer's ability to exercise the available remedies with respect to allegations of conduct that violate U.S. policy.

(b) One respondent is concerned that the rule does not provide guidance on how employees found to have engaged in trafficking will be prevented from working on another Government contract. The respondent believes that some ''stop-gap'' measure is required until the Government deals with the investigations and prosecution issue.

Response: The Councils disagree that the rule should provide guidance on how employees found to have engaged in trafficking are to be prevented from working on another Government contract. Providing such guidance would be outside the scope of the rule. Each acquisition carries its own unique and special contract requirements and terms and conditions for which the contractor is responsible and liable. This responsibility and liability includes the contractor's hiring of responsible employees and subcontractors that meet the performance requirements, and terms and conditions specified in the acquisition. This responsibility may include the contractor's responsibility to conduct appropriate background investigations prior to hiring its employees and subcontractors.

(c) Another respondent is concerned that the rule provides the potential for wrongful discharge filings and collective bargaining issues.

Response: A contractor may need to update the employment contracts it forms (whether with unions or non-unionized employees) to reflect the anti-trafficking statute, which is intended to have an impact on the behavior of Government contractor employees.

6. *Prescriptive Language Applicability*. One respondent noted that the prescriptive language at FAR 22.1703 and 22.1704(a) provides that ''Government contracts shall prohibit contractors, contractor employees, subcontractors and subcontractor employees'' from taking the listed actions. However, the clause at FAR 52.222–50(b) is limited to ''contractor and contractor employees.'' The prescriptive language and clause language should be reconciled.

Response: It should be noted that provisions and clauses are directed to the offeror or contractor. The term ''contractor and contractor employees'' refers to the prime contractor only. When a prime contractor issues a subcontract, the clause would then be applicable to the subcontractor using the term ''contractor and contractor employees.'' However, the prescriptive language provides all conditions, requirements, and instructions for using the provision or clause and is applicable to both contractors and subcontractors. The Councils recommends that the final rule remain unchanged.

7. *Administrative Issues*. One respondent recommended several administrative changes, as follows:

(a) FAR 22.1703 uses the word ''and'' while FAR 52.222–50(b) uses the word ''or.'' This should be reconciled;

(b) Move the reference to FAR clause 52.222–50 from FAR 52.212–5(b)(24)(i) and (ii) to FAR 52.212–5(a) because the clause applies to all contracts;

(c) FAR 52.212–5(e)(1)(vii) needlessly cites a reason for listing the flow-down clause. By incorporating the clause in paragraph (e), by definition the clause flows down to subcontractors; and

(d) FAR 52.222–50(e) should be reworded to remove awkwardness.

Responses:

(a) FAR language at 22.1703(a)(2) has been changed to read ''or'' instead of ''and.'' All other conjunctions are used correctly throughout the rule.

(b) FAR clause 52.222–50 has been moved to 52.212–5(a).

(c) FAR language at 52.212–5(e)(1)(vii) has been revised to remove the reason for flow-down.

(d) FAR 52.222–50(e) has been revised to remove awkward wording of remedies.

8. *Clarification of Definitions*. Two respondents recommended further revisions regarding definitions. One respondent recommended adding a definition for ''forced labor'' as defined in the criminal statute at 18 U.S.C. § 1589, and another recommended more elaboration to the definitions of ''sex act'' and ''employee'' and offered suggested language as well.

Response: The Councils concur that a definition of ''forced labor'' should be added. The statute prohibits severe forms of trafficking in persons and, separately, forced labor. While forced labor is a severe form of trafficking in persons, as defined in 22 U.S.C. 7102, the Councils agree that defining the specific term ''forced labor'' would add more clarity. Therefore, a definition of ''forced labor'' has been added to 22.1702 and the clause at 52.222–50.

Because the FAR rule reflects the definition of ''commercial sex act'' in accordance with 22 U.S.C. 7102, the Councils believe that the statutory definition of commercial sex acts should remain as stated in the rule without further elaboration.

Lastly, a respondent requested clarifications in the definition of ''employee'' to more clearly outline what is meant by ''directly engaged'' and ''minimal impact or involvement''. The original rule issued on April 19, 2006 (71 FR 20301) used the phrase ''including all direct cost employees'' in the definition of ''employee'', similar to the language used in FAR 23.503 implementing the Drug-Free Workplace Act. The Councils subsequently removed this phrase in the second interim rule based on public comment that the phrase caused confusion since the term ''direct cost'' appeared to refer to cost-reimbursement contracts only. The phrase ''minimal impact or involvement'' is also used in the definition of ''employee'' under FAR 23.503 and is not further defined. The Councils are not aware that the lack of more definitive elaboration has caused any problems in the implementation of the drug-free workplace requirements. Also see the discussion under Paragraph 3.

9. *Facilitation of Investigations and Prosecutions*. One respondent suggested the creation of an anti-trafficking hotline that would link directly to the Department of Justice to allow contractor employees to report trafficking allegations.

Response: This comment goes beyond the statutory requirements of the Act, which requires only that contracts contain provisions allowing for termination if the contractor or subcontractor engages in conduct that violates U.S. policy on trafficking. However, the Councils recommend adding a link to the Department of State's Office to Monitor and Combat Trafficking in Persons' (DOS G/TIP) (*http://www.state.gov/g/tip*) at FAR 22.1703 for further information on human trafficking and links to other Government websites.

10. One respondent suggested making a distinction between trafficking abuses and the procurement of a commercial sex act. The respondent further states that trafficking in persons is a felony while procurement of a commercial sex act is not covered by Federal law and is treated in most states as a misdemeanor, unless it involves a child. The lack of distinction in the rule heightens confusion and becomes difficult to implement.

Response: The statute requires that the Government have the authority to terminate a contract in cases where the contractor or subcontractor engages in severe forms of trafficking in persons, or in cases involving the procurement of a commercial sex act. The rule seeks to implement both statutory directives and remains unchanged.

11. *Enforcement Issues Where Commercial Sex Acts are Legal*. One respondent was concerned that certain

types of sex acts are legal in several jurisdictions of the U.S. and in some foreign countries and urged that careful attention be given to how the remedies in this rule intersect with otherwise lawful conduct.

Response: The Councils recognize the challenges contractors face in monitoring employee actions during non-work hours. However, contractors and their employees need to understand that procuring commercial sex acts is an unacceptable behavior that carries penalties. The Councils do not believe that a change in the language to distinguish enforcement actions for ''unlawful commercial sex acts'' and ''lawful commercial sex acts'' is consistent with the statute and therefore the final rule remains unchanged.

12. *Investigation and Punishment of Violators.* One respondent submitted two comments regarding the investigation of trafficking violators.

(a) The respondent recommends revising the text to include specific procedures governing the investigation and punishment of contractors for violating the rule. The respondent also questions whether there is a requirement for the contractor to investigate if the company learns that an employee may have been involved in a commercial sex act.

Response: Violations of the rule should be handled in the same manner that the contractor handles other allegations of employee misconduct.

(b) The respondent also suggests creating a decision-tree for contracting officers attempting to apply the rule.

Response: In cases where trafficking is alleged, the FAR is clear on what actions the contracting officer may take. After making a determination in writing that adequate evidence exists to suspect any of the violations in paragraph (a) of FAR 22.1704, the contracting officer may pursue any of the remedies specified in paragraph (e) of FAR clause 52.222–50.

13. *Public Meeting.* One respondent requested that the Councils seek an active dialogue with the contractor community in developing the final rule.

Response: The Councils have solicited the public several times for comments to assist with the development of this rule. Public comments were solicited on April 16, 2006 and August 17, 2007.

This is a significant regulatory action and, therefore, was subject to review under 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 impact will be minimal unless the contractor or its employees or subcontractors engage in forms of trafficking in persons, use forced labor, or procure commercial sex acts that are illegal within the U.S. Although not considered significant, additional impact may be associated with contract performance in counties/states and locations outside the U.S. where certain commercial sex acts are legal. However, the termination authorities at 22 U.S.C. 7104(g) apply to Government contracts performed in these areas.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule contains information collection requirements. Accordingly, the Regulatory Secretariat will forward a request for approval of a new information collection requirement to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

List of Subjects in 48 CFR Parts 12, 22, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Accordingly, the interim rules published in the **Federal Register** at 71 FR 20301, April 19, 2006, and at 72 FR 46335, August 17, 2007, are adopted as a final rule with the following changes:

■ 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 22.1702 by adding, in alphabetical order, the definition ''Forced Labor'' to read as follows:

22.1702 Definitions.

* * * * *

Forced labor means knowingly providing or obtaining the labor or services of a person—

(1) By threats of serious harm to, or physical restraint against, that person or another person;

(2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) By means of the abuse or threatened abuse of law or the legal process.

* * * * *

■ 3. Amend section 22.1703 by revising the introductory paragraph; and by removing from the end of paragraph (a)(2) ''and'' and adding ''or'' in its place. The revised text reads as follows:

22.1703 Policy.

The United States Government has adopted a zero tolerance policy regarding trafficking in persons. Additional information about trafficking in persons may be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons' at *http://www.state.gov/g/tip*. Government contracts shall—

* * * * *

■ 4. Amend section 22.1704 in paragraph (b) by adding a new sentence after the first sentence to read as follows:

22.1704 Violations and remedies.

* * * * *

(b) * * * The contracting officer may take into consideration whether the contractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining the appropriate remedies. * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (a)(1) and (a)(2) as (a)(2) and (a)(3), respectively; and adding a new paragraph (a)(1);

■ c. Removing paragraph (b)(25); and redesignating paragraphs (b)(26) through (b)(42) as (b)(25) through (b)(41), respectively; and

■ d. Revising paragraph (e)(1)(viii) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2009)

(a) * * *

(1) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

____Alternate I (Aug 2007) of 52.222–50 (22 U.S.C. 7104(g)).

* * * * *

(e)(1) * * *

(viii) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

____Alternate I (Aug 2007) of 52.222–50 (22 U.S.C. 7104(g)).

* * * * *

■ 6. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(1)(iv); and removing from paragraph (a)(2)(vi) ''(DEC 2008)'' and adding ''(FEB 2009)'' in its place to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS (FEB 2009)

(a) * * *

(1) * * *

(iv) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

* * * * *

■ 7. Amend section 52.222–50 by—

■ a. Revising the date of the clause;

■ b. Adding, in alphabetical order, the definition ''Forced Labor'';

■ c. Removing from the introductory text of paragraph (e) ''render the Contractor subject to'' and adding ''result in'' in its place; and revising paragraphs (e)(1) and (e)(2); and

■ d. Adding paragraph (g) to read as follows:

52.222–50 Combating Trafficking in Persons.

* * * * *

COMBATING TRAFFICKING IN PERSONS (FEB 2009)

(a) * * *

* * * * *

Forced Labor means knowingly providing or obtaining the labor or services of a person—

(1) By threats of serious harm to, or physical restraint against, that person or another person;

(2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) By means of the abuse or threatened abuse of law or the legal process.

* * * * *

(e) * * *

(1) Requiring the Contractor to remove a Contractor employee or employees from the performance of the contract;

(2) Requiring the Contractor to terminate a subcontract;

* * * * *

(g) *Mitigating Factor.* The Contracting Officer may consider whether the Contractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining remedies. Additional information about Trafficking in Persons and examples of awareness programs can be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons at *http://www.state.gov/g/tip.*

(End of clause)

■ 8. Amend section 52.244–6 by revising the date of the clause; by redesignating paragraph (c)(1)(vii) as paragraph (c)(1)(viii); and adding a new paragraph (c)(1)(vii) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (FEB 2009)

* * * * *

(c)(1) * * *

(vii) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

* * * * *

[FR Doc. E9–548 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2005–30; FAR Case 2007–016; Item VIII; Docket 2008–0001; Sequence 3]

RIN 9000–AK89

Federal Acquisition Regulation; FAR Case 2007–016, Trade Agreements—New Thresholds

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 incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.

DATES: *Effective Date*: January 15, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2007–016.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 73 FR 10962 on February 28, 2008, to implement the biannual changes specified by the United States Trade Representative (USTR) to the trade agreements thresholds. A correction was published in the **Federal Register** at 73 FR 16747, March 28, 2008.

No comments were received by the close of the public comment period on April 28, 2008. Therefore, the Councils agreed to convert the interim rule to a final rule 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 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 dollar threshold changes are designed to keep pace with inflation and thus maintain the status quo.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule contains information collection requirements that affect the prescriptions for use of the certifications at FAR 52.225–4 (OMB Control No. 9000–0130) and FAR 52.225–6 (OMB Control No. 9000–0025) and the clauses at FAR 52.225–9 and 52.225–11 (OMB Control No. 9000–0141), which contain information collection requirements approved under the specified OMB control numbers by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* However, there is no impact on the estimated burden hours, because the threshold changes are in

(1) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

____Alternate I (Aug 2007) of 52.222–50 (22 U.S.C. 7104(g)).

* * * * *

(e)(1) * * *

(viii) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

____Alternate I (Aug 2007) of 52.222–50 (22 U.S.C. 7104(g)).

* * * * *

■ 6. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(1)(iv); and removing from paragraph (a)(2)(vi) ''(DEC 2008)'' and adding ''(FEB 2009)'' in its place to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS (FEB 2009)

(a) * * *

(1) * * *

(iv) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

* * * * *

■ 7. Amend section 52.222–50 by—

■ a. Revising the date of the clause;

■ b. Adding, in alphabetical order, the definition ''Forced Labor'';

■ c. Removing from the introductory text of paragraph (e) ''render the Contractor subject to'' and adding ''result in'' in its place; and revising paragraphs (e)(1) and (e)(2); and

■ d. Adding paragraph (g) to read as follows:

52.222–50 Combating Trafficking in Persons.

* * * * *

COMBATING TRAFFICKING IN PERSONS (FEB 2009)

(a) * * *

* * * * *

Forced Labor means knowingly providing or obtaining the labor or services of a person—

(1) By threats of serious harm to, or physical restraint against, that person or another person;

(2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) By means of the abuse or threatened abuse of law or the legal process.

* * * * *

(e) * * *

(1) Requiring the Contractor to remove a Contractor employee or employees from the performance of the contract;

(2) Requiring the Contractor to terminate a subcontract;

* * * * *

(g) *Mitigating Factor.* The Contracting Officer may consider whether the Contractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining remedies. Additional information about Trafficking in Persons and examples of awareness programs can be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons at *http://www.state.gov/g/tip.*

(End of clause)

■ 8. Amend section 52.244–6 by revising the date of the clause; by redesignating paragraph (c)(1)(vii) as paragraph (c)(1)(viii); and adding a new paragraph (c)(1)(vii) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (FEB 2009)

* * * * *

(c)(1) * * *

(vii) 52.222–50, Combating Trafficking in Persons (FEB 2009) (22 U.S.C. 7104(g)).

* * * * *

[FR Doc. E9–548 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22, 25, and 52

[FAC 2005–30; FAR Case 2007–016; Item VIII; Docket 2008–0001; Sequence 3]

RIN 9000–AK89

Federal Acquisition Regulation; FAR Case 2007–016, Trade Agreements—New Thresholds

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 incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.

DATES: *Effective Date*: January 15, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2007–016.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 73 FR 10962 on February 28, 2008, to implement the biannual changes specified by the United States Trade Representative (USTR) to the trade agreements thresholds. A correction was published in the **Federal Register** at 73 FR 16747, March 28, 2008.

No comments were received by the close of the public comment period on April 28, 2008. Therefore, the Councils agreed to convert the interim rule to a final rule without change.

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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 dollar threshold changes are designed to keep pace with inflation and thus maintain the status quo.

C. Paperwork Reduction Act

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line with inflation and maintain the status quo.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 22, 25, and 52, which was published at 73 FR 10962 on February 28, 2008, and amended at 73 FR 16747 on March 28, 2008, is adopted as a final rule without change.

[FR Doc. E9–547 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005–30; Item IX; Docket FAR–2009–0011; Sequence 1]

Federal Acquisition Regulation; Technical Amendment

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

ACTION: Final rule.

SUMMARY: This document makes an amendment to the Federal Acquisition Regulation in order to make an editorial change.

DATES: Effective Date: January 15, 2009.

FOR FURTHER INFORMATION CONTACT The FAR Secretariat, Room 4041, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FAC 2005–30, Technical Amendment.

List of Subjects in 48 CFR Part 15

Government procurement.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 15 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).

15.101–2 [Amended]

■ 2. Amend section 15.101–2 by removing from paragraph (b)(1) ''15.304(c)(3)(iv)'' andadding ''15.304(c)(3)(iii)'' in its place.

[FR Doc. E9–546 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009–0013, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–30; 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 of 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. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-30 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005-30, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT Hada Flowers, Regulatory Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005–30

Item	Subject	FAR case	Analyst
I	Federal Procurement Data System (FPDS)	2004–038	Woodson.
II	Commercially Available Off-the-Shelf (COTS) Items	2000–305	Jackson.
•III	Exemption of Certain Service Contracts from the Service Contract Act (SCA)	2001–004	Woodson.
IV	Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (Interim).	2008–003	Woodson.
V	SAFETY Act: Implementation of DHS Regulations	2006–023	Chambers.
•VI	Electronic Products Environmental Assessment Tool (EPEAT)	2006–030	Clark.
VII	Combating Trafficking in Persons	2005–012	Woodson.
VIII	Trade Agreements—New Thresholds	2007–016	Murphy.
IX	Technical Amendment		

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 2005–30 amends the FAR as specified below:

line with inflation and maintain the status quo.

List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 22, 25, and 52, which was published at 73 FR 10962 on February 28, 2008, and amended at 73 FR 16747 on March 28, 2008, is adopted as a final rule without change.

[FR Doc. E9–547 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005–30; Item IX; Docket FAR–2009–0011; Sequence 1]

Federal Acquisition Regulation; Technical Amendment

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

ACTION: Final rule.

SUMMARY: This document makes an amendment to the Federal Acquisition Regulation in order to make an editorial change.

DATES: Effective Date: January 15, 2009.

FOR FURTHER INFORMATION CONTACT The FAR Secretariat, Room 4041, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FAC 2005–30, Technical Amendment.

List of Subjects in 48 CFR Part 15

Government procurement.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 15 as set forth below:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 15 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).

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■ 2. Amend section 15.101–2 by removing from paragraph (b)(1) ''15.304(c)(3)(iv)'' andadding ''15.304(c)(3)(iii)'' in its place.

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BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009–0013, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–30; 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 of 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. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-30 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005-30, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

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LIST OF RULES IN FAC 2005–30

Item	Subject	FAR case	Analyst
I	Federal Procurement Data System (FPDS)	2004–038	Woodson.
II	Commercially Available Off-the-Shelf (COTS) Items	2000–305	Jackson.
•III	Exemption of Certain Service Contracts from the Service Contract Act (SCA)	2001–004	Woodson.
IV	Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts-Section 844 of the National Defense Authorization Act for Fiscal Year 2008 (Interim).	2008–003	Woodson.
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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 2005–30 amends the FAR as specified below: