



# Federal Register

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**Friday,  
June 18, 2004**

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**Part II**

**Department of  
Defense**

**General Services  
Administration**

**National Aeronautics  
and Space  
Administration**

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**48 CFR Chapter 1  
Federal Acquisition Regulations; Final  
Rules**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2001–24; Introduction**

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

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

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–24. 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.acqnet.gov/far>.

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

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–24 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.acqnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Incentives for Use of Performance-Based Contracting for Services (Interim)	2004–004	Wise.
II	Definitions Clause	2002–013	Parnell.
III	Procurement Lists	2003–013	Nelson.
IV	Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA).	2004–009	Goral.
V	Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs).	1999–603	Nelson.
VI	Designated Countries—New European Communities Member States	2004–008	Davis.
VII	Buy American Act—Nonavailable Articles	2003–007	Davis.
VIII	Application of Cost Principles and Procedures and Accounting for Unallowable Costs.	2002–006	Loeb.
IX	Gains and Losses, Maintenance and Repair Costs, and Material Costs	2002–008	Loeb.
X	Technical Amendments.		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–24 amends the FAR as specified below:

**Item I—Incentives for Use of Performance-Based Contracting for Services (Interim) (FAR Case 2004–004)**

This interim rule amends the FAR to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 1431 enacts Governmentwide authority to treat performance-based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance-based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance-based terminology and to conform to the language added by Section 1431. Contracting officers will be able to use FAR Part 12, Acquisition of Commercial Items, and Subpart 37.6, Performance-Based Contracting, for non-commercial services and treat these services as commercial services when specific conditions are met. Agencies

will be required to report on performance-based contracts or task orders awarded using this authority.

**Item II—Definitions Clause (FAR Case 2002–013)**

This final rule revises FAR 2.201 and the clause at 52.202–1 to clarify the applicability of FAR definitions to solicitation provisions and contract clauses. The list of definitions in 52.202–1 is removed and replaced with policy stating that when a solicitation provision or contract clause uses a word or term that is defined in the FAR, the word or term has the meaning given in FAR 2.101 at the time the solicitation was issued. Certain exceptions to this policy are listed in FAR 52.202–1.

**Item III—Procurement Lists (FAR Case 2003–013)**

This final rule amends the FAR to clarify that the Javits-Wagner O’Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.

**Item IV—Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA) (FAR Case 2004–009)**

This final rule amends FAR 9.406–2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA) to include both the Attorney General of the United States and the Secretary of Homeland Security.

This rule implements Executive Order 13286 published March 5, 2003, which amended Section 4 of Executive Order 12989 published February 15, 1996.

Debarring officials may now debar a contractor based on a determination by the Secretary of Homeland Security or the Attorney General of the United States.

**Item V—Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) (FAR Case 1999–603)**

This final rule amends the FAR in order to incorporate policies and procedures for services under Federal Supply Schedules. The rule—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;

- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;
- Adds additional information regarding e-buy, GSA's electronic quote system for the schedules program;
- Clarifies that competition shall not be sought outside the Federal Supply Schedules;
- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value), the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information.
- Adds language stating that the performance period of Blanket Purchase Agreement (BPA) established under the schedules program may cross option periods on the base contracts;
- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review;
- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;
- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders;
- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;
- Reserves the ordering procedures for Mandatory Use Schedules section;
- Clarifies the procedures for termination for cause and convenience; and
- Reorganizes and revises the subpart text for ease of use.

**Item VI—Designated Countries—New European Communities Member States (FAR Case 2004-008)**

This final rule amends the FAR to implement a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (*i.e.*, the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA). This means that in acquisitions subject to the WTO GPA, the contracting officer can accept offers of eligible products from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia without application of the Buy American Act evaluation factor.

**Item VII—Buy American Act—Nonavailable Articles (FAR Case 2003-007)**

This final rule amends FAR 25.104(a) to add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

**Item VIII—Application of Cost Principles and Procedures and Accounting for Unallowable Costs (FAR Case 2002-006)**

This final rule amends the FAR by revising FAR 31.204, Application of principles and procedures, to improve clarity and structure. The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-

price incentive contracts, terminated contracts, or indirect cost rates.

**Item IX—Gains and Losses, Maintenance and Repair Costs, and Material Costs (FAR Case 2002-008)**

This final rule amends the FAR by deleting the cost principle at FAR 31.205-24, Maintenance and repair costs, because either Cost Accounting Standards (CAS) or Generally Accepted Accounting Practices (GAAP) adequately address these costs. The rule also revises the cost principles at FAR 31.205-7, Contingencies; FAR 31.205-26, Material costs; and FAR 31.205-44, Training and education costs, by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

**Item X—Technical Amendments**

This amendment makes editorial changes at 8.003(d), 11.102, and 11.202(b), and removes sections 53.301-254 and 53.301-255.

Dated: June 10, 2004.

**Ralph J. De Stefano,**  
*Acting Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

*Number 2001-224*

Federal Acquisition Circular (FAC) 2001-24 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-24 are effective July 19, 2004, except for Items I, IV, VI, and X, which are effective June 18, 2004.

Dated: June 9, 2004.

Deidre A. Lee,  
*Director, Defense Procurement and Acquisition Policy.*

Dated: June 10, 2004.

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

Dated: June 8, 2004.

Tom Luedtke,

Assistant Administrator for Procurement,  
National Aeronautics and Space  
Administration.

[FR Doc. 04-13617 Filed 6-17-04; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 4, 12, 37, and 52

[FAC 2001-24; FAR Case 2004-004;  
Item I]

RIN 9000-AJ97

#### Federal Acquisition Regulation; Incentives for Use of Performance- Based Contracting for Services

**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 sections  
1431 and 1433 of the National Defense  
Authorization Act for Fiscal Year 2004  
(Pub. L. 108-136). Section 1431 enacts  
Governmentwide authority to treat  
performance-based contracts or task  
orders for services as commercial items  
if certain conditions are met, and  
requires agencies to report on  
performance-based contracts or task  
orders awarded using this authority.  
Section 1433 amends the definition of  
commercial item to add specific  
performance-based terminology and to  
conform to the language added by  
section 1431.

**DATES:** *Effective Date:* June 18, 2004.

*Comment Date:* Interested parties  
should submit comments to the FAR  
Secretariat at the address shown below  
on or before August 17, 2004, to be  
considered in the formulation of a final  
rule.

**ADDRESSES:** Submit printed comments  
to General Services Administration,  
FAR Secretariat (MVA), 1800 F Street,  
NW., Room 4035, ATTN: Laurie Duarte,  
Washington, DC 20405. Submit  
electronic comments via the Internet to  
the U.S. Government's Web site at <http://www.regulations.gov>, or to GSA's e-mailbox at [farcase.2004-004@gsa.gov](mailto:farcase.2004-004@gsa.gov).

Please submit comments only and cite  
FAC 2001-24, FAR case 2004-004, in  
all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The  
FAR Secretariat at (202) 501-4755, for  
information pertaining to status or  
publication schedules. For clarification  
of content, contact Ms. Julia Wise,  
Procurement Analyst, at (202) 208-  
1168. Please cite FAC 2001-24, FAR  
case 2004-004.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 1431 of the National Defense  
Authorization Act for Fiscal Year 2004  
(Pub. L. 108-136) enacts  
Governmentwide authority to treat  
certain performance-based contracts or  
task orders for services as commercial  
items if the—

(1) Value of the contract or task order  
is estimated not to exceed \$25,000,000;

(2) Contract or task order sets forth  
specifically each task to be performed  
and, for each task—

a. Defines the task in measurable,  
mission-related terms;

b. Identifies the specific end products  
or output to be achieved; and

c. Contains firm, fixed prices for  
specific tasks to be performed or  
outcomes to be achieved; and

(3) Source of the services provides  
similar services to the general public  
under terms and conditions similar to  
those offered to the Federal  
Government.

Implementation of section 1431 also  
requires agencies to collect and  
maintain reliable data sufficient to  
identify the contracts or task orders  
treated as contracts for commercial  
items using the authority of this section.  
The data will be collected using the  
Federal Procurement Data System-Next  
Generation (FPDS-NG). By November  
24, 2006, OMB will be required to report  
to the Committees on Governmental  
Affairs and on Armed Services of the  
Senate and the Committees on  
Government Reform and on Armed  
Services of the House of Representatives  
on the implementation of Section 1431.  
The report shall include data on the use  
of such authority both Governmentwide  
and for each department and agency.  
The authority of section 1431 expires on  
November 24, 2013, ten years after  
enactment. Section 1433 also amends  
the definition of commercial services to  
conform to the language added by  
section 1431 by inserting performance-  
based terms for clarification. The  
implementation of sections 1431 and  
1433 will—

• Revise the commercial items  
definition in FAR 2.101 and 52.202-1;

• Add a new record requirement for  
reporting commercial performance-  
based contracts or task orders to FAR  
4.601;

• Incorporate the conditions for using  
FAR Part 12 for any performance-based  
contract or task order for services in  
FAR 12.102; and

• Add performance-based terms as  
required by section 1433, and

• Add a cross reference to FAR  
12.102(g) in FAR 37.601.

The reference to the definition of  
performance-based contracting in the  
proposed language is a change from the  
statutory requirement. Section 1431  
provides for a contract or task order to  
be treated as a contract for commercial  
items if: "The contract or task order sets  
forth specifically each task to be  
performed and for each task—defines  
the task in measurable, mission-related  
terms; identifies the specific end  
products or output to be achieved; and  
contains firm, fixed prices for specific  
tasks to be performed or outcomes to be  
achieved." However, the two  
requirements of law regarding how  
tasks, products, or outputs are described  
are being implemented by requiring  
contracts or task orders to meet the  
definition of performance-based  
contracting at FAR 2.101. This language  
and that at 12.102 paragraphs (g)(1)(iv)  
and (v) and in (g)(2) are to ensure  
consistency with the overarching policy  
in FAR 37.601 that applies to  
performance-based contracting for  
services.

Section 1431 recommends that the  
Federal Procurement Data System  
(FPDS) or other reporting mechanism  
collect this data. The FPDS is the only  
Governmentwide system that can  
potentially collect this data. This system  
currently tracks performance-based  
contracts and task orders awarded. A  
petition was made to the FPDS-NG  
Change Control Board to incorporate a  
change to report data on services treated  
as commercial items under the  
conditions stated in section 1431 when  
using performance-based contracting  
techniques.

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

##### B. Regulatory Flexibility Act

The changes may have a significant  
economic impact on a substantial  
number of small entities within the  
meaning of the Regulatory Flexibility  
Act, 5 U.S.C. 601 *et seq.*, because we  
have changed procedures for award and

administration of contracts or task orders enabling the Government to treat certain services as commercial items when the contract or task order—

- Is entered into on or before November 24, 2013;
- Has a value of \$25 million or less;
- Meets the definition of performance-based contracting at FAR 2.101;

- Includes a quality assurance surveillance plan;
- Includes performance incentives where appropriate;
- Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
- Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

Therefore, we have prepared an Initial Regulatory Flexibility Analysis that is summarized as follows:

The rule (1) amends the commercial items definition in FAR 2.101 and 52.202-1; (2) adds a new record requirement for reporting commercial performance-based contracts or task orders to FAR 4.601; (3) incorporates the conditions for using FAR Part 12 for any performance-based contract or task order for services in FAR 12.102; and (4) adds performance-based terms as required by section 1433, and (5) adds a cross reference to FAR 12.102(g) in FAR 37.601. The rule will apply to all large and small entities that seek award of performance-based service contracts that are not commercial services as defined by FAR 2.101 and 52.202-1. Although these changes were made to implement section 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (P.L. 108-136), the impact of these changes are positive and may provide (1) new contracting opportunities to small businesses that otherwise would not have been available if their services did not meet the definition of commercial item in FAR 2.101 and 52.202-1; and (2) contracting flexibility for the acquisition community when using PBC techniques.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 4, 12, 37, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-24, FAR case 2004-004), 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.*

### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) which became effective November 24, 2003. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 2, 4, 12, 37, and 52

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 12, 37, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 37, and 52 is revised 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) in the definition “Commercial item” by revising the introductory text of paragraph (6) to read as follows:

#### 2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

*Commercial item* means—

\* \* \* \* \*

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—

\* \* \* \* \*

### PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.601 by adding paragraph (d)(6) to read as follows:

#### 4.601 Record requirements.

\* \* \* \* \*

(d) \* \* \*

(6) Contracts or task orders treated as commercial items pursuant to 12.102(g).

\* \* \* \* \*

### PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.102 by adding paragraph (g) to read as follows:

#### 12.102 Applicability.

\* \* \* \* \*

(g)(1) In accordance with section 14313 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) (41 U.S.C. 437), the contracting officer also may use Part 12 for any acquisition performance-based contracting for services that does not meet the definition of commercial item in FAR 2.101, if the contract or task order—

(i) Is entered into on or before November 24, 2013;

(ii) Has a value of \$25 million or less;

(iii) Meets the definition of performance-based contracting at FAR 2.101;

(iv) Includes a quality assurance surveillance plan;

(v) Includes performance incentives where appropriate;

(vi) Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and

(vii) Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

(2) In exercising the authority specified in paragraph (g)(1) of this section, the contracting officer should tailor paragraph (a) of the clause at FAR 52.212-4 as may be necessary to ensure the contract's remedies adequately protect the Government's interests.

### PART 37—SERVICE CONTRACTING

■ 5. Revise section 37.601 to read as follows:

#### 37.601 General.

(a) Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed or outcomes achieved meet contract standards. Performance-based contracts or task orders—

(1) Describe the requirements in terms of results required rather than the methods of performance of the work;

(2) Use measurable performance standards (*i.e.*, in terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a));

(3) Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407); and

(4) Include performance incentives where appropriate.

(b) See 12.102(g) for the use of Part 12 procedures for performance-based contracting.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.202–1 by revising the date of the clause and the introductory text of paragraph (c)(6) of the clause to read as follows:

### 52.202–1 Definitions.

\* \* \* \* \*

Definitions (Jun 2004)

\* \* \* \* \*

(c) \* \* \*

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—

\* \* \* \* \*

[FR Doc. 04–13618 Filed 6–17–04; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2 and 52

[FAC 2001–24; FAR Case 2002–013; Item II]

RIN 9000–AJ83

#### Federal Acquisition Regulation; Definitions Clause

**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 clarify the applicability of FAR definitions to solicitation provisions and contract clauses.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. Please cite FAC 2001–24, FAR case 2002–013.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the FAR to delete the list of definitions from the clause at FAR 52.202–1 and to replace the list with general policy regarding the applicability of FAR definitions to solicitation provisions and contract clauses.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 2988, January 21, 2004. Three comments were received from one respondent. The first two comments requested clarification as to whether the second and third sentences of FAR 2.201 and Alternate I of the clause at FAR 52.202–1 are being deleted. This text has been deleted, and the proposed and final rules reflect this. The third comment suggested correcting the Web address in FAR 52.202–1. We agree. The Web address has been changed. The proposed rule has been converted to a final rule with this change and other minor editorial changes.

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 principle of how definitions apply is already expressed in FAR Part 2. Since this principle is not as clearly expressed

in the FAR Part 52 clauses, the rule repeats the principle in a clause to clarify this issue for offerors and contractors.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Parts 2 and 52

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

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

■ 1. The authority citation for 48 CFR parts 2 and 52 is revised 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. Revise section 2.201 to read as follows:

### 2.201 Contract clause.

Insert the clause at 52.202–1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Revise section 52.202–1 to read as follows:

### 52.202–1 Definitions.

As prescribed in 2.201, insert the following clause:

Definitions (Jul 2004)

(a) When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—

(1) The solicitation, or amended solicitation, provides a different definition;

(2) The contracting parties agree to a different definition;

(3) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or

(4) The word or term is defined in FAR Part 31, for use in the cost principles and procedures.

(b) The FAR Index is a guide to words and terms the FAR defines and shows where each

definition is located. The FAR Index is available via the Internet at <http://www.acqnet.gov> at the end of the FAR, after the FAR Appendix.

(End of clause)

#### 52.213-4 [Amended]

■ 4. Amend section 52.213-4 by removing "(May 2004)" from the clause heading and from paragraph (a)(2)(vi) of the clause and adding "(Jul 2004)" in their place.

■ 5. In section 52.244-6, revise the date of the clause; and in paragraph (a) of the clause revise the definition "Commercial item" to read as follows:

#### 52.244-6 Subcontracts for Commercial Items.

\* \* \* \* \*

Subcontracts for Commercial Items (Jul 2004)

(a) \* \* \*

*Commercial item* has the meaning contained in Federal Acquisition Regulation 2.101, Definitions.

\* \* \* \* \*

[FR Doc. 04-13619 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8 and 52

[FAC 2001-24; FAR Case 2003-013; Item III]

RIN 9000-AJ82

#### Federal Acquisition Regulation; Procurement Lists

**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 clarify the point that the Javits-Wagner-O'Day (JWOD) program becomes a mandatory source when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled. The rule also updates the address for the Committee for Purchase From People Who Are Blind or Severely Disabled.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-24, FAR case 2003-013. The TTY Federal Relay Number for further information is 1-800-877-8973.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the FAR to clarify that the Javits-Wagner-O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee). A Web site for the "Procurement List" is added, and the address for the Committee has also been updated. These changes are necessary to correct confusion and avoid misuse of mandatory source authority.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 69262, December 11, 2003. One source, the International Safety Equipment Association (ISEA), submitted comments on the proposed rule. The Councils concluded that the proposed rule should be converted to a final rule, with only an editorial change at FAR 8.714 to update address information and a clarification at FAR clause 52.208-9. A summary of the comments and the disposition follows:

*Comment:* The respondent recommended that a new provision be added to FAR 8.002 exempting personal protective equipment from requirements of that part.

*Response:* The Councils do not concur. The proposed change is outside the scope of the FAR case. Further, the FAR does not provide for particular product exemptions. Decisions to add a product or service to the Procurement List are made on a case-by-case basis by the Committee for Purchase From People Who Are Blind or Severely Disabled, following the notice-and-comment rulemaking provisions of the Administrative Procedure Act in accordance with 41 U.S.C. 47(a)(2).

*Comment:* The respondent recommended that the JWOD program provide for exceptions similar to those provided at FAR 8.606 for purchases from Federal Prison Industries (FPI).

*Response:* The Councils do not concur. First, the proposed change is outside the scope of the FAR case. Secondly, 41 U.S.C. 47(d) identifies the Committee as the entity responsible for

rules and regulations necessary to carry out the JWOD program. The Committee's statute and regulations do not provide for FPI-like exceptions, but do provide for purchase exceptions appropriate for JWOD, which are implemented in the FAR.

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

##### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule clarifies that the Javits-Wagner-O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services are added to the Procurement List. While we have made changes to clarify when a supply or service becomes a mandatory JWOD source, we have not substantively changed procedures for award and administration of contracts.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

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

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

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

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

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

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

■ 2. Amend section 8.002 by revising paragraphs (a)(1)(iv) and (a)(2)(i) to read as follows:

**8.002 Priorities for use of Government supply sources.**

(a) \* \* \*

(1) \* \* \*

(iv) Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

\* \* \* \* \*

(2) *Services.* (i) Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

\* \* \* \* \*

**8.004 [Amended]**

■ 3. Amend section 8.004 by removing from the first sentence the words "available from" and adding "on the Procurement List maintained by" in its place.

■ 4. Amend section 8.703 by revising the first paragraph to read as follows:

**8.703 Procurement list.**

The Committee maintains a Procurement List of all supplies and services required to be purchased from JWOD participating nonprofit agencies. The Procurement List may be accessed at: <http://www.jwod.gov/procurementlist>. Questions concerning whether a supply item or service is on the Procurement List may be submitted at Internet e-mail address [info@jwod.gov](mailto:info@jwod.gov) or referred to the Committee offices at the following address and telephone number: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, VA 22202-3259, (703) 603-7740.

\* \* \* \* \*

■ 5. Amend section 8.714 by revising paragraph (b) to read as follows:

**8.714 Communications with the central nonprofit agencies and the Committee.**

\* \* \* \* \*

(b) Any matter requiring referral to the Committee shall be addressed to the Executive Director of the Committee, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, VA 22202-3259.

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

■ 6. Amend section 52.208-9 by revising the date of the clause, by redesignating paragraph (c) as paragraph (a) and revising the first sentence of paragraph (a) to read as follows:

**52.208-9 Contractor Use of Mandatory Sources of Supply or Services.**

\* \* \* \* \*

Contractor Use of Mandatory Sources of Supply or Services (Jul 2004)

(a) Certain supplies or services to be provided under this contract for use by the Government are required by law to be obtained from nonprofit agencies participating in the program operated by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) under the Javits-Wagner-O'Day Act (JWOD) (41 U.S.C. 48). \* \* \*

\* \* \* \* \*

[FR Doc. 04-13620 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Part 9**

[FAC 2001-24; FAR Case 2004-009; Item IV]

RIN 9000-AJ98

**Federal Acquisition Regulation; Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA)**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA) to include both the Attorney General and the Secretary of Homeland Security, pursuant to Executive Order 13286 published March 5, 2003.

**DATES:** *Effective Date:* June 18, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Craig Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001-24, FAR case 2004-009.

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

This final rule amends FAR 9.406-2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with INA to include both the Attorney General and the Secretary of Homeland Security pursuant to Executive Order (E.O.) 13286 published March 5, 2003. E.O. 13286 amended Section 4 of E.O. 12989, published February 15, 1996, by adding, along with the Attorney General, the Secretary of Homeland Security as the responsible authority for determining when a contractor is not in compliance with the INA. Pursuant to this amendment, it is necessary to revise FAR 9.406-2(b)(2) to reflect this 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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 9 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-24, FAR case 2004-009), 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 Part 9**

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 9 as set forth below:

**PART 9—CONTRACTOR QUALIFICATIONS**

■ 1. The authority citation for 48 CFR part 9 is revised to read as follows:

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

■ 2. Amend section 9.406-2 by revising paragraph (b)(2) to read as follows:



**9.406-2 Causes for debarment.**

\* \* \* \* \*

(b) \* \* \*

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings.

\* \* \* \* \*

■ 3. Amend section 9.406-4 by revising the third sentence of paragraph (b) to read as follows:

**9.406-4 Period of debarment.**

\* \* \* \* \*

(b) \* \* \* Debarments under 9.406-2(b)(2) may be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. \* \* \*

\* \* \* \* \*

[FR Doc. 04-13621 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 8, 38, and 53**

[FAC 2001-24; FAR Case 1999-603; Item V]

RIN 9000-AJ63

**Federal Acquisition Regulation;  
Federal Supply Schedules Services  
and Blanket Purchase Agreements  
(BPAs)**

**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 policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-24, FAR case 1999-603. The TTY Federal Relay Number for further information is 1-800-877-8973.

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

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 19294, April 18, 2003, with request for comments. Thirty-four respondents submitted public comments. A discussion of the comments is provided below. The differences between the proposed rule and final rule are addressed in the Councils' response to comments 1 through 9. General changes made to FAR Subpart 8.4 by this rulemaking are provided in the list below. Of particular note, the rule—

- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value), the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information;

- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review; and
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders.

In addition, the rule also—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;

- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;

- Adds additional information regarding e-Buy, GSA's electronic quote system for the schedules program;

- Clarifies that competition shall not be sought outside the Federal Supply Schedules;

- Adds language stating that the performance period of Blanket Purchase Agreements (BPA) established under the schedules program may cross option periods on the base contracts;

- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;

- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;

- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;

- Reserves the ordering procedures for Mandatory Use Schedules section;

- Clarifies the procedures for termination for cause and convenience; and

- Reorganizes and revises the subpart text for ease of use.

**B. Summary and Discussion of  
Significant Public Comments**

1. *Comment: Ordering offices need not seek further competition.* Several respondents stated that the phrase "Ordering offices shall not seek further competition" is confusing or misleading. In addition, the requirement that agencies need not seek further competition, synopses the requirement, or consider small business programs when placing orders or issuing Blanket Purchase Agreements under the schedule ordering procedures did not seem fair.

*Councils' response:* Partially concur. The Councils determined that although the language was clear, an additional explanation would be added. The Councils clarified the language at 8.404(a) to indicate that ordering activities need not seek competition outside of the Federal Supply Schedules. Agencies must follow the procedures of Subpart 8.4 to ensure compliance with the requirement for full and open competition as implemented under the Multiple Award Schedules program.

2. *Comment: Use of the term "appropriate number."* Concern was raised regarding the use of the term "appropriate number" at FAR 8.404-1(d)(1) and FAR 8.404-2(c)(2)(ii) of the proposed rule. The term "appropriate number" pertains to the number of

contractors to be considered or contacted as part of the order evaluation and placement process. In general, the respondents were concerned that the language was too vague and did not provide sufficient guidance as to the number of contractors that should be considered or contacted. Further, there was a recommendation that “an appropriate number” be changed to state a specific number or delete the requirement.

*Councils’ response:* The Councils partially concur. The rule identifies factors that ordering activities might consider in determining the appropriate number of additional schedule contractors to consider. The intent is to leave it to the discretion of the contracting officer to determine the number of additional contractors to be considered or contacted. The recommendation that a specific number of contractors be identified in place of an “appropriate number” would unnecessarily limit the discretion of the contracting officer. A final note, proposed rule FAR 8.404–1(d)(1) is renumbered in the final rule as FAR 8.405–1(d)(1). Proposed rule FAR 8.404–2(c)(2)(ii) is renumbered FAR 8.405–2(c)(3)(i) in the final rule.

3. *Comment: Price reductions.* A respondent commented that the ordering procedures should be revised to remind agencies that price reductions could be requested at any time for any size order.

*Councils’ response:* Concur. Language was added to the final rule at FAR 8.404(d) reminding agencies that they can ask for price reductions prior to placing an order.

4. *Comment: Quality Assurance Surveillance Plans.* Several respondents raised concerns regarding the guidance on the use of Quality Assurance Surveillance Plans (QASP). The respondents felt that QASP should be required for all service orders regardless of whether the Statement of Work (SOW) is performance based or not. In addition, another respondent indicated that the proposed rule contains two different sections pertaining to QASP, which is redundant and confusing (see 8.404–2(c)(1) and (c)(4) of the proposed rule).

*Councils’ response:* The Councils generally agreed with the observation that the mention of QASPs in two different places was, in fact, redundant and confusing. As a result, the rule was revised to include a reference to FAR Subpart 37.6. See FAR 8.405–2(b) of the final rule. With regard to the suggestion that QASPs be required for all service orders regardless of type, the Councils rejected this suggestion. There is no

FAR requirement that QASPs be developed for all service orders. The FAR only requires the development of QASPs for performance-based service orders.

5. *Comment: Blanket Purchase Agreements.* Several respondents commented that the requirement for each agency to be a signatory when establishing a multi-agency BPA was confusing.

*Councils’ response:* The Councils agreed that the requirement for each agency using a multi-agency BPA to be a signatory to the BPA was unnecessary. The Councils revised the language to state that the agencies and their requirements must be identified in the BPA. The purpose of this change was two-fold; it eliminated the requirement that each agency actually sign the BPA while at the same time ensuring that the planned potential users of the BPA are reflected by including the user agencies’ estimated requirements. Additionally, including information regarding the various agencies’ estimated requirements fosters better pricing and enhances competition.

The Councils also added a new paragraph at 8.405–3(c) regarding the duration of BPAs. Over time, it has become apparent that additional guidance was needed on the length of BPAs. The underlying schedule contracts include a clause that allows BPAs to extend for the life of the contract. The supplemental guidance in the final rule advises agencies that a BPA should generally run for no longer than five years. However, BPAs may exceed five years to meet agency program requirements. The guidance further provides that a BPA can extend beyond the current term of the contract so long as there are option periods remaining on the underlying contract that, if exercised, will cover the BPA’s period of performance. The rule requires that an ordering activity review the BPA at least once per year.

6. *Comment: Small business.* Several respondents raised concerns regarding the ability of agencies to focus their consideration of contractors and their competitions for orders on small businesses. In particular, the Federal Office of Small Disadvantaged Business Utilization (OSDBU) Directors Interagency Council commented that the rule of two should apply to schedule orders and that all orders between \$2,500 and \$100,000 be restricted to small businesses. In addition, another respondent stated that the language regarding the applicability of Part 19 of the FAR needed to be clarified. Another respondent suggested that a 10 percent price evaluation advantage be given to

small businesses when agencies are placing orders.

*Councils’ response:* The Councils do not concur with the comment that the rule of two should apply to orders under the schedules program. Further, the Councils do not concur with the suggestion that all orders under \$100,000 be set-aside for small business. The Councils concluded that these suggestions would fundamentally alter the schedules program in terms of the efficiency and effectiveness of the overall program by increasing the administrative burden on agencies without having demonstrated that the changes would, in fact, benefit small business over the long term. In addition, the basic statutory authority for the program provides that contracts and orders be open to all sources. Creating a set-aside for all such orders would be inconsistent with the program’s basic operating authorities. In addition, the Councils, for the same general reasons, do not agree with the request for a 10 percent evaluation preference for small business.

However, the Councils did examine ways in which the rule could foster even greater small business participation than that which already exists. The Councils added language at FAR 8.405–5(b) that provides that “Ordering activities may consider socioeconomic status when identifying contractor(s) for consideration or competition for award of an order or BPA.” This language provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders.

The Councils also clarified the language at FAR 8.405–5(a) regarding the applicability of FAR Part 19 and added language that reminds agencies that when reporting an order for purposes of credit towards their socioeconomic goals, the ordering agency may only take credit if the awardee meets the size standard that corresponds to the work performed.

7. *Comments: Documentation requirements.* Several respondents indicated that the documentation requirements at FAR 8.404–6 of the proposed rule were confusing.

*Councils’ response:* The Councils agreed with these comments and revised the rule accordingly. The Councils moved the documentation for services requiring a statement of work from the end of the section to the beginning consolidating minimum documentation requirements for services under FAR 8.405–7(a) and (b) of the final rule. In addition, the sole source document

requirements were placed in a separate heading at FAR 8.405–6 of the final rule. A final note, proposed rule FAR 8.404–6 is renumbered in the final rule as FAR 8.405–7.

8. *Comment: Inspection and acceptance.* One respondent raised significant concerns regarding the inspection and acceptance guidance at FAR 8.405–3 of the proposed rule. The respondent commented that the new provisions regarding the inspection rights of the Government for services were overly broad and unduly burdensome. The provisions provided in part that the Government had the right to inspect services performed at any time and any place, including the contractor's facilities. The respondent indicated that inspection and acceptance are typically negotiated based on the type of service to be provided and are not left so open-ended in the Government's favor.

*Councils' response:* The Councils essentially agreed with the respondent's observations. As a result, the Councils revised the final rule at FAR 8.406–2(b) to state that inspection shall be in accordance with the contract and order terms. The order terms can be negotiated as part of a Quality Assurance Surveillance Plan for an order.

9. *Comment: Remedies for inadequate performance.* One respondent raised several concerns regarding the remedies for inadequate performance guidance included in the proposed rule. In cases where a contractor fails to correct earlier nonperformance of an order, FAR 8.405–4(c) of the proposed rule provided, in part, that the contracting office could reduce the order price to reflect the contractor nonperformance. The respondent commented that FAR 8.405–4(c) of the proposed rule would inappropriately grant agencies the unilateral right to reduce the order price without any mechanisms by which the contracting officer determines the amount of any such price reduction or any mechanism by which the contractor could challenge such a price reduction.

*Councils' response:* The Councils agreed with this comment. The Councils replaced the term "inadequate performance" in the heading with "nonconformance" and revised the rule at FAR 8.406–3(a) to state that the ordering activity shall take appropriate action for nonconformance in accordance with the inspection and acceptance clause of the contract as supplemented by the order.

10. *Comment: Outline factors to consider for services.* Section 8.404–1(c) outlines factors to consider when comparing schedule contractors, which

mainly apply to supplies. Recommend that a factor be added for services.

*Councils' response:* Do not concur. The language of section 8.405–1(c) is sufficient for purposes of a best value evaluation of basic services such as repair, maintenance, and installation. Section 8.405–1 lists various factors as examples of what may be considered in determining best value. The list is written to be inclusive and not exclusive. Therefore, agencies have the discretion to consider any other factor that may be important to their best value decision. In addition, the ordering procedures for services requiring a statement of work require that agencies include the evaluation criteria for selection in the Request for Quotation. Under these ordering procedures, the agencies have the discretion to develop the evaluation criteria that will best meet their needs in determining best value for their requirements.

11. *Comment: Other direct costs.* One respondent commented that the ordering procedures should include guidance regarding the acquisition and evaluation of other direct costs as part of an order.

*Councils' response:* The Councils agree that this is an area that may need additional guidance. However, GSA is currently reviewing the structure for other direct costs under its contracts and will be developing additional training and guidance in this area for agencies. Upon completion of this review, the Councils may revisit the issue as a follow-up to the final rule.

12. *Comment: Time-and-materials and labor-hour orders.* Several respondents raised concerns regarding the lack of clear guidance on the use of time-and-materials or labor-hour orders. The general comment was that the rule failed to fully address whether an order could be issued on a time-and-material or labor-hour basis and the circumstances when the use of such order types was appropriate. In addition, one respondent raised a concern regarding a potential conflict between the FAR and GSA ordering procedures regarding the type of contract that may be used for commercial items. Yet another respondent commented that time-and-materials contracts should not be used unless impossible to estimate accurately the extent or duration of the work or anticipate costs reasonably when placing the order.

*Councils' response:* The Councils agree with the comments that this area requires additional guidance. Currently, the Councils are working on a number of FAR cases to implement various sections of the Services Acquisition

Reform Act of 2003 (Title XIV of Public Law 108–136). The rule resulting from one of these FAR cases will implement Section 1432 (Authorization of additional commercial contracts types), which addresses the use of time-and-material and labor-hour contracts for commercial services. When Section 1432 has been implemented, the Councils will address the time-and-materials/labor-hour issue as it pertains to the Multiple Award Schedules Program as a follow-up to the final rule.

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

### C. Regulatory Flexibility Act

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

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 604.

1. Statement of need for, and objectives of, the rule. The Multiple Award Schedules (MAS) program, directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. For much of its history, the MAS focused on the sale of products. In recent years, however, GSA has sought to facilitate broad access to service contractors. This general transformation of the schedules program has coincided with a trend in Federal procurement towards acquiring managed solutions from the marketplace. The amount of services acquisition from the MAS has grown steadily as agencies increasingly turn to schedule contractors to meet their needs.

To assist its customers, GSA developed "special ordering procedures" that address the acquisition of services. However, because FAR Subpart 8.4 has remained primarily geared towards products, agencies have been inconsistent in adhering to certain basic acquisition requirements when buying services off the MAS, such as in their use of statements of work, effective pricing of orders, application of competition, and proper documentation of award decisions.

The purpose of the rule is to significantly improve the application of acquisition basics on MAS purchases for services and reinforce sound MAS practices generally. To achieve this result, the rule is amending the Federal Acquisition Regulation to incorporate policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

2. Summary of significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA),

a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments. An Initial Regulatory Flexibility Analysis was not performed because the proposed rule did not have significant economic impact on a substantial number of small entities. Thirty-four respondents submitted public comments in response to the proposed rule. None of the comments received identified or addressed any adverse impact on small businesses.

However, the final rule does make an amendment to the FAR that could foster even greater small business participation than that which already exists. The amendment provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders.

The rule also reminds agencies that when reporting an order for purposes of credit towards their socio-economic goals, the ordering agency may only take credit if the awardee meets the size standard that corresponds to the work performed. This final rule is intended to be beneficial in expanding small business access to an increased number of orders. We see no negative impact on small businesses.

3. Description of, and an estimate of the number of, small entities to which the rule will apply or an explanation of why no such estimate is available. This rule will apply to all large and small business concerns under the Federal Supply Schedule Program. Although the rule pertains to internal Government procedures, it may increase the number of orders for supplies and services placed by the Government with small business concerns. The net effect of the rule is unknown at this time.

As of fiscal year 2003, according to statistical data maintained by GSA's Federal Supply Service, out of a population of 14,169 national scope schedule contracts, 11,300 Federal Supply Schedule contracts are in effect with small business concerns. Approximately 80 percent of the schedule contractors are small business concerns. In fiscal year 2003, small business schedule contractors received approximately \$9 billion, or 36 percent of total schedule sales. Whereas, in 2002, 8,963 small businesses held contracts out of a population of 11,426 national scope schedule contracts. Small business sales in 2002 were \$7.2 billion, or 34 percent of total schedule sales. The number of small businesses holding Federal Supply Schedules increased 26 percent and sales increased 26.4 percent.

The procedures give small business contractors the opportunity to fairly compete within the broader universe of schedule contractors. These changes ensure that ordering activities have the broad discretion and effective and flexible business solutions to meet agency requirements.

4. Description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. There are no projected reporting, recordkeeping, or other compliance requirements.

5. Description of steps the agency has taken to minimize significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected. There are no known significant alternatives that will accomplish the objectives of the rule. No alternatives were proposed during the public comment period. The impact of the rule is unknown at this time. The rule could benefit small business concerns holding schedule contracts by permitting those concerns to compete for awards that offer products and services that meet the needs of the requiring agency.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

#### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Parts 8, 38, and 53

Government procurement.

Dated: June 10, 2004.

Ralph De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 38, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 38, and 53 is revised to read as follows:

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

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

■ 2. Revise Subpart 8.4 to read as follows:

##### Subpart 8.4—Federal Supply Schedules

Sec.

8.401 Definitions.

8.402 General.

8.403 Applicability.

8.404 Use of Federal Supply Schedules.

8.405 Ordering procedures for Federal Supply Schedules.

8.405-1 Ordering procedures for supplies, and services not requiring a statement of work.

8.405-2 Ordering procedures for services requiring a statement of work.

8.405-3 Blanket purchase agreements (BPAs).

8.405-4 Price reductions.

8.405-5 Small business.

8.405-6 Sole source justification and approval.

8.405-7 Documentation.

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8.406 Ordering activity responsibilities.

8.406-1 Order placement.

8.406-2 Inspection and acceptance.

8.406-3 Remedies for nonconformance.

8.406-4 Termination for cause.

8.406-5 Termination for the Government's convenience.

8.406-6 Disputes.

#### 8.401 Definitions.

As used in this subpart—

*Ordering activity* means an activity that is authorized to place orders, or establish blanket purchase agreements (BPA), against the General Services Administration's (GSA) Multiple Award Schedule contracts. A list of eligible ordering activities is available at <http://www.gsa.gov/schedules> (click "For Customers Ordering from Schedules" and then "Eligibility to Use GSA Sources").

*Multiple Award Schedule (MAS)* means contracts awarded by GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, at varying prices. The primary statutory authority for the MAS program is derived from both Title III of the Administrative Services Act of 1949 (41 U.S.C. 251, *et seq.*) and Title 40 U.S.C., Public Buildings, Property and Works.

*Requiring agency* means the agency needing the supplies or services.

*Schedules e-Library* means the on-line source for GSA and VA Federal Supply Schedule contract award information. Schedules e-Library may be accessed at <http://www.gsa.gov/elibrary>.

*Special Item Number (SIN)* means a group of generically similar (but not identical) supplies or services that are intended to serve the same general purpose or function.

#### 8.402 General.

(a) The Federal Supply Schedule program is also known as the GSA Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies (see 8.002) with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Indefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time. GSA may delegate certain responsibilities to other agencies (*e.g.*, GSA has delegated authority to the VA to procure medical supplies under the VA Federal Supply Schedules program). Orders issued under the VA

Federal Supply Schedule program are covered by this subpart. Additionally, the Department of Defense (DoD) manages similar systems of schedule-type contracting for military items; however, DoD systems are not covered by this subpart.

(b) GSA schedule contracts require all schedule contractors to publish an "Authorized Federal Supply Schedule Pricelist" (pricelist). The pricelist contains all supplies and services offered by a schedule contractor. In addition, each pricelist contains the pricing and the terms and conditions pertaining to each Special Item Number that is on schedule. The schedule contractor is required to provide one copy of its pricelist to any ordering activity upon request. Also, a copy of the pricelist may be obtained from the Federal Supply Service by submitting a written e-mail request to [schedules.infocenter@gsa.gov](mailto:schedules.infocenter@gsa.gov) or by telephone at 1-800-488-3111. This subpart, together with the pricelists, contain necessary information for placing delivery or task orders with schedule contractors. In addition, the GSA schedule contracting office issues Federal Supply Schedules publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics. Ordering activities may request copies of schedules publications by contacting the Centralized Mailing List Service through the Internet at <http://www.gsa.gov/cmlls>, submitting written e-mail requests to [CMLS@gsa.gov](mailto:CMLS@gsa.gov); or by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing List Service (7SM), P.O. Box 6477, Fort Worth, TX 76115. Copies of GSA Form 457 may also be obtained from the above-referenced points of contact.

(c)(1) GSA offers an on-line shopping service called "GSA Advantage!" through which ordering activities may place orders against Schedules. (Ordering activities may also use GSA Advantage! to place orders through GSA's Global Supply System, a GSA wholesale supply source, formerly known as "GSA Stock" or the "Customer Supply Center." FAR Subpart 8.4 is not applicable to orders placed through the GSA Global Supply System.) Ordering activities may access GSA Advantage! through the GSA Federal Supply Service Home Page (<http://www.gsa.gov/fss>) or the GSA Federal Supply Schedule Home Page at <http://www.gsa.gov/schedules>.

(2) GSA Advantage! enables ordering activities to search specific information (*i.e.*, national stock number, part

number, common name), review delivery options, place orders directly with Schedule contractors and pay for orders using the Governmentwide commercial purchase card.

(d) *e-Buy*, GSA's electronic Request for Quotation (RFQ) system, is a part of a suite of on-line tools which complement GSA Advantage!. *E-Buy* allows ordering activities to post requirements, obtain quotes, and issue orders electronically. Ordering activities may access *e-Buy* at <http://www.ebuy.gsa.gov>. For more information or assistance on either GSA Advantage! or *e-Buy*, contact GSA at Internet e-mail address [gsa.advantage@gsa.gov](mailto:gsa.advantage@gsa.gov).

(e) For more information or assistance regarding the Federal Supply Schedule Program, review the following Web site: <http://www.gsa.gov/schedules>. Additionally, for on-line training courses regarding the Schedules Program, review the following Web site: <http://fsstraining.gsa.gov>.

(f) For administrative convenience, an ordering activity contracting officer may add items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if—

(1) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (*e.g.*, publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (Part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19));

(2) The ordering activity contracting officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;

(3) The items are clearly labeled on the order as items not on the Federal Supply Schedule; and

(4) All clauses applicable to items not on the Federal Supply Schedule are included in the order.

#### 8.403 Applicability.

(a) Procedures in this subpart apply to—

(1) Individual orders for supplies or services placed against Federal Supply Schedules contracts; and

(2) BPAs established against Federal Supply Schedule contracts.

(b) GSA may establish special ordering procedures for a particular schedule. In this case, that schedule will specify those special ordering procedures. Unless otherwise noted, special ordering procedures established for a Federal Supply Schedule take

precedence over the procedures in 8.405.

#### 8.404 Use of Federal Supply Schedules.

(a) *General*. Parts 13 (except 13.303–2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202–1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts (but see 8.405–5). BPAs and orders placed against a MAS, using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3)). Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsise the requirement.

(b) The contracting officer, when placing an order or establishing a BPA, is responsible for applying the regulatory and statutory requirements applicable to the agency for which the order is placed or the BPA is established. The requiring agency shall provide the information on the applicable regulatory and statutory requirements to the contracting officer responsible for placing the order.

(c) *Acquisition planning*. Orders placed under a Federal Supply Schedule contract—

(1) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39);

(2) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)); and

(3) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

(d) *Pricing*. Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (*e.g.*, installation, maintenance, and repair). GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405–2(d). By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has

concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

#### **8.405 Ordering procedures for Federal Supply Schedules.**

Ordering activities shall use the ordering procedures of this section when placing an order or establishing a BPA for supplies or services. The procedures in this section apply to all schedules.

##### **8.405-1 Ordering procedures for supplies, and services not requiring a statement of work.**

(a) Ordering activities shall use the procedures of this subsection when ordering supplies and services that are listed in the schedule contracts at a fixed price for the performance of a specific task, where a statement of work is not required (e.g., installation, maintenance, and repair).

(b) *Orders at or below the micro-purchase threshold.* Ordering activities may place orders at, or below, the micro-purchase threshold with any Federal Supply Schedule contractor that can meet the agency's needs. Although not required to solicit from a specific number of schedule contractors, ordering activities should attempt to distribute orders among contractors.

(c) *Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold.* Ordering activities shall place orders with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, an ordering activity shall consider reasonably available information about the supply or service offered under MAS contracts by surveying the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors (see 8.405-5). In addition to price, when determining best value, the ordering activity may consider, among other factors, the following:

- (1) Past performance.
- (2) Special features of the supply or service required for effective program performance.
- (3) Trade-in considerations.
- (4) Probable life of the item selected as compared with that of a comparable item.
- (5) Warranty considerations.
- (6) Maintenance availability.

(7) Environmental and energy efficiency considerations.

(8) Delivery terms.

(d) *Orders exceeding the maximum order threshold.* Each schedule contract has a maximum order threshold established on a SIN-by-SIN basis. Although a price reduction may be sought at any time, this threshold represents the point where, given the dollar value of the potential order, the ordering activity shall seek a price reduction. In addition to following the procedures in paragraph (c) of this section and before placing an order that exceeds the maximum order threshold or establishing a BPA (see 8.405-3), ordering activities shall—

(1) Review the pricelists of additional schedule contractors (the GSA Advantage! on-line shopping service can be used to facilitate this review);

(2) Based upon the initial evaluation, seek price reductions from the schedule contractor(s) considered to offer the best value (see 8.404(d)); and

(3) After seeking price reductions (see 8.405-4), place the order with the schedule contractor that provides the best value. If further price reductions are not offered, an order may still be placed.

##### **8.405-2 Ordering procedures for services requiring a statement of work.**

(a) *General.* Ordering activities shall use the procedures in this subsection when ordering services priced at hourly rates as established by the schedule contracts. The applicable services will be identified in the Federal Supply Schedule publications and the contractor's pricelists.

(b) *Statements of Work (SOWs).* All Statements of Work shall include the work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements (e.g., security clearances, travel, special knowledge). To the maximum extent practicable, agency requirements shall be performance-based statements (see subpart 37.6).

(c) *Request for Quotation procedures.* The ordering activity must provide the Request for Quotation (RFQ), which includes the statement of work and evaluation criteria (e.g., experience and past performance), to schedule contractors that offer services that will meet the agency's needs. The RFQ may be posted to GSA's electronic RFQ system, e-Buy (see 8.402(d)).

(1) *Orders at, or below, the micro-purchase threshold.* Ordering activities may place orders at, or below, the micro-purchase threshold with any Federal Supply Schedule contractor that

can meet the agency's needs. The ordering activity should attempt to distribute orders among contractors.

(2) *For orders exceeding the micro-purchase threshold, but not exceeding the maximum order threshold.* (i) The ordering activity shall develop a statement of work, in accordance with 8.405-2(b).

(ii) The ordering activity shall provide the RFQ (including the statement of work and evaluation criteria) to at least three schedule contractors that offer services that will meet the agency's needs.

(iii) The ordering activity should request that contractors submit firm-fixed prices to perform the services identified in the statement of work.

(3) *For proposed orders exceeding the maximum order threshold or when establishing a BPA.* In addition to meeting the requirements of 8.405-2(c)(2), the ordering activity shall—

(i) Provide the RFQ (including the statement of work and evaluation criteria) to additional schedule contractors that offer services that will meet the needs of the ordering activity. When determining the appropriate number of additional schedule contractors, the ordering activity may consider, among other factors, the following:

(A) The complexity, scope and estimated value of the requirement.

(B) The market search results.

(ii) Seek price reductions.

(4) The ordering activity shall provide the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it.

(d) *Evaluation.* The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors. The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable. Place the order, or establish the BPA, with the schedule contractor that represents the best value (see 8.404(d)). After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

##### **8.405-3 Blanket purchase agreements (BPAs).**

(a)(1) *Establishment.* Ordering activities may establish BPAs under any schedule contract to fill repetitive needs for supplies or services. BPAs may be

established with one or more schedule contractors. The number of BPAs to be established is within the discretion of the ordering activity establishing the BPAs and should be based on a strategy that is expected to maximize the effectiveness of the BPA(s). In determining how many BPAs to establish, consider—

- (i) The scope and complexity of the requirement(s);
- (ii) The need to periodically compare multiple technical approaches or prices;
- (iii) The administrative costs of BPAs; and
- (iv) The technical qualifications of the schedule contractor(s).

(2) Establishment of a single BPA, or multiple BPAs, shall be made using the same procedures outlined in 8.405-1 or 8.405-2. BPAs shall address the frequency of ordering, invoicing, discounts, requirements (*e.g.* estimated quantities, work to be performed), delivery locations, and time.

(3) When establishing multiple BPAs, the ordering activity shall specify the procedures for placing orders under the BPAs.

(4) Establishment of a multi-agency BPA against a Federal Supply Schedule contract is permitted if the multi-agency BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.

(b) *Ordering from BPAs*—(1) *Single BPA*. If the ordering activity establishes one BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.

(2) *Multiple BPAs*. If the ordering activity establishes multiple BPAs, before placing an order exceeding the micro-purchase threshold, the ordering activity shall—

(i) Forward the requirement, or statement of work and the evaluation criteria, to an appropriate additional number of BPA holders, as established in the BPA ordering procedures; and

(ii) Evaluate the responses received, make a best value determination (see 8.404(d)), and place the order with the BPA holder that represents the best value.

(3) *BPAs for hourly rate services*. If the BPA is for hourly rate services, the ordering activity shall develop a statement of work for requirements covered by the BPA. All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

(c) *Duration of BPAs*. BPAs generally should not exceed five years in length, but may do so to meet program requirements. Contractors may be

awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.

(d) *Review of BPAs*. (1) The ordering activity that established the BPA shall review it at least once a year to determine whether—

(i) The schedule contract, upon which the BPA was established, is still in effect;

(ii) The BPA still represents the best value (see 8.404(d)); and

(iii) Estimated quantities/amounts have been exceeded and additional price reductions can be obtained.

(2) The ordering activity shall document the results of its review.

#### 8.405-4 Price reductions.

In addition to seeking price reductions before placing an order exceeding the maximum order threshold (see 8.405-1(d)), or in conjunction with the annual BPA review, there may be other reasons to request a price reduction. For example, ordering activities should seek a price reduction when the supply or service is available elsewhere at a lower price, or when establishing a BPA to fill recurring requirements. The potential volume of orders under BPAs, regardless of the size of individual orders, offers the opportunity to secure greater discounts. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order.

#### 8.405-5 Small business.

(a) Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business

schedule contractor(s). GSA Advantage! and Schedules e-Library at <http://www.gsa.gov/fss> contain information on the small business representations of Schedule contractors.

(c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

#### 8.405-6 Sole source justification and approval.

Orders placed under Federal Supply Schedules are exempt from the requirements in Part 6. However, ordering activities shall—

(a) Procure sole source requirements under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraph (b) of this section; and

(b) Prepare sole source justifications using the information at 6.303-2, modified to cite that the acquisition is conducted under the authority of Section 201 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 501).

(1) For proposed orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, the ordering activity contracting officer may solicit from one source, if the ordering activity contracting officer determines that the circumstances deem only one source is reasonably available (*e.g.*, urgency, exclusive licensing agreement, industrial mobilization). The contracting officer shall approve the justification unless a higher approval level is established in accordance with agency procedures.

(2) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$500,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(3) For a proposed order exceeding \$500,000, but not exceeding \$10 million, the competition advocate for the procuring activity, designated pursuant to 6.501, or an official described in 6.304(a)(3) or (a)(4) must approve the justification. This authority is not delegable.

(4) For a proposed order exceeding \$10 million but not exceeding \$50 million, the head of the procuring activity or an official described in 6.304(a)(3)(i) or (ii) shall approve the

justification. This authority is not delegable.

(5) For a proposed order exceeding \$50 million, the official described in 6.304(a)(4) shall approve the justification. This authority is not delegable, except as provided in 6.304(a)(4).

#### 8.405-7 Documentation.

(a) *Minimum documentation.* The ordering activity shall document—

(1) The contracts considered, noting the contractor from which the supply or service was purchased;

(2) A description of the supply or service purchased;

(3) The amount paid; and

(4) If applicable, the circumstances and rationale for restricting consideration of schedule contractors to fewer than that required in 8.405-1 or 8.405-2 (see 8.405-6). Justifications for such restrictions may include—

(i) Only one source is capable of responding due to the unique or specialized nature of the work;

(ii) The new work is a logical follow-on to an existing order provided that the original order was placed in accordance with 8.405-1 or 8.405-2 (excluding orders placed previously under sole source requirements);

(iii) The item is peculiar to one manufacturer. A brand name item, available on various schedule contracts, is an item peculiar to one manufacturer; or

(iv) An urgent and compelling need exists and following the ordering procedures would result in unacceptable delays.

(b) *Additional documentation for services.* In addition to the documentation requirements of paragraph (a) of this section, when acquiring services using the procedures at 8.405-2, the ordering office shall also document—

(1) The evaluation methodology used in selecting the contractor to receive the order;

(2) The rationale for any tradeoffs in making the selection;

(3) The price reasonableness determination required by 8.405-2(d); and

(4) The rationale for using other than—

(i) A firm-fixed price order; or

(ii) A performance-based order.

#### 8.405-8 Payment.

Agencies may make payments for oral or written orders by any authorized means, including the Governmentwide commercial purchase card.

#### 8.406 Ordering activity responsibilities.

##### 8.406-1 Order placement.

Ordering activities may place orders orally (except for services requiring a statement of work (SOW)) or use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order supplies or services from schedule contracts. The ordering activity shall place an order directly with the contractor in accordance with the terms and conditions of the pricelists (see 8.402(b)). Prior to placement of the order, the ordering activity shall ensure that the regulatory and statutory requirements of the requiring agency have been applied. Orders shall include the following information in addition to any information required by the schedule contract:

(a) Complete shipping and billing addresses.

(b) Contract number and date.

(c) Agency order number.

(d) F.o.b. delivery point; *i.e.*, origin or destination.

(e) Discount terms.

(f) Delivery time or period of performance.

(g) Special item number or national stock number.

(h) A statement of work for services, when required, or a brief, complete description of each item (when ordering by model number, features and options such as color, finish, and electrical characteristics, if available, must be specified).

(i) Quantity and any variation in quantity.

(j) Number of units.

(k) Unit price.

(l) Total price of order.

(m) Points of inspection and acceptance.

(n) Other pertinent data; *e.g.*, delivery instructions or receiving hours and size-of-truck limitation.

(o) Marking requirements.

(p) Level of preservation, packaging, and packing.

##### 8.406-2 Inspection and acceptance.

(a) *Supplies.* (1) Consignees shall inspect supplies at destination except when—

(i) The schedule contract indicates that mandatory source inspection is required by the schedule contracting agency; or

(ii) A schedule item is covered by a product description, and the ordering activity determines that the schedule contracting agency's inspection assistance is needed (based on the ordering volume, the complexity of the supplies, or the past performance of the supplier).

(2) When the schedule contracting agency performs the inspection, the ordering activity will provide two copies of the order specifying source inspection to the schedule contracting agency. The schedule contracting agency will notify the ordering activity of acceptance or rejection of the supplies.

(3) Material inspected at source by the schedule contracting agency, and determined to conform with the product description of the schedule, shall not be reinspected for the same purpose. The consignee shall limit inspection to kind, count, and condition on receipt.

(4) Unless otherwise provided in the schedule contract, acceptance is conclusive, except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(b) *Services.* The ordering activity has the right to inspect all services in accordance with the contract requirements and as called for by the order. The ordering activity shall perform inspections and tests as specified in the order's quality assurance surveillance plan in a manner that will not unduly delay the work.

##### 8.406-3 Remedies for nonconformance.

(a) If a contractor delivers a supply or service, but it does not conform to the order requirements, the ordering activity shall take appropriate action in accordance with the inspection and acceptance clause of the contract, as supplemented by the order.

(b) If the contractor fails to perform an order, or take appropriate corrective action, the ordering activity may terminate the order for cause or modify the order to establish a new delivery date (after obtaining consideration, as appropriate). Ordering activities shall follow the procedures at 8.406-4 when terminating an order for cause.

##### 8.406-4 Termination for cause.

(a)(1) An ordering activity contracting officer may terminate individual orders for cause. Termination for cause shall comply with FAR 12.403, and may include charging the contractor with excess costs resulting from repurchase.

(2) The schedule contracting office shall be notified of all instances where an ordering activity contracting officer has terminated for cause an individual order to a Federal Supply Schedule contractor, or if fraud is suspected.

(b) If the contractor asserts that the failure was excusable, the ordering activity contracting officer shall follow the procedures at 8.406-6, as appropriate.

(c) If the contractor is charged excess costs, the following apply:



(1) Any repurchase shall be made at as low a price as reasonable, considering the quality required by the Government, delivery requirement, and administrative expenses. Copies of all repurchase orders, except the copy furnished to the contractor or any other commercial concern, shall include the notation:

Repurchase against the account of \_\_\_\_ [insert contractor's name] under Order \_\_\_\_ [insert number] under Contract \_\_\_\_ [insert number].

(2) When excess costs are anticipated, the ordering activity may withhold funds due the contractor as offset security. Ordering activities shall minimize excess costs to be charged against the contractor and collect or set-off any excess costs owed.

(3) If an ordering activity is unable to collect excess repurchase costs, it shall notify the schedule contracting office after final payment to the contractor.

(i) The notice shall include the following information about the terminated order:

(A) Name and address of the contractor.

(B) Schedule, contract, and order number.

(C) National stock or special item number(s), and a brief description of the item(s).

(D) Cost of schedule items involved.

(E) Excess costs to be collected.

(F) Other pertinent data.

(ii) The notice shall also include the following information about the purchase contract:

(A) Name and address of the contractor.

(B) Item repurchase cost.

(C) Repurchase order number and date of payment.

(D) Contract number, if any.

(E) Other pertinent data.

(d) Only the schedule contracting officer may modify the contract to terminate for cause any, or all, supplies or services covered by the schedule contract. If the schedule contracting officer has terminated any supplies or services covered by the schedule contract, no further orders may be placed for those items. Orders placed prior to termination for cause shall be fulfilled by the contractor, unless terminated for the convenience of the Government by the ordering activity contracting officer.

#### **8.406-5 Termination for the Government's convenience.**

(a) An ordering activity contracting officer may terminate individual orders for the Government's convenience. Terminations for the Government's convenience shall comply with FAR 12.403.

(b) Before terminating orders for the Government's convenience, the ordering activity contracting officer shall endeavor to enter into a "no cost" settlement agreement with the contractor.

(c) Only the schedule contracting officer may modify the schedule contract to terminate any, or all, supplies or services covered by the schedule contract for the Government's convenience.

#### **8.406-6 Disputes.**

(a) *Disputes pertaining to the performance of orders under a schedule contract.* (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) *Disputes pertaining to the terms and conditions of schedule contracts.* The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) *Appeals.* Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

(d) *Alternative dispute resolution.* The contracting officer should use the alternative dispute resolution (ADR) procedures, to the maximum extent practicable (see 33.204 and 33.214).

#### **PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING**

■ 3. Revise section 38.000 to read as follows:

##### **38.000 Scope of part.**

This part prescribes policies and procedures for contracting for supplies and services under the Federal Supply Schedule program, which is directed and managed by the General Services Administration (see Subpart 8.4, Federal Supply Schedules, for additional information). GSA may delegate certain responsibilities to other agencies (e.g., GSA has delegated authority to the Department of Veterans Affairs (VA) to procure medical supplies under the VA Federal Supply Schedules Program). The VA Federal Supply Schedules

Program is covered by this subpart. Additionally, the Department of Defense manages a similar system of schedule contracting for military items; however, the Department of Defense systems are not a part of the Federal Supply Schedule program.

■ 4. Amend section 38.101 by revising paragraph (a) to read as follows:

##### **38.101 General.**

(a) The Federal Supply Schedule program, pursuant to 41 U.S.C. 259(b)(3)(A), provides Federal agencies with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time, for delivery within a stated geographic area such as the 48 contiguous states, the District of Columbia, Alaska, Hawaii, and overseas. The schedule contracting office issues Federal Supply Schedule publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics.

\* \* \* \* \*

#### **PART 53—FORMS**

##### **53.213 [Amended]**

■ 5. Amend section 53.213 in paragraph (f)(4) by removing "8.405-2" and adding "8.406-1" in its place.

[FR Doc. 04-13622 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

#### **DEPARTMENT OF DEFENSE**

##### **GENERAL SERVICES ADMINISTRATION**

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

##### **48 CFR Parts 22, 25, and 52**

[FAC 2001-24; FAR Case 2004-008; Item VI]

RIN 9000-AJ96

##### **Federal Acquisition Regulation; Designated Countries—New European Communities Member States**

**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 a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (i.e., the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA).

**DATES:** *Effective Date:* June 18, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-24, FAR case 2004-008.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

As of May 1, 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia have joined the EC. The EC has notified the other WTO GPA parties of its intention that the WTO GPA is binding on the new EC Member States as of May 1, 2004. The USTR has determined under the Trade Agreements Act that suppliers from these countries are eligible to participate in U.S. Government procurement under the terms and conditions of the WTO GPA (69 FR 25654, May 7, 2004). Therefore, these countries have been added to the list of designated countries at FAR 25.003, 52.225-5, and 52.225-11, as well as the list of countries subject to the WTO GPA at FAR 22.1503 and 52.222-19. Corresponding changes have also been made to the clause dates in the list of clauses at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

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 does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities

concerning the affected FAR Parts 22, 25, and 52 in accordance with 5 U.S.C. 610.

**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 22, 25, and 52**

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**  
*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 25, and 52 is revised 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 22.1503 by revising paragraph (b)(4) to read as follows:

**22.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.**

\* \* \* \* \*

(b) \* \* \*

(4) Aruba, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom and the anticipated value of the acquisition is \$175,000 or more (see 25.403(b)).

\* \* \* \* \*

**PART 25—FOREIGN ACQUISITION**

**25.003 Definitions.**

■ 3. Amend section 25.003 in the definition “Designated country” by adding, in alphabetical order, the countries “Cyprus”, “Czech Republic”, “Estonia”, “Hungary”, “Latvia”, “Lithuania”, “Malta”, “Poland”, “Slovak Republic”, and “Slovenia”.

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

**52.212-5 [Amended]**

■ 4. Amend section 52.212-5 by revising the date of the clause to read “(Jun 2004)”; and by removing “(Jan 2004)” from paragraphs (b)(15) and (b)(24) of the clause and adding “(Jun 2004)” in their place.

**52.213-4 [Amended]**

■ 5. Amend section 52.213-4 by revising the date of the clause to read “(Jun 2004)”; and by removing “(Jan 2004)” from paragraph (b)(1)(i) of the clause and adding “(Jun 2004)” in its place.

■ 6. Amend section 52.222-19 by revising the date of the clause and paragraph (a)(4) of the clause to read as follows:

**52.222-19 Child Labor—Cooperation with Authorities and Remedies.**

\* \* \* \* \*

**Child Labor—Cooperation With Authorities and Remedies—(Jun 2004)**

(a) \* \* \*

(4) Aruba, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom and the anticipated value of the acquisition is \$175,000 or more.

\* \* \* \* \*

**52.225-5 [Amended]**

■ 7. Amend section 52.225-5 by revising the date of the clause to read “(Jun 2004)”; and in paragraph (a) of the clause, in the definition “Designated country”, by adding, in alphabetical order, the countries “Cyprus”, “Czech Republic”, “Estonia”, “Hungary”, “Latvia”, “Lithuania”, “Malta”, “Poland”, “Slovak Republic”, and “Slovenia”.

**52.225-11 [Amended]**

■ 8. Amend section 52.225-11 by revising the date of the clause to read “(Jun 2004)”; and in paragraph (a) of the clause, in the definition “Designated country”, by adding, in alphabetical order, the countries “Cyprus”, “Czech Republic”, “Estonia”, “Hungary”, “Latvia”, “Lithuania”, “Malta”, “Poland”, “Slovak Republic”, and “Slovenia”.

[FR Doc. 04-13623 Filed 6-17-04; 8:45 am]

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Part 25**

[FAC 2001-24; FAR Case 2003-007; Item VII]

RIN 9000-AJ72

**Federal Acquisition Regulation; Buy  
American Act—Nonavailable Articles**

**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 add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality.

**DATES:** Effective Date: July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-24, FAR case 2003-007.

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

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 54296, September 16, 2003. The proposed rule amended FAR 25.104(a), adding certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality.

The Councils received two responses to the proposed rule. One respondent opposed the rule because she does not think that the "American public" needs or wants these items. She believes that if we do not produce these items in the United States, then we should do without them. The Councils nonconcur with this comment. The Defense Logistics Agency has provided support for the need for these items and demonstrated non-availability. The Buy American Act does not require that we

"do without" items that are domestically nonavailable.

The second respondent fully supported the proposed rule. In addition, they provided a list of additional food items that are nonavailable in the United States. Evaluation of this additional list is outside the scope of this case.

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 items being added to the list are not available from domestic sources.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 25**

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,***Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 25 as set forth below:

**PART 25—FOREIGN ACQUISITION**

■ 1. The authority citation for 48 CFR part 25 is revised to read as follows:

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

■ 2. Amend section 25.104 in paragraph (a) by adding, in alphabetical order, the articles "Bamboo shoots," "Goat hair canvas," "Grapefruit sections, canned," "Modacrylic fur ruff," and "Water chestnuts," to read as follows:

**25.104 Nonavailable articles.**

(a) \* \* \*  
 \* \* \* \* \*  
 Bamboo shoots  
 \* \* \* \* \*  
 Goat hair canvas  
 Grapefruit sections, canned  
 \* \* \* \* \*

Modacrylic fur ruff.

\* \* \* \* \*

Water chestnuts.

\* \* \* \* \*

[FR Doc. 04-13624 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Part 31**

[FAC 2001-24; FAR Case 2002-006; Item VIII]

RIN 9000-AJ65

**Federal Acquisition Regulation;  
Application of Cost Principles and  
Procedures and Accounting for  
Unallowable Costs**

**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 revise FAR 31.204, Application of principles and procedures, to improve clarity and structure.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Advisor, at (202) 501-0650. Please cite FAC 2001-24, FAR case 2002-006.

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

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at (68 FR 28108) on May 22, 2003, with request for comments. The rule proposed to amend FAR 31.204, Application of principles and procedures, and FAR 31.201-6, Accounting for unallowable costs. Nine respondents submitted comments; however, no comments related to FAR 31.204. Therefore, the Councils concluded that the proposed rule should be converted to a final rule without changes.

The proposed FAR rule also included proposed revisions to FAR 31.201-6, Accounting for unallowable costs. Due to significant changes made as a result of public comments received, the Councils have decided that the proposed revisions to FAR 31.201-6 will be published as a second proposed rule in a **Federal Register** notice under new FAR case 2004-006.

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. Public Comments

There were no public comments received on section 31.204.

#### C. 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. For FY 2003, only 2.4 % of all contract actions were cost contracts awarded to small business.

#### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Part 31

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

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

■ 1. The authority citation for 48 CFR part 31 is revised to read as follows:

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

■ 2. Amend section 31.204 in the first sentence of paragraph (a) by removing “shall be allowed” and adding “are

allowable” in its place; by revising paragraph (b); and by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

#### 31.204 Application of principles and procedures.

\* \* \* \* \*

(b)(1) For the following subcontract types, costs incurred as reimbursements or payments to a subcontractor are allowable to the extent the reimbursements or payments are for costs incurred by the subcontractor that are consistent with this part:

(i) Cost-reimbursement.

(ii) Fixed-price incentive.

(iii) Price redeterminable (*i.e.*, fixed-price contracts with prospective price redetermination and fixed-ceiling-price contracts with retroactive price redetermination).

(2) The requirements of paragraph (b)(1) of this section apply to any tier above the first firm-fixed-price subcontract or fixed-price subcontract with economic price adjustment provisions.

(c) Costs incurred as payments under firm-fixed-price subcontracts or fixed-price subcontracts with economic price adjustment provisions or modifications thereto, for which subcontract cost analysis was performed are allowable if the price was negotiated in accordance with 31.102.

\* \* \* \* \*

[FR Doc. 04-13625 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

#### DEPARTMENT OF DEFENSE

#### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 31

[FAC 2001-24; FAR Case 2002-008; Item IX]

RIN 9000-AJ69

#### Federal Acquisition Regulation; Gains and Losses, Maintenance and Repair Costs, and Material Costs

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by deleting the cost principle regarding maintenance and repair costs, and revising the cost principles regarding contingencies, material costs, and training and education costs. The rule revises the cost principles by improving clarity and structure, and removing unnecessary and duplicative language. The revisions are intended to amend the FAR regarding contract cost principles and procedures in light of the evolution of generally accepted accounting principles (GAAP), the advent of acquisition reform, and experience gained from implementation of the FAR regarding contract cost principles and procedures.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb at (202) 501-0650. Please cite FAC 2001-24, FAR case 2002-008.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 40466, July 7, 2003, with request for comments. Three respondents submitted comments on the proposed FAR rule. A discussion of the comments related to FAR 31.205-24 and 31.205-26 are provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with minor changes to the proposed rule. Differences between the proposed rule and final rule are discussed in Section B, Comment 2, below.

In addition to the above, the proposed FAR rule also included proposed revisions to FAR 31.205-16, Gains and losses on disposition or impairment of depreciable property or other capital assets. Due to significant changes made as a result of public comments received, the Councils have decided that the proposed revisions to the FAR 31.205-16 cost principle will be published as a second proposed rule in a **Federal Register** notice under FAR case 2004-005.

##### B. Public Comments

*FAR 31.205-24, Maintenance and Repair Costs*

1. *Comment:* The respondent agrees that the cost principle can be removed from the FAR.

*Councils' response:* Concur.

*FAR 31.205–26, Material Costs*

2. *Comment:* One respondent agreed with the deletion of the FAR 31.205–26 wording as proposed because generally accepted accounting principles (GAAP) adequately cover the topic. A second respondent was concerned with the deletions in paragraphs (a) and (c) that deal with the allowability of material costs and the allowability of reasonable adjustments between book and physical inventory. The second respondent was concerned that the part of the FAR that delineates allowable versus unallowable cost would omit these statements of material cost allowability; the respondent believes these statements should be retained to avoid confusion and disputes.

*Councils' response:* Partially concur. The Councils generally believe that affirmative statements of allowability are not value-added in a cost principle. For this reason, the Councils do not believe it is necessary to retain the last sentence in paragraph (a), which simply states that material costs are allowable subject to the requirements of paragraphs (b) through (e) of the cost principle. The Councils recognize that there are instances in which it is desirable to retain the coverage if users might apply another cost principle and improperly disallow a particular type of cost. However, the Councils do not believe this situation exists for FAR 31.205–26.

The current paragraph (c) requires that adjustments for differences in physical and book inventories relate to the period of contract performance. The Councils had recommended deleting this provision and, thereby, relying upon GAAP. However, based on the public input, it appears there are significant concerns that reliance solely upon GAAP could result in potential disputes. The Councils, therefore, now believe that the language in paragraph (c) should be retained. The Councils recognize that this provision provides protection to both the contractor and the Government by specifically permitting reasonable adjustments for inventory differences while also requiring that such adjustments relate to the period of contract performance.

3. *Comment:* A respondent noted that reference to FAR 31.205–26(e) in paragraph (k) of FAR 31.205–11, Depreciation, and in FAR 15.208, Submission, modification, revision, and withdrawal of proposals, needs to be revised to reflect the reordering and renumbering of the FAR 31.205–26 cost principle.

*Councils' response:* Since the Councils have reinstated paragraph (c),

as noted in the response to Comment 1, above, the original paragraph numbering for paragraph (e) is retained and there is no need to revise FAR 31.205–11 or FAR 15.208. Notwithstanding, the Councils note that paragraph (k) of FAR 31.205–11 was deleted by FAC 2001–18, dated December 11, 2003.

**C. Regulatory Planning and Review**

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.

**D. 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. For fiscal year 2003, only 2.4 percent of all contract actions were cost contracts awarded to small businesses.

**E. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

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

■ 1. The authority citation for 48 CFR part 31 is revised to read as follows:

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

■ 2. In section 31.205–7, revise the last sentence in paragraph (c)(2) to read as follows:

**31.205–7 Contingencies.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \* (See, for example, 31.205–6(g) and 31.205–19.)

**31.205–24 [Removed and Reserved]**

■ 3. Remove and reserve section 31.205–24.

■ 4. Revise section 31.205–26 to read as follows:

**31.205–26 Material costs.**

(a) Material costs include the costs of such items as raw materials, parts, subassemblies, components, and manufacturing supplies, whether purchased or manufactured by the contractor, and may include such collateral items as inbound transportation and in-transit insurance. In computing material costs, the contractor shall consider reasonable overruns, spoilage, or defective work (unless otherwise provided in any contract provision relating to inspecting and correcting defective work).

(b) The contractor shall—

(1) Adjust the costs of material for income and other credits, including available trade discounts, refunds, rebates, allowances, and cash discounts, and credits for scrap, salvage, and material returned to vendors; and

(2) Credit such income and other credits either directly to the cost of the material or allocate such income and other credits as a credit to indirect costs. When the contractor can demonstrate that failure to take cash discounts was reasonable, the contractor does not need to credit lost discounts.

(c) Reasonable adjustments arising from differences between periodic physical inventories and book inventories may be included in arriving at costs; provided such adjustments relate to the period of contract performance.

(d) When materials are purchased specifically for and are identifiable solely with performance under a contract, the actual purchase cost of those materials should be charged to the contract. If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable.

(e) Allowance for all materials, supplies and services that are sold or transferred between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of cost incurred in accordance with this subpart. However, allowance may be at price when—

(1) It is the established practice of the transferring organization to price interorganizational transfers at other

than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control; and

(2) The item being transferred qualifies for an exception under 15.403-1(b) and the contracting officer has not determined the price to be unreasonable.

(f) When a commercial item under paragraph (e) of this subsection is transferred at a price based on a catalog or market price, the contractor—

(1) Should adjust the price to reflect the quantities being acquired; and

(2) May adjust the price to reflect the actual cost of any modifications necessary because of contract requirements.

**31.205-44 [Amended]**

■ 5. Amend section 31.205-44 in paragraph (f) by removing “31.205-24.”

[FR Doc. 04-13626 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 8, 11 and 53**

[FAC 2001-24; Item X]

**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 amendments to the Federal Acquisition Regulation (FAR) in order to update an address and remove the illustrations of Standard Forms 254 and 255 (which became obsolete on June 8, 2004) from the FAR.

**DATES:** *Effective Date:* June 18, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2001-24, Technical Amendments.

**List of Subjects in 48 CFR Parts 8, 11 and 53**

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 11 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 11 and 53 is revised to read as follows:

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

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

**8.003 [Amended]**

■ 2. Amend section 8.003 in paragraph (d) by removing from the address “Suite 4528” and adding “Suite 3229” in its place.

**PART 11—DESCRIBING AGENCY NEEDS**

**11.102 [Amended]**

■ 3. Amend section 11.102 by removing “DoD 4120.3-M” each time it appears and adding “DoD 4120.24-M” in its place.

**11.202 [Amended]**

■ 4. Amend section 11.202 in paragraph (b) by removing “DoD 4120.3-M” and adding “DoD 4120.24-M” in its place.

**PART 53—FORMS**

**53.301-254 and 53.301-255 [Removed]**

■ 5. Remove sections 53.301-254 and 53.301-255.

[FR Doc. 04-13627 Filed 6-17-04; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Regulation; Small Entity Compliance Guide**

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001-24 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 2001-24 which precedes this document. These documents are also available via the Internet at <http://www.acqnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:** Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001-24

Item	Subject	FAR Case	Analyst
*I .....	Incentives for Use of Performance-Based Contracting for Services (Interim) .....	2004-004	Wise.
II .....	Definitions Clause .....	2002-013	Parnell.
III .....	Procurement Lists .....	2003-013	Nelson.
IV .....	Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA).	2004-009	Goral.
*V .....	Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) ..	1999-603	Nelson.
VI .....	Designated Countries—New European Communities Member States .....	2004-008	Davis.
VII .....	Buy American Act—Nonavailable Articles .....	2003-007	Davis.
VIII .....	Application of Cost Principles and Procedures and Accounting for Unallowable Costs.	2002-006	Loeb.
IX .....	Gains and Losses, Maintenance and Repair Costs, and Material Costs .....	2002-008	Loeb.

## LIST OF RULES IN FAC 2001–24—Continued

Item	Subject	FAR Case	Analyst
X .....	Technical Amendments.		

**Item I—Incentives for Use of Performance-Based Contracting for Services (Interim) (FAR Case 2004–004)**

This interim rule amends the FAR to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136). Section 1431 enacts Governmentwide authority to treat performance-based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance-based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance-based terminology and to conform to the language added by section 1431. Contracting officers will be able to use FAR Part 12, Acquisition of Commercial Items, and Subpart 37.6, Performance-Based Contracting, for non-commercial services and treat these services as commercial services when specific conditions are met. Agencies will be required to report on performance-based contracts or task orders awarded using this authority.

**Item II—Definitions Clause (FAR Case 2002–013)**

FAR 2.201 and the clause at 52.202–1 are revised to clarify the applicability of FAR definitions to solicitation provisions and contract clauses. The list of definitions in 52.202–1 is removed and replaced with policy stating that, when a solicitation provision or contract clause uses a word or term that is defined in the FAR, the word or term has the meaning given in FAR 2.101 at the time the solicitation was issued. Certain exceptions to this policy are listed in FAR 52.202–1.

**Item III—Procurement Lists (FAR Case 2003–013)**

This final rule amends the FAR to clarify that the Javits-Wagner O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.

**Item IV—Determining Official for Employment Provision Compliance-- Immigration and Nationality Act (INA) (FAR Case 2004–009)**

This final rule amends FAR 9.406–2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA), to include both the Attorney General of the United States and the Secretary of Homeland Security.

This rule implements Executive Order 13286 published March 5, 2003, which amended Section 4 of Executive Order 12989 published February 15, 1996.

Debarring officials may now debar a contractor based on a determination by the Secretary of Homeland Security or the Attorney General of the United States.

**Item V—Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) (FAR Case 1999–603)**

This final rule amends the FAR in order to incorporate policies and procedures for services under Federal Supply Schedules. The rule—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;
- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;
- Adds additional information regarding e-buy, GSA's electronic quote system for the schedules program;
- Clarifies that competition shall not be sought outside the Federal Supply Schedules;
- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value),

the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information.

- Adds language stating that the performance period of Blanket Purchase Agreement (BPA) established under the schedules program may cross option periods on the base contracts;
- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review;
- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;
- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders;
- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;
- Reserves the ordering procedures for Mandatory Use Schedules section;
- Clarifies the procedures for termination for cause and convenience; and
- Reorganizes and revises the subpart text for ease of use.

**Item VI—Designated Countries New European Communities Member States (FAR Case 2004–008)**

This final rule amends the FAR to implement a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (*i.e.*, the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA). This means that in acquisitions subject to the WTO GPA, the contracting officer can accept offers of eligible products from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania,

Malta, Poland, the Slovak Republic, and Slovenia without application of the Buy American Act evaluation factor.

**Item VII—Buy American Act—Nonavailable Articles (FAR Case 2003–007)**

This final rule amends Federal Acquisition Regulation (FAR) 25.104(a) to add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

**Item VIII—Application of Cost Principles and Procedures and Accounting for Unallowable Costs (FAR Case 2002–006)**

This final rule amends the Federal Acquisition Regulation (FAR) by revising FAR 31.204, Application of principles and procedures, to improve clarity and structure. The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

**Item IX—Gains and Losses, Maintenance and Repair Costs, and Material Costs (FAR Case 2002–008)**

This final rule amends the FAR by deleting the cost principle at FAR 31.205 24, Maintenance and repair costs, because either Cost Accounting Standards (CAS) or Generally Accepted Accounting Practices (GAAP)

adequately address these costs. The rule also revises the cost principles at FAR 31.205–7, Contingencies; FAR 31.205–26, Material costs; and FAR 31.205–44, Training and education costs, by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

**Item X—Technical Amendments**

This amendment makes editorial changes at 8.003(d), 11.102, and 11.202(b), and removes sections 53.301–254 and 53.301–255.

Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

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