



# Federal Register

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**Friday,  
August 30, 2002**

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**Part V**

**Department of  
Defense  
General Services  
Administration  
National Aeronautics  
and Space  
Administration**

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**48 CFR Parts Ch. 1, 2, 7, 8, et al.  
Federal Acquisition Regulations; Final  
Rules**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2001–09; 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 and technical amendments.

**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) 2001–09. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.arnet.gov/far>.

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

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–09 and specific FAR case number(s). Interested parties may also visit our website at <http://www.arnet.gov/far>.

Item	Subject	FAR case	Analyst
I .....	Task-Order and Delivery-Order Contracts .....	1999–303	Wise.
II .....	Temporary Emergency Procurement Authority (Interim) .....	2002–003	Moss.
III .....	Veterans Entrepreneurship and Small Business Development Act of 1999 .....	2000–302	Cundiff.
IV .....	Trade Agreements Thresholds .....	2002–009	Davis.
V .....	Payments Under Fixed-Price Construction Contracts .....	2001–012	Olson.
VI .....	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 2001–09 amends the FAR as specified below:*

**Item I—Task-Order and Delivery-Order Contracts (FAR Case 1999–303)**

This final rule amends the Federal Acquisition Regulation (FAR) to further implement subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000 concerning task-order and delivery-order contracts.

With respect to acquisition planning, the rule draws greater attention to the capital planning requirements of the Clinger-Cohen Act (40 U.S.C. 1422) and ensures more deliberation by agency acquisition planners before orders are placed under a Federal Supply Schedule contract, or task-order contract or delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract).

With respect to the structuring of orders and the consideration given to contract holders prior to order placement, the rule (1) increases attention to modular contracting principles to help agencies avoid unnecessarily large and inadequately defined orders, (2) facilitates information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the Government to award

performance-based orders, and (3) revises existing documentation requirements to address tradeoff decisions as well as the issuance of sole-source orders as logical follow-ons to orders already issued under the contract. This rule also adds a separate definition for the terms “Governmentwide acquisition contract (GWAC)” and “Multi-agency contract (MAC)” to the FAR to clarify the difference between the terms and the purpose of each contract vehicle.

**Item II—Temporary Emergency Procurement Authority (FAR Case 2002–003)**

This interim rule implements Section 836 of the Fiscal Year 2002 National Defense Authorization Act which increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for DoD during fiscal years 2002 and 2003, where those procurements are to facilitate the defense against terrorism or biological or chemical attack against the United States. Also, contracting officers acquiring biotechnology supplies or biotechnology services, for use to facilitate the defense against terrorism or biological or chemical attack against the United States, may treat the supplies or services as commercial items.

**Item III—Veterans Entrepreneurship and Small Business Development Act of 1999 (FAR Case 2000–302)**

This final rule finalizes two interim rules published previously at 65 FR

60542, October 11, 2000 (FAC 97–20), and 66 FR 53492, October 22, 2001 (FAC 2001–01), respectively. The first interim rule implemented portions of the Veterans Entrepreneurship and Small Business Development Act of 1999 (Pub. L. 106–50), which added a subcontracting plan goal for veteran-owned small businesses and a 3 percent Governmentwide agency goal for service-disabled veteran-owned small businesses. The second interim rule implemented Section 803 of the Small Business Reauthorization Act of 2000 (part of the Consolidated Appropriations Act, 2001, Pub. L. 106–554), which added an additional subcontracting plan goal for service-disabled veteran-owned small business concerns. Both rules, and the correction published at 67 FR 1858, January 14, 2002 (FAC 2001–01 Correction), are adopted as final without change.

**Item IV—Trade Agreements Thresholds (FAR Case 2002–009)**

This final rule amends FAR Subparts 22.15, 25.2, 25.4, 25.6, 25.11, and the clauses at 52.213–4 and 52.222–19 to implement new dollar thresholds for application of the Trade Agreements Act and North American Free Trade Agreement as published by the U.S. Trade Representative in the **Federal Register** at 67 FR 14763, March 27, 2002. Contracting officers must review the new thresholds when acquiring supplies, services, or construction in order to select the appropriate clauses to implement the Buy American Act, trade agreements, and sanctions of European

Union country end products and services.

**Item V—Payments Under Fixed-Price Construction Contracts (FAR Case 2001-012)**

This final rule amends the FAR to clarify in the certification language of the clause entitled Payments Under Fixed-Price Construction Contracts that *all* payments due to subcontractors and suppliers have been made by the prime contractor from previous progress payments received from the Government. The rule is of special interest to contracting officers that administer construction contracts.

**Item VI—Technical Amendments**

These amendments update sections and make editorial changes at FAR 22.1503, 36.606, and 52.232-16.

Dated: August 21, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001-09 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 2001-09 are effective September 30, 2002, except for Items II and III which are effective August 30, 2002.

Dated: August 15, 2002.

**Deidre A. Lee,**

*Director, Defense Procurement.*

Dated: August 21, 2002.

**Patricia A. Brooks,**

*Acting Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.*

Dated: August 14, 2002.

**Tom Luedtke,**

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

[FR Doc. 02-21866 Filed 8-29-02; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 7, 8, 16, 17, and 52**

[FAC 2001-09; FAR Case 1999-303; Item I]

**RIN 9000-A172**

**Federal Acquisition Regulation; Task-Order and Delivery-Order Contracts**

**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 further implement subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000. These subsections focus primarily on appropriate use of task-order and delivery-order contracts and specific steps agencies should take when placing orders under task-order and delivery-order contracts established by another agency. The rule also clarifies that written acquisition plans may be required for orders as determined by the agency head.

**DATES:** *Effective Date:* September 30, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Procurement Analyst, at (202) 208-1168. Please cite FAC 2001-09, FAR case 1999-303.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Councils published a final rule, FAR case 1999-014, Competition Under Multiple Award Contracts, in the **Federal Register** at 65 FR 24317, April 25, 2000, to clarify what contracting officers should consider when planning for multiple awards of indefinite-delivery contracts, and clarify how orders should be placed against the resultant contracts. That rule implemented portions of subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000. This rule further strengthens that policy

and the implementation of subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000 in several ways.

With respect to acquisition planning, the rule draws greater attention to the capital planning requirements of the Clinger-Cohen Act (40 U.S.C. 1422) and ensures more deliberation by agency acquisition planners before orders are placed under a Federal Supply Schedule contract; or task-order contract or delivery-order contract awarded by another agency, (*i.e.*, Governmentwide acquisition contract or multi-agency contract). The Councils are continuing to review the agency acquisition planning practices of customers of interagency contracts to determine if additional guidance is needed to ensure strategic use of these vehicles.

With respect to the structuring of orders and the consideration given to contract holders prior to order placement, the rule (1) increases attention to modular contracting principles to help agencies avoid unnecessarily large and inadequately defined orders, (2) facilitates information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the Government to award performance-based orders, and (3) revises existing documentation requirements to address tradeoff decisions as well as the issuance of sole-source orders as logical follow-ons to orders already issued under the contract.

This rule also adds to the FAR a separate definition for the terms "Governmentwide acquisition contract (GWAC)" and "Multi-agency contract (MAC)" to clarify the difference between the terms and the purpose of each contract vehicle.

A proposed rule was published in the **Federal Register** at 66 FR 44518, August 23, 2001. Four sources submitted comments in response to the proposed rule. This final rule includes a change based on some of the comments received. Substantive public comments addressed the need for additional clarification pertaining to the application of the Economy Act within the proposed definition of multi-agency contract. The definition states that supplies and services would be obtained "consistent with" the Economy Act. The Councils agreed that clarification was needed. Accordingly, the definition of multi-agency contract was amended by adding a reference to FAR 17.500(b), which expressly provides that the Economy Act is not applicable if an interagency acquisition is authorized under a more specific statutory

authority. In other words, use of more specific authority, if it exists, would still be "consistent with" the Economy Act.

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 makes various changes to improve the use of task-order contracts and delivery-order contracts. The primary focus is on usage of these contracts where multiple awards are made and where the contracts are being used to support inter-agency transactions. Some aspects of the final rule (e.g., planning, documentation) largely address the internal operating procedures of Government agencies. The changes that affect small entities should have a slight positive effect by, among other things, strengthening use of the fair opportunity process to ensure small entities are appropriately being given opportunities to pursue business opportunities under multiple award task-order and delivery-order contracts. The rule further acknowledges that access to small business concerns is an appropriate factor for an agency to consider as part of its acquisition planning prior to placing an order under a contract awarded by another agency.

We did not receive any comments regarding this determination as a result of publication of the proposed rule in the **Federal Register** at 66 FR 44518, August 23, 2001.

**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, 7, 8, 16, 17, and 52**

Government procurement.

Dated: August 21, 2002.

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 8, 16, 17, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 7, 8, 16, 17, and 52 continues to read as follows:

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

**PART 2—DEFINITIONS OF WORDS AND TERMS**

2. Amend section 2.101 by adding, in alphabetical order, the definitions "Governmentwide acquisition contract (GWAC)" and "Multi-agency contract (MAC)" to read as follows:

**2.101 Definitions.**

*Governmentwide acquisition contract (GWAC)* means a task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated—

(1) By an executive agent designated by the Office of Management and Budget pursuant to section 5112(e) of the Clinger-Cohen Act, 40 U.S.C. 1412(e); or

(2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by the Brooks Act, 40 U.S.C. 759 (repealed by Public Law 104–106). The Economy Act does not apply to orders under a Governmentwide acquisition contract.

*Multi-agency contract (MAC)* means a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act (see 17.500(b)). Multi-agency contracts include contracts for information technology established pursuant to section 5124(a)(2) of the Clinger-Cohen Act, 40 U.S.C. 1424(a)(2).

**PART 7—ACQUISITION PLANNING**

3. Amend section 7.101 by adding, in alphabetical order, the definition "Order" to read as follows:

**7.101 Definitions.**

*Order* means an order placed under a—

- (1) Federal Supply Schedule contract; or
- (2) Task-order contract or delivery-order contract awarded by another

agency, (i.e., Governmentwide acquisition contract or multi-agency contract).

4. Amend section 7.103 by revising paragraphs (e) and (q); and adding paragraph (t) to read as follows:

**7.103 Agency-head responsibilities.**

(e) Writing plans either on a systems basis, on an individual contract basis, or on an individual order basis, depending upon the acquisition.

(q) Ensuring that no purchase request is initiated or contract entered into that would result in the performance of an inherently governmental function by a contractor and that all contracts or orders are adequately managed so as to ensure effective official control over contract or order performance.

(t) Ensuring that agency planners on information technology acquisitions comply with the capital planning and investment control requirements in 40 U.S.C. 1422 and OMB Circular A–130.

5. Amend section 7.104 by revising the first sentence of paragraph (a); in the second sentence of paragraph (b) by adding "with" after the word "consult"; and by revising the second sentence of paragraph (c) to read as follows:

**7.104 General procedures.**

(a) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award or order placement is necessary.

(c) \* \* \* If the plan proposes using other than full and open competition when awarding a contract, the plan shall also be coordinated with the cognizant competition advocate.

6. Amend section 7.105 in the first sentence of the introductory paragraph by removing "subparagraph" and adding "paragraph" in its place, and in the last sentence by adding "or orders" after the word "contracts"; and by revising paragraph (b)(4) to read as follows:

**7.105 Contents of written acquisition plans.**

(b) \* \* \*

(4) *Acquisition considerations.* (i) For each contract contemplated, discuss contract type selection (see part 16); use of multiyear contracting, options, or other special contracting methods (see part 17); any special clauses, special solicitation provisions, or FAR

deviations required (*see* subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (*see* subpart 7.4) and why; and any other contracting considerations.

(ii) For each order contemplated, discuss—

(A) For information technology acquisitions, how the capital planning and investment control requirements of 40 U.S.C. 1422 and OMB Circular A-130 will be met (*see* 7.103(t) and part 39); and

(B) Why this action benefits the Government, such as when—

(1) The agency can accomplish its mission more efficiently and effectively (*e.g.*, take advantage of the servicing agency's specialized expertise; or gain access to contractors with needed expertise); or

(2) Ordering through an indefinite delivery contract facilitates access to small business concerns, including small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.

\* \* \* \* \*

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

**8.001 through 8.003 [Redesignated as 8.002 through 8.004]**

7. Redesignate sections 8.001 through 8.003 as 8.002 through 8.004, respectively; and add a new section 8.001;

7a. In the newly designated section 8.002 remove from the introductory text of paragraph (a) "8.002" and add "8.003" in its place; and in the second sentence of the newly designated section 8.004, remove "must" and add "shall" (twice) in its place.

The added text reads as follows:

**8.001 General.**

Regardless of the source of supplies or services to be acquired, information technology acquisitions shall comply with capital planning and investment control requirements in 40 U.S.C. 1422 and OMB Circular A-130.

\* \* \* \* \*

**8.401 [Amended]**

8. Amend section 8.401 in the first sentence of paragraph (a) by removing "8.001" and adding "8.002" in its place.

9. Amend section 8.404 by revising paragraph (a) to read as follows:

**8.404 Using schedules.**

(a) *General.* (1) Parts 13 and 19 do not apply to orders placed against Federal Supply Schedules, except for the provision at 13.303-2(c)(3). Orders placed against a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued using full and open competition (*see* 6.102(d)(3)).

(i) Ordering offices need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business programs.

(ii) GSA has already determined the prices of items under schedule contracts to be fair and reasonable. By placing an order against a schedule using the procedures in this section, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs.

(2) Orders placed under a Federal Supply Schedule contract are not exempt from the development of acquisition plans (*see* subpart 7.1), and an information technology acquisition strategy (*see* part 39).

\* \* \* \* \*

**8.602 [Amended]**

10. Amend section 8.602 in the introductory text of paragraph (b) by removing "8.001" and adding "8.002" in its place.

**PART 16—TYPES OF CONTRACTS**

11. Amend section 16.505 as follows:

- a. Revise paragraph (a)(2);
- b. In paragraph (a)(3) by adding "or order" after the word "contract";
- c. Redesignate paragraphs (a)(4), (a)(5), and (a)(6) as (a)(5), (a)(6), and (a)(8), respectively, and add new paragraphs (a)(4) and (a)(7);
- d. Add paragraphs (b)(1)(iii)(A)(4) and (b)(1)(iii)(A)(5);
- e. Revise the introductory text of paragraph (b)(2);
- f. Amend paragraphs (b)(2)(i) and (b)(2)(ii) by removing the semicolons and adding periods in their places;
- g. Revise paragraph (b)(2)(iii);
- h. Revise paragraph (b)(4); and
- i. Revise the heading and the first sentence of paragraph (b)(5).

The revised and added text reads as follows:

**16.505 Ordering.**

- (a) \* \* \*
- (2) Individual orders shall clearly describe all services to be performed or

supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract.

\* \* \* \* \*

(4) When acquiring information technology and related services, consider the use of modular contracting to reduce program risk (*see* 39.103(a)).

\* \* \* \* \*

(7) Orders placed under a task-order contract or delivery-order contract awarded by another agency (*i.e.*, a Governmentwide acquisition contract, or multi-agency contract)—

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

(ii) May not be used to circumvent conditions and limitations imposed on the use of funds (*e.g.*, 31 U.S.C. 1501(a)(1)).

\* \* \* \* \*

- (b) \* \* \*
- (1) \* \* \*
- (iii) \* \* \*
- (A) \* \* \*

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(i) Seeking comments from two or more contractors on draft statements of work;

(ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (*e.g.*, requirements are complex or need continued development), where all contractors are initially considered on price considerations (*e.g.*, rough estimates), and other considerations as appropriate (*e.g.*, proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

\* \* \* \* \*

(2) *Exceptions to the fair opportunity process.* The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$2,500 unless one

of the following statutory exceptions applies:

\* \* \* \* \*

(iii) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

\* \* \* \* \*

(4) *Decision documentation for orders.* The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision. The contract file shall also identify the basis for using an exception to the fair opportunity process. If the agency uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(5) *Task-order and delivery-order ombudsman.* The head of the agency shall designate a task-order and delivery-order ombudsman. \* \* \*

\* \* \* \* \*

## PART 17—SPECIAL CONTRACTING METHODS

12. Revise paragraph (b) of section 17.500 to read as follows:

### 17.500 Scope of subpart.

\* \* \* \* \*

(b) The Economy Act applies when more specific statutory authority does not exist. Examples of interagency acquisitions to which the Economy Act does not apply include—

(1) Acquisitions from required or optional sources of supplies prescribed in Part 8, which have separate statutory authority (e.g., Federal Supply Schedule contracts); and

(2) Acquisitions using Governmentwide acquisition contracts.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 52.208–9 [Amended]

13. Amend section 52.208–9 by removing from the prescription “8.003” and adding “8.004” in its place.

[FR Doc. 02–21867 Filed 8–29–02; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 12, 13, 19, and 25

[FAC 2001–09; FAR Case 2002–003; Item II]

RIN 9000–AJ40

### Federal Acquisition Regulation; Temporary Emergency Procurement Authority

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 836 of the Fiscal Year 2002 National Defense Authorization Act. Section 836 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for DoD during fiscal years 2002 and 2003, where those procurements are to facilitate the defense against terrorism or biological or chemical attack against the United States.

**DATES:** *Effective Date:* August 30, 2002.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before October 29, 2002, to be considered in the formulation of a final rule.

**ADDRESSES:** Submit written comments to—General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—[farcase.2002-003@gsa.gov](mailto:farcase.2002-003@gsa.gov)

Please submit comments only and cite FAC 2001–09, FAR case 2002–003, in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAC 2001–09, FAR case 2002–003.

**SUPPLEMENTARY INFORMATION:**

### A. Background

This interim rule implements Section 836 of the Fiscal Year 2002 National Defense Authorization Act (Pub. L. 107–107, 10 U.S.C. 2302 Note). Section 836 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for DoD during fiscal years 2002 and 2003, where those procurements are to facilitate the defense against terrorism or biological or chemical attack against the United States.

For acquisitions of supplies and services to facilitate the defense against terrorism or biological or chemical attack against the United States, by or for the Department of Defense, the micro-purchase threshold is raised to \$15,000 (except for construction subject to the Davis-Bacon Act). The simplified acquisition threshold for such acquisitions in support of a contingency operation is raised to \$250,000 inside the United States and \$500,000 outside the United States.

Any acquisition by or for the Department of Defense of biotechnology supplies or biotechnology services to facilitate the defense against terrorism or biological or chemical attack against the United States shall be treated as being a procurement of 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 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.* However, the increased thresholds are limited to procurements that are to facilitate the defense against terrorism or biological or chemical attack against the United States. There are no data available on the number of procurements that will be eligible. We expect the increased thresholds to this limited class of procurements will apply to a very small number of small entities.

This interim rule does not impose any data collection requirements on small business concerns. The rule does not duplicate, overlap, or conflict with other relevant Federal rules. There are no significant alternatives to the proposed rule that would accomplish the stated beneficial objective.

The FAR Secretariat has submitted a copy of the Initial Regulatory Flexibility

Analysis 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 subparts 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 2001-09, FAR case 2002-003), in correspondence.

### C. Paperwork Reduction Act

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

### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the FAR coverage implements Section 836 of the Fiscal Year 2002 National Defense Authorization Act, signed on December 28, 2001, which provides for urgently needed authorities.

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, 12, 13, 19, and 25

Government procurement.

Dated: August 21, 2002.

AL Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 12, 13, 19, and 25 as set forth below:

1. The authority citation for 48 CFR parts 2, 12, 13, 19, and 25 continues to read as follows:

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

### PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by revising the definitions “Micro-purchase”, “Micro-purchase threshold”, and “Simplified acquisition threshold” to read as follows:

#### 2.101 Definitions.

\* \* \* \* \*

*Micro-purchase* means an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold.

*Micro-purchase threshold* means \$2,500, except it means—

(1) \$2,000 for construction subject to the Davis-Bacon Act; and

(2) \$15,000 for acquisitions by or for the Department of Defense facilitating the defense against terrorism or biological or chemical attack as described in 13.201(g), except for construction subject to the Davis-Bacon Act.

\* \* \* \* \*

*Simplified acquisition threshold* means \$100,000, except that in the case of any contract to be awarded and performed, or purchase to be made—

(1) Outside the United States in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)) or a humanitarian or peacekeeping operation (as defined in 10 U.S.C. 2302(8) and 41 U.S.C. 259(d)), the term means \$200,000; or

(2) To facilitate the defense against terrorism or biological or chemical attack against the United States, for acquisitions—

(i) Inside the United States, by or for the Department of Defense, for which award is made and funds are obligated on or before September 30, 2003, in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)), the term means \$250,000; or

(ii) Outside the United States, by or for the Department of Defense, for which award is made and funds are obligated on or before September 30, 2003, in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)), the term means \$500,000.

\* \* \* \* \*

### PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.102 by adding paragraph (f) to read as follows:

#### 12.102 Applicability.

\* \* \* \* \*

(f) Contracting officers shall treat any acquisition by or for the Department of Defense of biotechnology supplies or biotechnology services, for use to facilitate the defense against terrorism or biological attack against the United States, as an acquisition of commercial items. The policies of this part shall apply to such acquisitions, including the requirement to use firm-fixed price contracts or fixed-price contracts with

economic price adjustments. Nothing in this paragraph shall preclude a contracting officer from treating an acquisition described in this paragraph as one for a non-commercial item if a determination is made by the contracting officer that the purchase cannot be made at a fair and reasonable price using the policies of this part. This paragraph applies only when award is made and funds are obligated on or before September 30, 2003.

### PART 13—SIMPLIFIED ACQUISITION PROCEDURES

#### 13.003 [Amended]

4. Amend section 13.003 in paragraph (b)(1) by adding “(\$15,000 for acquisitions as described in 13.201(g))” after “\$2,500”; and in paragraph (b)(2) by removing “\$2,500” and adding “the micro-purchase threshold” in its place.

5. Amend section 13.201 by adding paragraph (g) to read as follows:

#### 13.201 General.

\* \* \* \* \*

(g) There is a temporary \$15,000 micro-purchase threshold for the acquisition of supplies or services by or for the Department of Defense for which award is made and funds are obligated on or before September 30, 2003, facilitating the defense against terrorism or biological or chemical attack against the United States (see 2.101). Purchases using this authority must have a clear and direct relationship to the defense against terrorism or biological or chemical attack.

### PART 19—SMALL BUSINESS PROGRAMS

6. Amend section 19.502-1 by revising paragraph (b) to read as follows:

#### 19.502-1 Requirements for setting aside acquisitions.

\* \* \* \* \*

(b) This requirement does not apply to purchases of \$2,500 or less (\$15,000 or less for acquisitions as described in 13.201(g)), or purchases from required sources of supply under part 8 (*e.g.*, Federal Prison Industries, Committee for Purchase From People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

#### 19.502-2 [Amended]

7. Amend section 19.502-2 in the first sentence of paragraph (a) by removing “\$2,500,” and adding “\$2,500 (\$15,000 for acquisitions as described in 13.202(g)),” in its place.

8. Amend section 19.903 by—

a. Removing the word “or” from paragraph (b)(1);

b. Removing the period at the end of the sentence in paragraph (b)(2) and adding “; or” in its place; and

c. Adding paragraph (b)(3) to read as follows:

**19.903 Applicability.**

\* \* \* \* \*

(b) \* \* \*

(3) Acquisitions of \$15,000 or less facilitating the defense against terrorism or biological or chemical attack against the United States as described in 13.201(g).

**PART 25—FOREIGN ACQUISITION**

**25.1101 [Amended]**

9. Amend section 25.1101 in the introductory text of paragraph (a)(1) by adding “(\$15,000 for acquisitions as described in 13.201(g))” after “\$2,500”.

**25.1103 [Amended]**

10. Amend section 25.1103 in paragraph (a) by removing “\$2,500,” and adding “\$2,500 (\$15,000 for acquisitions as described in 13.201(g)),” in its place.

[FR Doc. 02–21868 Filed 8–29–02; 8:45 am]

BILLING CODE 6820–EP–U

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Parts 2, 4, 5, 7, 19, 52, and 53**

[FAC 2001–09; FAR Case 2000–302; Item III]

RIN 9000–A193

**Federal Acquisition Regulation;  
Veterans Entrepreneurship and Small  
Business Development Act of 1999**

**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 adopt, as final, the first interim rule published at 65 FR 60542, October 11, 2000, which implemented portions of the Veterans Entrepreneurship and Small Business Development Act of 1999 which added a subcontracting plan goal for veteran-owned small businesses and a 3 percent

Governmentwide agency goal for service-disabled veteran-owned small businesses, and the second interim rule published at 66 FR 53492, October 22, 2001, which implemented Section 803 of the Small Business Reauthorization Act of 2000 (part of the Consolidated Appropriations Act, 2001), which added an additional subcontracting plan goal for service-disabled veteran-owned small business concerns. Both rules, and the correction published January 14, 2002, are adopted as final without change.

**DATES:** Effective Date: August 30, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2001–09, FAR case 2000–302.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The final rule amends the FAR to implement portions of the Veterans Entrepreneurship and Small Business Development Act of 1999 (Pub. L. 106–50) and section 803 of the Small Business Reauthorization Act of 2000 (part of the Consolidated Appropriations Act, 2001, Pub. L. 106–554). The Veterans Entrepreneurship and Small Business Development Act of 1999 established new assistance programs for veterans and service-disabled veterans who own and operate small businesses. Specifically, the Act—

- Defines the terms “small business concern owned and controlled by service-disabled veterans”; and “small business concern owned and controlled by service-disabled veterans”;

- Establishes that veteran-owned and service-disabled veteran-owned small businesses be afforded maximum practical opportunity to participate in the performance of contracts and subcontracts awarded by any Federal agency;

- Establishes a requirement to include a goal for veteran-owned small businesses in subcontracting plans under the clause at 52.219–9;

- Establishes a 3 percent Governmentwide goal (based on the total value of all prime contract and subcontract awards) for participation by service-disabled veteran-owned small businesses; and

- Adds data collection requirements for prime and subcontract awards to veteran-owned small businesses and service disabled veteran-owned small business concerns.

DoD, GSA, and NASA published in the **Federal Register** two interim rules (65 FR 60542, October 11, 2000 (FAC 97–20) and 66 FR 53492, October 22, 2001 (FAC 2001–01), respectively); and a correction to the second interim rule (67 FR 1858, January 14, 2002 (FAC 2001–01 Correction)), to implement the statutes.

Four respondents submitted comments in response to the interim rule. The Councils considered all comments and made no changes as a result. However, three of the comments merit noting. The first comment was that the interim rule, as published on October 11, 2001, is flawed as 19.704(a)(1) and the clause at 52.219–9(d)(1) still contain the phrase “a separate goal for service-disabled veteran-owned small business concerns is not required.” *Response:* The appearance of that phrase in the **Federal Register** was an error and was subsequently corrected by the January 14, 2002, **Federal Register** notice.

The second comment consists of several suggestions of policy steps that should be taken to implement the legislation. *Response:* The comment is outside the scope of the case, as it does not address any existing or proposed FAR coverage.

The third comment suggests that the rule be modified to provide service-disabled veteran-owned small business concerns “the benefit of every contracting preference afforded SDBs and women-owned small businesses \* \* \*”. The comment also suggests limiting of competition for certain commodities or service that may be furnished by service-disabled veteran-owned small business concerns. *Response:* Existing legislation does not permit adopting any of the suggestions contained in the comment.

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 the rule adds a new statutory subcontracting plan goal requirement for service-disabled veteran-owned small business concerns. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

This final rule revises the Federal Acquisition Regulation to implement



portions of the Veterans Entrepreneurship and Small Business Development Act of 1999 (Pub. L. 106-50) and section 803 of the Small Business Reauthorization Act of 2000, part of the Consolidated Appropriations Act, 2001 (Pub. L. 106-554). The statutes added a separate subcontracting plan goal requirement for veteran-owned small business and another goal for service-disabled veteran-owned small business concerns. There are approximately 4 to 5.5 million small businesses owned and controlled by veterans and 100,000 to 300,000 small businesses owned and controlled by service-disabled veterans. This rule does not duplicate, overlap, or conflict with other relevant Federal regulations. There are no alternatives to the final rule that would accomplish the stated objectives.

The FAR Secretariat has submitted a copy of the FRFA 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, 5, 7, 19, 52, and 53 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 2001-09, FAR case 2000-302), in correspondence.

### C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) applies. However, this final rule requires contractors to report, as a separate item, information already collected and reported under OMB Control Numbers 9000-0006 and 9000-0007. The impact of this final rule on the information collection hours of these OMB clearances is so small as to be within the estimating parameters of these clearances. Therefore, the clearances have not been changed.

#### List of Subjects in 48 CFR Parts 2, 4, 5, 7, 19, 52, and 53

Government procurement.

Dated: August 21, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

#### Interim Rule Adopted as Final Without Change

Accordingly, DoD, GSA, and NASA adopt the interim rules and correction amending 48 CFR parts 2, 4, 5, 7, 19, 52, and 53, which were published in the **Federal Register** at 65 FR 60542, October 11, 2000, the second interim rule at 66 FR 53492, October 22, 2001, and the correction to the second interim rule at 67 FR 1858, January 14, 2002, as a final rule without change.

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).  
[FR Doc. 02-21869 Filed 8-29-02; 8:45 am]

**BILLING CODE 6820-EP-U**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 2001-09; FAR Case 2002-009; Item IV]

RIN 9000-AJ41

#### Federal Acquisition Regulation; Trade Agreements Thresholds

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement new dollar thresholds for application of the Trade Agreements Act (TAA) and North American Free Trade Agreement (NAFTA) as published by the U.S. Trade Representative in the **Federal Register** at 67 FR 14763, March 27, 2002.

**DATES:** Effective Date: September 30, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-09, FAR case 2002-009.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends FAR Subparts 22.15, 25.2, 25.4, 25.6, and 25.11 to implement new dollar thresholds for application of the Trade Agreements Act (TAA) and North American Free Trade Agreement (NAFTA), as published by the U.S. Trade Representative in the **Federal Register** at 67 FR 14763, March 27, 2002.

The rule also amends the clauses at 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items), and 52.222-19, Child Labor—Cooperation with Authorities and Remedies.

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. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-09, FAR case 2002-009), in correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000-0023, 9000-0025, 9000-0130, and 9000-0141.

#### List of Subjects in 48 CFR Parts 22, 25, and 52

Government procurement.

Dated: August 21, 2002.

**Al Matera,**

*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 continues to read as follows:

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

#### PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS 22.1503 [Amended]

2. Amend section 22.1503 in paragraph (b)(3) by removing “\$54,372” and adding “\$56,190” in its place; and by removing from paragraph (b)(4) “\$177,000” and adding “\$169,000” in its place.

#### PART 25—FOREIGN ACQUISITION

##### 25.202 [Amended]

3. Amend section 25.202 in paragraph (c) by removing “\$6,806,000” and “\$7,068,419” and adding “\$6,481,000” and “\$7,304,733” in their place, respectively.

##### 25.403 [Amended]

4. Amend section 25.403 in paragraph (b)(1) by removing “\$177,000” and “\$6,806,000” and adding “\$169,000” and “\$6,481,000” in their place, respectively.

25.405 [Amended]

5. Amend section 25.405 as follows:
a. In paragraph (a) by removing "\$25,000 or less" and "\$54,372" and adding "less than \$25,000" and "\$56,190" in their place, respectively;
b. In paragraph (b) by removing "\$7,068,419" and adding "7,304,733" in its place; and
c. In paragraph (c) by removing "\$54,372" and "\$7,068,419" and adding "\$56,190" and "\$7,304,733" in their place, respectively.

25.601 [Amended]

6. Amend section 25.601 as follows:
a. In the introductory text of paragraph (a) by removing "must" and adding "shall" in its place;
b. In paragraphs (a)(1) and (a)(3)(ii) by removing "\$177,000" and adding "\$169,000" in their places; and
c. In paragraph (a)(2) by removing "\$6,806,000" and adding "\$6,481,000" in its place.
7. Amend section 25.1101 as follows:
a. Revise paragraphs (b)(1)(i)(A), (b)(1)(ii), (b)(1)(iii), (b)(2)(ii), and (b)(2)(iii); and
b. In paragraphs (c)(1) and (d) by removing "\$177,000" and adding "\$169,000" in their place.

The revised text reads as follows:

25.1101 Acquisition of supplies.

\* \* \* \* \*

(b)(1)(i) \* \* \*

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is \$25,000 or more, but is less than \$169,000; and

\* \* \* \* \*

(ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the clause with its Alternate I.

(iii) If the acquisition value is \$50,000 or more but is less than \$56,190, use the clause with its Alternate II.

(2) \* \* \*

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

(iii) If the acquisition value is \$50,000 or more but is less than \$56,190, use the provision with its Alternate II.

\* \* \* \* \*

25.1102 [Amended]

8. Amend section 25.1102 as follows:
a. In the introductory text of paragraphs (a) and (c), and paragraphs (c)(3) and (d)(3) by removing "\$6,806,000" and adding "\$6,481,000" in their place; and
b. In paragraphs (c)(3) and (d)(3) by removing "\$7,068,419" and adding "\$7,304,733" in their place.

25.1103 [Amended]

9. Amend section 25.1103 in paragraphs (c)(1)(i) and (c)(1)(ii)(B) by removing "\$177,000" and adding "\$169,000" in their place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Amend section 52.213-4 as follows:

a. Revise the date of the clause; and
b. Remove paragraph (b)(1)(vi) and redesignate paragraphs (b)(1)(i) through (b)(1)(v) as (b)(1)(ii) through (b)(1)(vi), respectively; and add a newly designated paragraph (b)(1)(i) to read as follows:

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

\* \* \* \* \*

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

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) 52.222-19, Child Labor—Cooperation with Authorities and Remedies (Sept 2002) (E.O. 13126). (Applies to contracts for supplies exceeding the micro-purchase threshold.)

\* \* \* \* \*

52.222-19 [Amended]

11. Amend section 52.222-19 by revising the date of the clause to read (SEPT 2002); in paragraph (a)(3) by removing "\$54,372" and adding "\$56,190" in its place; and in paragraph (a)(4) by removing "\$177,000" and adding "\$169,000" in its place.

[FR Doc. 02-21870 Filed 8-29-02; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2001-09; FAR Case 2001-012; Item V]

RIN 9000-AJ22

Federal Acquisition Regulation; Payments Under Fixed-Price Construction Contracts

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 in the certification language of the clause entitled Payments Under Fixed-Price Construction Contracts that all payments due to subcontractors and suppliers have been made by the prime contractor from previous progress payments received from the Government.

DATES: Effective Date: September 30, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501-3221. Please cite FAC 2001-09, FAR case 2001-012.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 66 FR 53050, October 18, 2001, with request for comments. Six respondents submitted public comments. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with no changes made to the proposed rule.

The rule revises FAR 52.232-5, Payments Under Fixed-Price Construction Contracts, to clarify the certification language. The ambiguity surfaced as a result of a decision issued on April 2, 1999, by the United States Court of Appeals for the Sixth Circuit in United States v. Gatewood, 173 F.3d 983 (6th Cir. 1999). The Court concluded that certifying that the prime contractor has made payments to subcontractors and suppliers does not explicitly include all payments due.

Of the six respondents who submitted public comments, two endorsed the proposed rule as written. The remaining respondents provided comments, which are discussed below:

1. One of the respondents asserted that some of its customers "that do not pay their invoices on time use the rationale of this FAR regulation to respond to us that it is not necessary to pay us until they themselves are paid by the Federal Government." The respondent requested that the Government close "a loophole" for billion dollar companies to avoid paying their smaller vendors.

*Response:* It has always been the Government's intent that subcontractors be paid all that they are due on a timely basis, in accordance with the terms of their subcontract agreements with their prime contractors. Because of the decision in *United States v. Gatewood*, it is necessary to make that point with greater clarity by inserting the word "all," thus ensuring that the prime contractor has made all payments due its subcontractors that have been included in its progress payments billings. The FAR change is designed to better ensure that subcontractors are paid on a timely basis, thus addressing the respondent's request that a "loophole" be closed. The final rule would prevent construction prime contractors from making only partial payments to subcontractors, based on a very narrow reading of the current language of FAR 52.232-5(c)(2).

2. A second respondent suggested a slight rewording of the proposed change to FAR 52.232-5(c)(2), to better address not only the requirement for the prime contractor to have made previous payments in a timely manner, but that it make current payments in a timely manner as well. The wording suggested is as follows:

"All payments due to subcontractors and suppliers from previous payments received under the contract have been made in a timely manner; and all payments due to subcontractors and suppliers from the proceeds of the payment covered by this certification will be made timely, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code \* \* \*"

*Response:* The Councils concluded that the rewording of the proposed rule recommended by respondent #2 is not necessary. The proposed rule states that "timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code." Consequently, if the prime contractor elects to make only a part of the payments due to subcontractors from the proceeds of the progress payment, the prime contractor would be making some of its payments on an untimely basis, and as such, the prime contractor will have made a false certification. Under the language of the clause, payments due in accordance with the terms of subcontract agreements and the law must be made on a timely basis if they are to be included in the prime contractor's payment request.

3. A third respondent suggested alternative language to paragraph (c)(2)

of the FAR clause at FAR 52.232-5. The respondent's rationale was that the clause should specifically indicate that the prime contractor's certification covers payments due for both work completed and supplies or services delivered by the subcontractors. Respondent #3 asserted that prime contractors do not have to pay their subcontractors for supplies or services delivered unless and until those supplies or services have been incorporated into the scope of work. Consequently, the respondent wanted to specifically indicate that the payments covered by the certified payment request include payments to subcontractors for materials and services that may not have been incorporated into the scope of the prime contract at the time the prime contractor's payment request is made to the Government. The wording suggested by the respondent is as follows:

"(2) All payments due to subcontractors and suppliers for work completed or materials/equipment delivered have been made from previous payments under this contract and timely payments will be made from payments due for which this certification and the attached invoice is submitted. This requirement supercedes any other payment terms that may have been included in any subcontract terms and is required by chapter 39 of Title 31, United States Code."

*Response:* The Councils concluded that the language suggested by respondent #3 is not needed and may lead to confusion with regard to the requirements of the entire payment clause at FAR 52.232-5. FAR 52.232-5(b)(1) requires that the prime contractor's progress payment request include a listing of the amount included for work performed by each subcontractor under the contract; a listing of the total amount of each subcontract under the contract; and a listing of amounts previously paid to each subcontractor. The clause also clearly indicates in 52.232-5(c)(1) that the contractor's certified payment request is for amounts "only for performance in accordance with the specifications, terms, and conditions of the contract."

It is not the intent of this clause to enable the billing of progress payments for materials and services that may not have been incorporated into the scope of work of the contract. It is conceivable that a construction prime contractor may have purchased building materials from a single vendor sufficient to support not only the construction project under the Government's contract, but also on other jobs as well.

However, the prime contractor can only bill for the materials used on the subject Government contract, once it has been determined what portion of those materials will be used to perform the Government contract. The fact that the prime contractor may not have paid the subcontractor for materials as yet unidentifiable to the Government contract may be a matter of general concern to the contracting officer, but it does not have a bearing on progress payment billings under a specific Government contract until after the material has been identified as part of the scope of work of that contract.

4. The fourth respondent asserted that, because the payments made under construction prime contracts are almost always covered by payment bonds or alternate payment procedures, the Government should not be involved in payment disputes between prime contractors and subcontractors. Consequently, respondent #4 concluded that the prime contractor's certification that payments have been made to its subcontractors was redundant and unnecessary, and that the certification should be eliminated. Respondent #4 also indicated that contracting officer inquiries as to whether a subcontractor has been paid on time were usually a reflection of a situation where the subcontractor has not been paid because of a dispute over subcontractor performance. Consequently, respondent #4 believed the following language was sufficient:

"(2) All past and future payments due to subcontractors and suppliers will be or have been made as required by chapter 39 of Title 31, United States Code."

*Response:* The Councils concluded that adopting respondent #4's proposed alternative language could be seen as a significant weakening of the payment protections afforded to construction subcontractors by Government contracts. The certification requirement questioned by respondent #4 is provided for in chapter 39 of Title 31 of the U.S.C. The certification is needed in the event the prime contractor has fraudulently billed the Government for progress payments that the prime contractor has represented will be used to pay its subcontractors; as such, this certification supports the possibility that the Government may need to prosecute the prime contractor under laws relating to defrauding the Government. Absent a certification, and employing only the words proposed by respondent #4, the Government could assert that the prime contractor had breached its contract if it failed to pay its subcontractors with the proceeds

from progress payments paid to the prime contractor for that purpose. But that is well short of the enforcement action potentially available under the fraud statute.

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 most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold and, therefore, do not have the progress payment type of financing. In addition, this change is a clarification of existing policy, rather than the addition of new policy.

### C. Paperwork Reduction Act

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

#### List of Subjects in 48 CFR Part 52

Government procurement.

Dated: August 21, 2002

Al Matera,

Director, Acquisition Policy Division.

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

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 52 continues to read as follows:

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

2. Amend section 52.232–5 by revising the date of the clause and paragraph (c)(2) to read as follows:

#### 52.232–5 Payments Under Fixed-Price Construction Contracts.

\* \* \* \* \*

#### Payments Under Fixed-Price Construction Contracts (Sept. 2002)

\* \* \* \* \*

(c) \* \* \*

(2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code;

\* \* \* \* \*

[FR Doc. 02–21871 Filed 8–29–02; 8:45 am]

BILLING CODE 6820–EP–U

### DEPARTMENT OF DEFENSE

#### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 22, 36, and 52

[FAC 2001–09; Item VI]

#### Federal Acquisition Regulation; Technical Amendments

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

**ACTION:** Final rule.

**SUMMARY:** This document makes amendments to the Federal Acquisition Regulation in order to update references and make editorial changes.

**DATES:** Effective Date: September 30, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755. Please cite FAC 2001–09, Technical Amendments.

#### List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: August 21, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 36, and 52 as set forth below:

1. The authority citation for 48 CFR parts 22, 36, and 52 continues to read as follows:

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

### PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

#### 22.1503 [Amended]

2. Amend section 22.1503 in the first sentence of paragraph (a) by removing “(www.dol.gov/dol/ilab)” and adding “(www.dol.gov/ilab/)” in its place.

### PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

#### 36.606 [Amended]

3. Amend section 36.606 in the last sentence of paragraph (a) by removing from the parenthetical the words “and the determination and findings requirement at 16.306(c)(2) for a cost-plus-fixed-fee contract”.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.232–16 by correcting Alternate III of the clause to read as follows:

#### 52.232–16 Progress Payments.

\* \* \* \* \*

*Alternate III (Feb 2002).* As prescribed in 32.502–4(d), add the following paragraph (m) to the basic clause. If Alternate II is also being used, redesignate the following paragraph as paragraph (o):

(m) The provisions of this clause will not be applicable to individual orders at or below the simplified acquisition threshold.

[FR Doc. 02–21872 Filed 8–29–02; 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 (Pub. L. 104–121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–09 which amend the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–09 which precedes this document.

These documents are also available via the Internet at <http://www.arnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:**  
Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content,

contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001-09

Item	Subject	FAR case	Analyst
I .....	Task-Order and Delivery-Order Contracts .....	1999-303	Wise.
II .....	Temporary Emergency Procurement Authority (Interim) .....	2002-003	Moss.
III .....	Veterans Entrepreneurship and Small Business Development Act of 1999 .....	2000-302	Cundiff.
IV .....	Trade Agreements Thresholds .....	2002-009	Davis.
V .....	Payments Under Fixed-Price Construction Contracts .....	2001-012	Olson.
VI .....	Technical Amendments		

**Item I—Task-Order and Delivery-Order Contracts (FAR Case 1999-303)**

This final rule amends the Federal Acquisition Regulation (FAR) to further implement subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000 concerning task-order and delivery-order contracts.

With respect to acquisition planning, the rule draws greater attention to the capital planning requirements of the Clinger-Cohen Act (40 U.S.C. 1422) and ensures more deliberation by agency acquisition planners before orders are placed under a Federal Supply Schedule contract, or task-order contract or delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract).

With respect to the structuring of orders and the consideration given to contract holders prior to order placement, the rule (1) increases attention to modular contracting principles to help agencies avoid unnecessarily large and inadequately defined orders, (2) facilitates information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the Government to award performance-based orders, and (3) revises existing documentation requirements to address tradeoff decisions as well as the issuance of sole-source orders as logical follow-ons to orders already issued under the contract. This rule also adds a separate definition for the terms “Governmentwide acquisition contract (GWAC)” and “Multi-agency contract (MAC)” to the FAR to clarify the difference between the terms and the purpose of each contract vehicle.

**Item II—Temporary Emergency Procurement Authority (FAR Case 2002-003)**

This interim rule implements Section 836 of the Fiscal Year 2002 National Defense Authorization Act which increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for DoD during fiscal years 2002 and 2003, where those procurements are to facilitate the defense against terrorism or biological or chemical attack against the United States. Also, contracting officers acquiring biotechnology supplies or biotechnology services, for use to facilitate the defense against terrorism or biological or chemical attack against the United States, may treat the supplies or services as commercial items.

**Item III—Veterans Entrepreneurship and Small Business Development Act of 1999 (FAR Case 2000-302)**

This final rule finalizes two interim rules published previously at 65 FR 60542, October 11, 2000 (FAC 97-20), and 66 FR 53492, October 22, 2001 (FAC 2001-01), respectively. The first interim rule implemented portions of the Veterans Entrepreneurship and Small Business Development Act of 1999 (Pub. L. 106-50), which added a subcontracting plan goal for veteran-owned small businesses and a 3 percent Governmentwide agency goal for service-disabled veteran-owned small businesses. The second interim rule implemented Section 803 of the Small Business Reauthorization Act of 2000 (part of the Consolidated Appropriations Act, 2001, Pub. L. 106-554), which added an additional subcontracting plan goal for service-disabled veteran-owned small business concerns. Both rules, and the correction published at 67 FR 1858, January 14,

2002 (FAC 2001-01 Correction), are adopted as final without change.

**Item IV—Trade Agreements Thresholds (FAR Case 2002-009)**

This final rule amends FAR Subparts 22.15, 25.2, 25.4, 25.6, 25.11, and the clauses at 52.213-4 and 52.222-19 to implement new dollar thresholds for application of the Trade Agreements Act and North American Free Trade Agreement as published by the U.S. Trade Representative in the **Federal Register** at 67 FR 14763, March 27, 2002. Contracting officers must review the new thresholds when acquiring supplies, services, or construction in order to select the appropriate clauses to implement the Buy American Act, trade agreements, and sanctions of European Union country end products and services.

**Item V—Payments Under Fixed-Price Construction Contracts (FAR Case 2001-012)**

This final rule amends the FAR to clarify in the certification language of the clause entitled Payments Under Fixed-Price Construction Contracts that all payments due to subcontractors and suppliers have been made by the prime contractor from previous progress payments received from the Government. The rule is of special interest to contracting officers that administer construction contracts.

**Item VI—Technical Amendments**

These amendments update sections and make editorial changes at FAR 22.1503, 36.606, and 52.232-16.

Dated: August 21, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

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