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Part V

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

**48 CFR Chapter 1, et al.
Federal Acquisition Circular 2001–26;
Introduction, Federal Acquisition
Regulation; Electronic Representations
and Certifications, et al.; Final Rules**

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Chapter 1

**Federal Acquisition Circular 2001–26;
Introduction**

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

ACTION: Summary presentation of final rules and a technical amendment.

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) 2001–26. 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 2001–26 and specific FAR case number(s). Interested parties may also visit our website at <http://www.acqnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Electronic Representations and Certifications	2002–024	Zaffos.
II	Excluded Parties List System Enhancement	2002–023	Goral.
III	Special Emergency Procurement Authority	2003–022	Zaffos.
IV	Notification of Employee Rights Concerning Payment of Union Dues or Fees (Interim)	2004–010	Goral.
V	Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements	2003–010	Cundiff.
VI	Applicability of the Cost Principles and Penalties for Unallowable Costs	2001–018	Loeb.
VII	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 2001–26 amends the FAR as specified below:

Item I—Electronic Representations and Certifications (FAR Case 2002–024)

This final rule requires offerors to provide representations and certifications electronically via the BPN website; to update the representations and certifications as necessary, but at least annually, to keep them current, accurate and complete; and to make changes that affect only one solicitation by completing the appropriate sections of either paragraph (j) of FAR provision 52.212–3 or FAR provision 52.204–8, whichever is included in the solicitation. This change represents a conversion of a paper-based process to a more efficient electronic process to obtain offerors’ representations and certifications. It will also significantly reduce the paperwork burden for both offerors and contracting officers.

Item II—Excluded Parties List System Enhancement (FAR Case 2002–023)

This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA’s new searchable on-line electronic list of parties excluded from doing business with the Federal Government. The EPLS enables agencies to directly input data into this

system and obviates the need for the hard copy List of Parties Excluded from Federal Procurement and Nonprocurement Programs. The EPLS will provide more up-to-date and readily accessible information to the contracting officer on parties excluded from doing business with the Federal Government.

Item III—Special Emergency Procurement Authority (FAR Case 2003–022)

This rule finalizes the interim rule 2003–022 by including under FAR subpart 13.5 the acquisition of supplies and services that meet the definition of a commercial item in FAR 2.101, and which, as determined by the head of the agency, are to be used to support a contingency operation. This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and also incorporates the higher thresholds authorized by Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. This rule allows the contracting officer expanded use of Simplified Acquisition and Commercial Items procedures when acquiring supplies or services that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack.

Item IV—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004–010) (Interim)

This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item V—Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements (FAR Case 2003–010)

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of the Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies and to make some minor changes for clarification. This change is being made in order for DoD to streamline and

transform itself to more effectively achieve its mission.

Item VI—Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001–018)

This final rule increases the threshold at FAR 42.709(b) and FAR 42.709–6 from \$500,000 to \$550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement. The threshold was increased to reflect inflation and is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(l).

The rule is of importance to contracting officers and contractors who negotiate contracts and modifications, and determine costs in accordance with FAR Part 31 contract cost principles.

Item VII—Technical Amendments

Editorial changes are made at FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1), and in the introductory text of FAR provision 52.219–1 in order to update references.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–26 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 2001–26 is effective December 20, 2004, except for Item I, which is effective January 1, 2005, and Items II, III, V, and VI, which are effective January 19, 2005.

Dated: December 6, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: December 8, 2004.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

Dated: December 2, 2004.

Tom Luedtke,

Deputy Chief Acquisition Officer, National Aeronautics and Space Administration.
[FR Doc. 04–27632 Filed 12–17–04; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 14, 15, and 52

[FAC 2001–26; FAR Case 2002–024; Item I]

RIN 9000–AJ80

Federal Acquisition Regulation; Electronic Representations and Certifications

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 require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply.

DATES: *Effective Date:* January 1, 2005.

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. Gerald Zaffos, Procurement Analyst, at (202) 501–6091. Please cite FAC 2001–26, FAR case 2002–024.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 4012, January 27, 2004. The 60-day comment period for the proposed rule ended March 29, 2004. Forty-five comments were received. Some of the comments merely agreed with the concept of ORCA; others pointed out typographical errors. The substantive comments are discussed below.

1. *Comment:* Should a contracting officer check for paper reps and certs and, failing to find them, check for electronic ones? Or, should a contracting officer only check for electronic ones if the offeror falls within a particular class of small business?

Council's response: The inclusion of the FAR provisions at 52.204–8 or 52.212–3(j) (as described in the final rule) in a solicitation would alert both the vendor and the contracting officer that the electronic completion of

representations and certifications on the Online Representations and Certifications Application (ORCA) module is required for the specific contracting action.

2. *Comment:* Without reps and certs, how would a Contracting Officer know what class of small business an offeror is?

Council's response: ORCA includes the socio-economic representations and certifications (such as FAR 52.219–1, Small Business Program Representations.) A vendor would revise its responses in either FAR 52.204–8 or 52.212–3(j) (as described in the final rule) if its responses in ORCA is incorrect for the present solicitation.

3. *Comment:* The possibility of parallel paper and electronic systems offers myriad chances for error. What if paper and electronic versions differ? What if an offeror from the class of small businesses not required to build an electronic record chooses to build an electronic record? What if someone required to build an electronic record submits paper reps and certs instead?

Council's response: The provisions at FAR 52.204–8 and 52.212–3(j) make it clear that vendors are required to complete the representations and certifications in ORCA. Those certifications and representations would take precedence over any other representations and certifications received (for the same provisions included in ORCA) for the specific contract action unless the offeror indicates he is amending those answers in accordance with the referenced provisions.

4. *Comment:* Since contractors are currently using the CCR database, the EEO database, PRO-Net, and EPLS (consolidated under “*BPN.com*”), will there be a future consideration for a contractor to have access and use the contractor's reps and certs rather than have the contractor continuing to request a new reps and certs package for the same sources that are on the “BPN” reps and certs database?

Council's response: Vendors will have access to ORCA. Please also note that the PRO-Net system has been retired, with its key capabilities being incorporated into CCR.

5. *Comment:* An additional clarification at FAR 12.301 is needed for oral solicitations. FAR 13.106–1(c) states the contracting officer shall solicit quotations orally to the maximum extent practicable. FAR 5.101(a)(2)(ii) exempts contracting officers from posting \$10K–\$25K requirements if oral solicitations are used. Otherwise, the requirement has to be posted for 10 days - a millennium in the customer's

eyes. In contrast, FAR 12.301(a)(2) says we have to use FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, in all commercial solicitations. Recommend verbiage be added to stating, “...other than oral...” just before the first “solicitation” in FAR 12.301(b). It would then read, “To implement this Act, the contracting officer shall insert the following provisions in other than oral solicitations for” If this isn’t the best place for it, then I would recommend similar verbiage in FAR 12.301(b)(2) to clear up this ambiguity.

Council’s response: This comment will be separately considered by the Councils for appropriate action.

6. *Comment:* The requirement for a physical affirmation (check box) that the representations and certifications posted to BPN are current appears unnecessary. Respondent recommends the following language: “The Offeror has completed the annual representations and certifications electronically via the Business Partner Network (BPN) web site at <http://orca.bpn.gov>, however, submits the following changes pertaining to this specific solicitation as identified below (insert changes, identifying change by clause number, title, and date). These amended representation(s) and/or certifications are also incorporated in this offer and are current, accurate, and complete as of the date of this proposal.” This (a) addresses the true intent of the proposed language; (b) eliminates additional physical check boxes; and (c) reinforces the fact that the vendor is being held responsible for the currency of their online reps and certs information.

Council’s response: We concur and have revised the applicable provisions accordingly.

7. *Comment:* Should FAR 52.222–38, Compliance with Veteran’s Employment Reporting Requirements, be included in FAR 14.213(b)?

Council’s response: We concur. The final rule and ORCA reflect the addition of this provision.

8. *Comment:* Can the electronic representations and certifications be incorporated with the Central Contractor Registration (CCR) file so as not to cause an additional burden on contractors already registered in the CCR?

Council’s response: The ORCA portion of the BPN was built to supplement the data in CCR. Because CCR is now used for more than contracting purposes, we decided to not require additional representation and certification information from all CCR registrants, as it is only necessary for

contracting offices. To alleviate the burden on the vendors, company information collected in CCR is electronically provided and pre-populated into ORCA. The vendor is not asked to re-enter any information that is found in CCR. The only information the vendor needs to supply in ORCA is directly related to representations and certifications.

9. *Comment:* Our contracts are for low dollar amounts and I cannot see the contractors doing all this preliminary work just for a small amount of business for them. All of this may work for higher dollar business. Can there be a dollar value attached?

Council’s response: The provisions included in ORCA have applicability at different dollar values with the majority applying to items over the micro-purchase level. As such, ORCA must be applied to all acquisitions over the micro-purchase threshold. (However, in accordance with FAR 4.1102, micro-purchases can also be exempted from Central Contractor Registration (CCR) requirements.)

10. *Comment:* If vendors already access CCR, why is ORCA available only through the Business Partner Network? It seems it would be easier to include the necessary fields for ORCA into CCR so that vendors would not have to access two systems.

Council’s response: ORCA is available through the BPN because it is part of the BPN, as is CCR. However, just like CCR, it can be reached directly via the URL <http://orca.bpn.gov>. To alleviate the burden on the vendor, company information collected in CCR is electronically provided and pre-populated into ORCA. The vendor is not asked to re-enter any information that is found in CCR.

11. *Comment:* Does a contractor first submit online reps and certs when he/she receives a solicitation and decides to submit an offer; or are the CCR database administrators going to notify its registrants and instruct them to go to the “Online Representations and Certifications Application (ORCA)” at bpn.gov and enter in the reps and certs?

Council’s response: The first time the vendor responds to a solicitation that includes either FAR 52.204–8 or 52.212–3(j), the vendor would be required to complete the online representations and certifications. However, the Government plans an extended outreach effort, including notifications from CCR, in order to publicize ORCA’s availability and required use.

12. *Comment:* Informational language in the proposed rule stated, “Small businesses that are exempted from

registering in the CCR database are also exempted from submitting representations and certifications electronically.” This statement is confusing. We are not aware of any business class exceptions to CCR registration. The exception to CCR registration at FAR 4.1102 does not apply to the entity doing business with the Government inasmuch as it applies to the type of acquisition or contract being awarded at the time. Even if a contractor was awarded a contract that happened to be exempt from the CCR requirement, the exception does not then apply for subsequent or new awards, if the new award does not meet one of the exceptions.

Council’s response: We concur. The informational language has been corrected in the final rule.

13. *Comment:* We think that contractors may become frustrated or confused if, after completing reps and certs on line, they are then required to fill out reps and certs in another contract, just because that particular contract is exempt from the CCR requirements. Perhaps there should be direction to the CO to check ORCA before deciding which reps and certs clause to include in a solicitation for an award that may be exempt from CCR. If the contractor has already completed the annual reps and certs, then the annual reps and certs clause(s) could be used in the solicitation. If not, then the CO would include all applicable reps and certs required for the solicitation. However, since reps and certs are required for every award (except for micropurchases), there should be no exceptions for annual reps and certs. All solicitations should include the annual reps and certs clause. We believe that even contractors who may have had a contract exempted from CCR will eventually have to be registered in the CCR and therefore will be able to submit annual reps and certs.

Council’s response: Concur. Final rule includes language to encourage ORCA use when CCR is not required and provides further instructions if the offeror has already completed representations and certifications in ORCA.

14. *Comment:* Perhaps the requirement for annual reps and certs should be moved from FAR Parts 12, 14, and 15 and moved to FAR Part 4, in a new Subpart, 4.12 (after 4.11, Central Contractor Registration). Alternatively, revise Subpart 4.11 to be a subpart titled Business Partner Network, with two sections. The scope of the subpart would prescribe policies and procedures for requiring contractor registration in the CCR database, and

submission of annual representations and certifications.

Council's response: We concur. The final rule adds a new Subpart 4.12 that addresses these requirements.

15. *Comment:* We have a concern about the submission process of the "Online Representations and Certification Application (ORCA)". In reading the ORCA procedures, we noted that contractors would be required to have a Marketing Partner Identification Number (MPIN) in order to enter information into ORCA. This is a number created by the vendor during the registration process in the CCR. We have a concern about this requirement. The MPIN is not a mandatory field in the CCR and it is likely that quite a few contractors did not create an MPIN at the time of CCR registration. It is possible that a lot of contractors will now have to go back to CCR and create an MPIN. We suggest allowing that the Trading Partner Identification Number (TPIN) issued by CCR be used instead, or change the MPIN field in CCR to a mandatory one. While this may be outside the scope of this case, this is something that should be looked into.

Council's response: The TPIN, for security reasons, is not provided to anyone (including other government systems) other than the Point of Contact provided by the registrant in its CCR record. The MPIN is required for vendors to use other Government systems (such as the Past Performance Information Retrieval System (PPIRS) and Federal Technical Data Solution (FedTeDS)), so its use for ORCA is consistent. However, it is true that currently the MPIN is an optional field in CCR. The suggestion to make it mandatory has been provided to the CCR Program Manager for consideration. Additionally, vendor outreach is planned for the implementation of ORCA, which will include instructions on the MPIN and its use.

16. *Comment:* Why is there no reference to annual representations and certifications in FAR Part 13 for use with non-commercial item acquisitions. We assume that either FAR 52.214-30 or 52.215-7 would be used. We recommend adding language similar to that at the proposed FAR 15.209(g) to FAR 13.302-5(d).

Council's response: Although FAR Part 13 does not specifically discuss representations and certifications, FAR 13.003(g)(1) states that any appropriate combination of procedures in FAR parts 13, 14, 15, 35, or 36 may be used for non-commercial items that do not exceed the simplified acquisition

threshold. This would include using ORCA.

17. *Comment:* We recommend adding language similar to that at the proposed FAR 15.209(g) to FAR 14.201-9(e).

Council's response: By adding new Subpart 4.12, there is no need to add language to FAR 14.201-9(e).

18. *Comment:* FAR 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products. This particular certification, which is listed as a certification that is not to be included in a solicitation that includes the annual reps and certs clause, doesn't seem appropriate as an annual certification because it contains contract specific fill-ins for the CO. This is only used for acquisition of certain products, which the CO must identify in the solicitation. How can this be an "annual certification?"

Council's response: For the majority of vendors completing FAR 52.222-18, the answer would likely be the same: that they do not supply any end products from the identified countries. Vendors that have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

19. *Comment:* We think the language in the "Annual Reps and Certs" clauses should be revised to make it clear to offerors that any reps and certs posted on the BPN that do not apply or are different because of a particular solicitation must be identified. We are especially concerned that offerors understand that while they may be certified as a small business under one NAICS code, they may not be small under another one.

Council's response: We concur. The language included in the new Subpart 4.12 and in the provisions at FAR 52.204-8 and 52.212-3(j) makes it clear that offerors are required to indicate in the specific solicitation differences from the representations and certifications in ORCA.

20. *Comment:* When using ORCA, will contractors indicate their business size for the NAICS that they most commonly do business under and then be required to update the listing and business size when additional NAICS are used for particular situations? Or will they just indicate how many employees/dollars and then have the Government make assessments based on the particular NAICS that pertains to each solicitation?

Council's response: The vendor can provide up to 20 NAICS in CCR and consequently ORCA. Every NAICS the vendor provides to CCR is listed in

ORCA. Size determination is automatically calculated (using annual revenue and number of employees) and displayed for each NAICS given. Additionally, the vendor-provided annual revenue and number of employees is shown. Contracting officers can use that information to calculate size status for NAICS not provided.

21. *Comment:* Vendors may be reluctant to publish TIN numbers because of concerns that it would be accessible to other parties.

Council's response: TIN numbers are never displayed in ORCA. The notice "TIN on File with CCR" is shown in place of the actual TIN.

22. *Comment:* An offeror's response to the Buy American Act certification would depend on the type of product being provided by the vendor.

Council's response: Vendors can list all of their foreign end products and the associated countries in ORCA. If in response to a solicitation a vendor offers a foreign end product not listed in ORCA, the vendor would provide the information in accordance with either provision FAR 52.204-8 or 52.212-3(j).

23. *Comment:* The proposed FAR 52.214-30 and 52.215-7 clauses are nearly identical (one referring to sealed bids and the other referring to negotiation and offerors). Consider combining the two proposed clauses into a single clause.

Council's response: Concur. The two provisions have been combined into new provision FAR 52.204-8.

24. *Comment:* Will the BPN Web site for the representations and certifications also accommodate agency-specific reps and certs, such as DFARS 252.247-7022?

Council's response: At this time ORCA only contains FAR level representations and certifications. Agency specific provisions are included in RFPs as required by Agency policies and regulations. However, this recommendation has been forwarded to the ORCA Program Manager for possible future inclusion in ORCA.

25. *Comment:* It would appear that Certificates of Current Cost and Pricing Data (when required - i.e., non-competitive RFPs) would need to be included within RFPs, outside of their place within the Reps and Certs.

Council's response: We concur. The certification at FAR 15.406-2, Certificate of Current Cost or Pricing Data, is not included in ORCA.

26. *Comment:* Reps and Certs concerning Limited Rights Data/Restricted Software would have to remain and RFP-specific requirement to

be called out by a contractor in some other portion of their proposal.

Council's response: ORCA allows the vendor to enter multiple Limited Rights Data and Restricted Computer Software into their record. A vendor that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

27. *Comment:* Information pertaining to Place of Performance would have to be RFP-specific and identified by contractors in another portion of their proposal.

Council's response: ORCA allows the vendor to enter multiple Places of Performance. A vendor that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

28. *Comment:* The identification of "authorized negotiators," often included within Reqs and Certs, is RFP-specific information for most contractors, and would have to be identified elsewhere in a contractor's proposal.

Council's response: ORCA does not provide for identification of authorized negotiators. This requirement is solicitation specific.

29. *Comment:* There are a number of issues regarding the handling of subcontractor Reqs and Certs: (a) prime contractors could be given controlled access to the CCR database, to determine whether and what Reqs and Certs have been completed by a subcontractor; (b) prime contractors could rely on a written affirmation/certification from subcontractors that they have completed the all-encompassing Reqs and Certs; and (c) giving prime contractors access to the CCR database is probably the best solution, otherwise, there is a large amount of information that prime contractors would still have to get from subcontractors: business size, DUNS #, taxpayer ID #, whether they are debarred, or whether they are subject to the Cost Accounting Standards, for several examples.

Council's response: ORCA is available to the public to search and view. However, as previously stated, a vendor's TIN Number is never publicly displayed on ORCA.

30. *Comment:* Contractors must be required to update their BPN annual revenue size certifications whenever they complete a fiscal year, and must be required to update their BPN number of employees size certifications on a monthly basis in order for such certifications to be current, accurate, and complete. Otherwise the BPN reqs

and certs will be most likely be out-of-date, inaccurate, and incomplete, resulting in increased costs for both the procuring agency (increased number of size protests and related GAO protests) and offerors (costs associated with preparing offer for procurement where concern is ultimately found to be ineligible for award).

Council's response: In accordance with the provisions at FAR 52.204-8 and 52.212-3(j) (whichever is included in the solicitation), the vendor's offer constitutes affirmation that the information in ORCA is current, accurate, and complete as of the date of the offer. The offeror assumes the risk of out-of-date, inaccurate, or incomplete information by submission of his offer.

31. *Comment:* FAR 52.219-1 also contains reqs and certs with respect to offers from HUBZone joint ventures, which are contract-specific reqs and certs that cannot be submitted through the BPN (FAR 52.219-1(b)(6)(ii)). If the rule is adopted as proposed, the HUBZone joint venture reqs and certs must be added to another FAR clause so that affected entities can make the required joint venture reqs and certs with respect to particular contracts.

Council's response: We disagree. Vendors that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

32. *Comment:* Under the proposed rule, firms will not have to submit FAR 52.219-2, Equal Low Bids, on a contract-by-contract basis. However, under FAR 52.219-2, a concern must identify the labor surplus area (LSA) "in which the costs to be incurred on account of manufacturing or production (by the bidder or first-tier subcontractors) amount to more than 50 percent of the contract price." Such a representation can only be made on a contract-by-contract basis. FAR clause 52.219-2 must be included in each particular contract. We recommend that proposed FAR 14.213(b)(9) be deleted.

Council's response: We disagree. For the majority of vendors completing FAR 52.219-2, the answer would likely be the same regardless of the solicitation. Vendors that have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j), (whichever is included in the solicitation).

33. *Comment:* Under the proposed rule, firms will not have to submit FAR 52.219-22, Small Disadvantaged Business Status, on a contract-by-contract basis. However, this clause

allows a firm that has not been certified as small disadvantaged business (SDB) to claim entitlement to SDB preferences while an application for SDB certification is pending (FAR 52.219-22(b)(1)(ii)). Procedures are currently in place for expediting SBA's review of an SDB application when an applicant is the apparent successful offeror (FAR 19.304(c)(2), 19.304(d); 13 CFR 124.1001(c)(2) and 124.1010). It is unclear if concerns can only represent themselves as SDBs in BPN if they have in fact already been certified as SDBs by SBA. If that is the case, then the provisions of FAR clause 52.219-22(b)(1)(ii) must be included in all solicitations so that firms can take advantage of the regulatory provisions which allow concerns to claim entitlement to SDB preferences while an SDB application is pending.

Council's response: We disagree. FAR 52.219-22(b)(1)(ii) is included in ORCA. A vendor can initially indicate that it has submitted a completed application to SBA and then update the representation if and when it is certified. A vendor can also indicate a change in status in either FAR 52.204-8 or 52.212-3(j), as appropriate.

Therefore, this final rule amends FAR parts 2, 4, 14, 15 and 52 to require offerors to—

- Provide representations and certifications electronically via the BPN Website at <http://orca.bpn.gov>;
- Update the representations and certifications as necessary, but at least annually to ensure they are kept current, accurate and complete; and
- Make changes that affect only one solicitation by completing the appropriate sections of either FAR 52.204-8 or 52.212-3(j); whichever is included in the solicitation.

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

B. Regulatory Flexibility Act

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

1. A succinct statement of the need for, and the objectives of, the rule.

The FAR requires small businesses to provide representations and certifications for individual solicitations. However, FAR 15.209(g) and FAR 14.213 do permit annual submissions if authorized by individual agencies. This rule establishes the requirement for annual submissions by electronic means.

In an effort to broaden use and reliance upon e-business applications, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are working with the Office of Federal Procurement Policy to eliminate the need to maintain paper-based sources of contractor information. The objective of this rule is to eliminate the need for offerors to submit the same information (*i.e.*, representations and certifications) to different Government contracting and payment offices. By the offerors providing this information to a centralized location, it is anticipated that this rule will have a significant positive impact on small businesses by reducing their overall administrative burden.

2. Legal basis for the rule.

There is no statutory basis for this rule but, rather, an e-Government Integrated Acquisition Environment's (IAE) initiative to re-use data as much as possible throughout the Federal procurement workspace (*i.e.*, "submit once, use many" times).

3. Description of, and, where feasible, estimate of the number of small entities to which the rule will apply.

The rule applies to small business offerors that also are required to register in the Central Contractor Registration (CCR) database. The reason for the link with CCR is that, as part of the online representations and certifications process, the software will use information that an offeror has already provided into the CCR database. The offeror will provide the additional information needed. Therefore, small businesses that are exempted from registering in the CCR database are also exempted from submitting representations and certifications electronically. The following CCR exceptions also apply to this rule:

(a) The purchase uses a Governmentwide commercial purchase card as the purchasing mechanism.

(b) Registration (see 4.401) in the CCR database, or use of CCR data, could compromise the safeguarding of classified information or national security.

(c) The contract is awarded by—

(1) A deployed contracting officer in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(7); or

(2) A contracting officer in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, *e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121).

(d) The contract is to support unusual or compelling needs.

(e) The award made is to a foreign vendor for work performed outside the United States, if it is impractical to obtain CCR registration before award.

Based on Governmentwide data, approximately, 20,825 small businesses were awarded contracts of \$25,000 or more in fiscal year 2002. It is estimated that a majority of them will be subject to the rule. Many of these businesses are already among the over 240,000 registrants in CCR. Information is not available to identify the

additional number of small businesses that were awarded contracts of less than \$25,000, or were awarded basic agreements, basic ordering agreements, or blanket purchase agreements.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The Office of Management and Budget has already approved the current FAR information and recordkeeping requirement for obtaining representations and certifications under OMB Control Number 9000-0034. The rule decreases the collection requirements since the rule requires offerors to provide representations and certifications annually into a centralized database, in lieu of providing this information with each solicitation.

Administrative or financial personnel that have general knowledge of the contractor's business are able to register by providing the pertinent information into the Business Partner Network website.

5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the rule.

The rule will not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the final rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.

There are no significant practical alternatives that will accomplish the objective of this rule. Continued reliance on a paper-based system would unnecessarily promote inefficiency associated with paper-based processes. The successful phase-in of CCR by the Department of Defense demonstrates that the Federal contracting community, including small businesses, is successfully transitioning to greater use of electronic tools and their associated efficiencies to conduct business.

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

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule contains information collection requirements; however, these changes do not impose additional information collection requirements to the paperwork burdens previously approved under the Office of Management and Budget (OMB) Control Numbers 9000-0018, 9000-0024, 9000-0025, 9000-0047, 9000-0090, 9000-0094, 9000-0097, 9000-0130, 9000-0134, 9000-0139, 9000-0150, and 9000-0155, since the rule requires offerors to provide representations and certifications annually into a centralized database, in lieu of providing the same information with each solicitation.

List of Subjects in 48 CFR Parts 2, 4, 14, 15, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 14, 15, 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)(2) by adding, in alphabetical order, the definitions "Business Partner Network (BPN)" and "Online Representations and Certifications Application (ORCA)" to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Business Partner Network (BPN)

means an integrated electronic infrastructure the Government uses to manage (*i.e.*, collect, validate, access and maintain) the information it needs to transact business with its contractors. The BPN is located at <http://www.bpn.gov>.

* * * * *

Online Representations and Certifications Application (ORCA) means the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government. ORCA is part of the Business Partner Network (BPN). ORCA is located at <http://orca.bpn.gov>.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

4.1101 Definition.

■ 3. Amend section 4.1101 by revising the section heading to read as set forth above; and removing the definition "Business Partner Network."

■ 4. Add Subpart 4.12 to read as follows:

Subpart 4.12—Annual Representations and Certifications

Sec.

4.1200 Scope.

4.1201 Policy.

4.1202 Solicitation provision and contract clause.

4.1200 Scope.

This subpart prescribes policies and procedures for requiring prospective contractors to submit Annual

Representations and Certifications via the Online Representations and Certifications Application (ORCA), a part of the Business Partner Network (BPN), to—

- (a) Eliminate the administrative burden for contractors of submitting the same information to various contracting offices; and
- (b) Establish a common source for this information to procurement offices across the Government.

4.1201 Policy.

(a) Prospective contractors shall complete electronic annual representations and certifications at <http://orca.bpn.gov> in conjunction with required registration in the Central Contractor Registration (CCR) database (see FAR 4.1102).

(b) Prospective contractors shall update the representations and certifications submitted to ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update to ORCA.

4.1202 Solicitation provision and contract clause.

Except for commercial item solicitations issued under FAR Part 12, insert in solicitations the provision at 52.204–8, Annual Representations and Certifications. When the clause at 52.204–7, Central Contractor Registration, is included in the solicitation, do not include the following representations and certifications:

- (a) 52.203–2, Certificate of Independent Price Determination.
- (b) 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.
- (c) 52.204–3, Taxpayer Identification.
- (d) 52.204–5, Women-Owned Business (Other Than Small Business).
- (e) 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.
- (f) 52.214–14, Place of Performance—Sealed Bidding.
- (g) 52.215–6, Place of Performance.
- (h) 52.219–1, Small Business Program Representations (Basic & Alternate I).
- (i) 52.219–2, Equal Low Bids.
- (j) 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.
- (k) 52.219–21, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program.

- (l) 52.219–22, Small Disadvantaged Business Status (Basic & Alternate I).
- (m) 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products.
- (n) 52.222–22, Previous Contracts and Compliance Reports.
- (o) 52.222–25, Affirmative Action Compliance.
- (p) 52.222–38, Compliance with Veterans' Employment Reporting Requirements.
- (q) 52.222–48, Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment—Contractor Certification.
- (r) 52.223–4, Recovered Material Certification.
- (s) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).
- (t) 52.223–13, Certification of Toxic Chemical Release Reporting.
- (u) 52.225–2, Buy American Act Certificate.
- (v) 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate (Basic, Alternate I & II).
- (w) 52.225–6, Trade Agreements Certificate.
- (x) 52.226–2, Historically Black College or University and Minority Institution Representation.
- (y) 52.227–6, Royalty Information (Basic & Alternate I).
- (z) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

PART 14—SEALED BIDDING

14.201–6 [Amended]

■ 5. Amend section 14.201–6 by removing and reserving paragraph (u).

14.213 [Removed]

■ 6. Remove section 14.213.

PART 15—CONTRACTING BY NEGOTIATION

15.209 [Amended]

■ 7. Amend section 15.209 by removing and reserving paragraph (g).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.204–8 to read as follows:

52.204–8 Annual Representations and Certifications.

As prescribed in 4.1202, insert the following provision:

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (JAN 2005)

(a)(1) If the clause at 52.204–7, Central Contractor Registration, is included in this solicitation, paragraph (b) of this provision applies.

(2) If the clause at 52.204–7 is not included in this solicitation, and the offeror is currently registered in CCR, and has completed the ORCA electronically, the offeror may choose to use paragraph (b) of this provision instead of completing the corresponding individual representations and certifications in the solicitation. The offeror shall indicate which option applies by checking one of the following boxes:

(i) Paragraph (b) applies.

(ii) Paragraph (b) does not apply and the offeror has completed the individual representations and certifications in the solicitation.

(b) The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) website at <http://orca.bpn.gov>. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [offeror to insert changes, identifying change by clause number, title, date]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR Clause #	Title	Date	Change

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.

(End of Provision)

■ 9. Amend section 52.212–1 by revising the date of the provision and paragraph (b)(8) to read as follows:

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

INSTRUCTIONS TO OFFERORS—
COMMERCIAL ITEMS (JAN 2005)

* * * * *

(b) *Submission of offers.* * * *

(8) A completed copy of the representations and certifications at FAR 52.212-3 (see FAR 52.212-3(j) for those representations and certifications that the offeror shall complete electronically);

* * * * *

■ 10. Amend section 52.212-3 by revising the date of the provision; adding an introductory paragraph and paragraph (j) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND
CERTIFICATIONS—COMMERCIAL ITEMS
(JAN 2005)

An offeror shall complete only paragraph (j) of this provision if the offeror has completed the annual representations and certifications electronically at <http://orca.bpn.gov>. If an offeror has not completed the annual representations and certifications electronically at the ORCA website, the offeror shall complete only paragraphs (b) through (i) of this provision.

* * * * *

(j)(1) *Annual Representations and Certifications.* Any changes provided by the offeror in paragraph (j) of this provision do not automatically change the representations and certifications posted on the Online Representations and Certifications Application (ORCA) website.

(2) The offeror has completed the annual representations and certifications electronically via the ORCA website at <http://orca.bpn.gov>. After reviewing the ORCA database information, the offeror verifies by submission of this offer that the representations and certifications currently posted electronically at FAR 52.212-3, Offeror Representations and Certifications—Commercial Items, have been entered or updated in the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201), except for paragraphs _____.

[Offeror to identify the applicable paragraphs at (b) through (i) of this provision that the offeror has completed for the purposes of this solicitation only, if any.]

These amended representation(s) and/or certification(s) are also

incorporated in this offer and are current, accurate, and complete as of the date of this offer.

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.]

(End of provision)

52.214-30 [Removed and Reserved]

■ 11. Remove and reserve section 52.214-30.

52.215-7 [Removed and Reserved]

■ 12. Remove and reserve section 52.215-7.

[FR Doc. 04-27633 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**48 CFR Parts 2, 9, 22, 28, 44, and 52**

[FAC 2001-26; FAR Case 2002-023; Item II]

RIN 9000-AJ78

**Federal Acquisition Regulation;
Excluded Parties List System
Enhancement**

AGENCY: 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 publish an electronic list of parties excluded from doing business with the Federal Government online identified as the Excluded Parties List System (EPLS). This will obviate the need to publish the hard copy of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (List of Parties) produced by the Government Printing Office.

DATES: *Effective Date:* January 19, 2005.

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 2001-26, FAR case 2002-023.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule incorporates the Excluded Parties List System into the FAR and enables agencies to directly enter data on parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies or the Government Accountability Office. GSA maintains that direct entry by the acting agency will improve the reliability of the system, eliminate the need for a hard copy list, provide access to the archival data, and enhance the ability to verify entries by permitting a search by exact name and social security number where the agencies entering the data have the authority to collect, retain, and publish the party's social security number.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 67353, December 1, 2003. The Councils received comments in response to the proposed rule from six respondents. Several respondents concurred in the rule as written. Other comments are categorized as follows:

1. One respondent recommended that the names of the parties listed in the EPLS be linked to the Central Contractor Registry (CCR) accessible on the Internet at <http://www.ccr.gov/index.cfm>. The Councils partially concur; however, in light of impending review of the CCR and the Business Partner Network (BPN) by their Program Manager, within the next six months to ascertain the capabilities of these systems, no change was made at the present time.

2. One respondent pointed out a technological glitch in conducting searches using the EPLS search engine for a field for DUNS number that is not a required entry. He points out that if the searcher has a DUNS number and searches for that given DUNS number but the agency data entry person has not entered the number, the research results will indicate no such entry or "No records were found matching this criteria." Searchers could readily interpret this search engine response as an indication that the party to which Dun and Bradstreet assigned a DUNS number is not listed in EPLS when what such search results could also mean is that there is no data actually entered into a non-mandatory field. He suggested adding a cautionary note to FAR 9.404 or 9.105-1(c)(1). The Councils acknowledge the validity of his concern but decline to add a cautionary note to the FAR. The Councils acknowledge that while obtaining a DUNS number is a

requirement in many areas within which one “conducts business with the government,” it is not yet a universal requirement. For instance, OMB has issued guidance for its use by grantees but the requirement does not extend to sub-recipients. The Councils also noted that his concern may be equally applicable to any field where entry is optional or not required. GSA has been requested to modify the automated response when a searcher searches on data possibly entered into an optional/not required field, so that the search engine response states words to the effect of “No records were found matching this criteria; however, you have searched for data contained in a non-mandatory field. A negative response may only indicate that no data matching your search criterion has been entered in the field DUNS number field or SSN/TIN field. A search on other required fields is recommended.”

3. One respondent made five suggestions addressing broad policy changes in the suspension and debarment system. The respondent stated that the EPLS has not been adequately applied or uniformly enforced against large and small contractors and recommends five changes to improve the suspension and debarment system:

a. Create a centralized information database that should be consulted before awarding a contract or making a suspension and debarment system.

b. Require a contractor to disclose current suspensions or debarment, Federal or state litigation initiated against them in the past 3 years, and any Administrative Agreements the contractor is currently implementing.

c. Require an agency debarment official to use suspension and debarment actions equally against large and small contractors or to justify in writing a determination to do business with a nonresponsible contractor.

d. Amend the FAR to require mandatory suspension or debarment for a contractor that either had been criminally convicted or had a civil judgment entered against them for more than once in a three-year period.

e. Empower the Interagency Suspension and Debarment Committee (ISDC) to coordinate with the Federal agency taking a leadership role in a suspension or debarment case (especially with a repeat offender) and require the Interagency Committee to submit semi-annual reports to Congress regarding suspension and debarment decisions.

Because these comments lay outside the scope of the rule and addressed basic principles and policies leading to

decisions to exclude parties rather than with the procedural changes in the operation of the electronic system, no change to the final rule is required. However, we will bring these comments to the attention of the ISDC.

4. One respondent had a list of comments regarding errors in citation and conflicts between definitions used in the FAR and the Nonprocurement Common Rule (NCR) published November 26, 2003 (68 FR 66553). The Councils acknowledge the definitions used in the NCR, but do not concur with the recommended changes to the proposed rule in the FAR. The FAR terminology, although not identical to the NCR terminology, is not entirely inconsistent. The FAR uses the specific terms “suspension,” “debarment,” or “proposed for debarment” which are also used in the NCR, but for which the NCR has provided an overall term of “excluded,” which the FAR does not use. The FAR uses the term “ineligible” (defined in FAR 2.101) rather than the comparable term “disqualified” used in the NCR, but the NCR also uses the term “ineligible” to cover both “excluded” and “ineligible.” Therefore, the actions described as “ineligible” in the FAR are also “ineligible” under the NCR, although the NCR uses the term more broadly. The term “ineligible” has been used for many years in the FAR, and is imbedded in the “Procurement Cause and Treatment Codes” and in agency supplements such as the Defense Federal Acquisition Regulation Supplement. The Councils consider that it would be unnecessarily disruptive to remove this term from the FAR. As stated in paragraph (b) of FAR 9.400, although FAR Subpart 9.4 covers the listing of ineligible contractors and the effect of this listing, it does not prescribe policies and procedures governing declarations of ineligibility. The main thing a contracting officer needs to know is the effect of being listed in the “Excluded Parties List System,” not the underlying basis for the listing, and whether the party is considered “ineligible” or “disqualified.” The contracting officer also needs to know the effect of being listed and may glean this from consultation with the cause and treatment codes. Accordingly, the final rule retains the current definition of “ineligible” in the FAR and deletes the NCR definitions of “disqualified” and “excluded or exclusion” which appeared in the proposed rule. However, the final rule adds “or disqualified under the Nonprocurement Common Rule” to paragraph (b)(1) of FAR 9.404. The respondent also noted

that the proposed rule also used the definition “covered transactions” but no definition was provided and that the statutory citations to the listing of violating facilities in the Clean Water Act and Clean Air Act were erroneous in the definition of “excluded or exclusion.” Because the final rule deletes this definition, no change has been made, although the respondent was correct in noting the citations were wrong. Lastly, the respondent recommended that the word “generally” be added to paragraph (c)(5) of FAR 9.404 to occasions where 5 working days may be insufficient. The final rule includes the adverb but notes that posting the data beyond the five days provided should occur rarely.

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 only makes changes in the way GSA manages and maintains the list of excluded parties. It does not change the criteria for inclusion on the list or the effect of the list on award or 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 2, 9, 28, 44, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 9, 22, 28, 44, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 9, 22, 28, 44, and 52 is revised to read as follows:

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

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition “Excluded Parties List System”; and removing the definition “List of Parties Excluded from Federal Procurement and Nonprocurement Programs.” The added definition reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

Excluded Parties List System means an electronic database maintained and posted by the General Services Administration containing the list of all parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies, Government corporations, or by the Government Accountability Office.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.105-1 by revising paragraph (c)(1) to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) * * *

(1) The Excluded Parties List System maintained in accordance with Subpart 9.4.

* * * * *

■ 4. Amend section 9.207 by revising paragraph (a)(9) to read as follows:

9.207 Changes in status regarding qualification requirements.

(a) * * *

(9) The source is on the Excluded Parties List System (see Subpart 9.4); or

* * * * *

■ 5. Revise section 9.404 to read as follows:

9.404 Excluded Parties List System.

(a) The General Services Administration (GSA)—

(1) Operates the web-based Excluded Parties List System (EPLS);

(2) Provides technical assistance to Federal agencies in the use of the EPLS; and

(3) Includes in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The EPLS includes the—

(1) Names and addresses of all contractors debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified

under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) DUNS No.;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency must—

(1) Obtain password(s) from GSA to access the EPLS for data entry;

(2) Notify GSA in the event a password needs to be rescinded (*e.g.*, when an agency employee leaves or changes function);

(3) Enter the information required by paragraph (b) of this section within 5 working days after the action becomes effective;

(4) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar;

(5) Update EPLS, generally within 5 working days after modifying or rescinding an action;

(6) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(7) Establish procedures to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors whose names are in the EPLS, except as otherwise provided in this subpart;

(8) Direct inquiries concerning listed contractors to the agency or other authority that took the action; and

(9) Contact GSA for technical assistance with the EPLS, via the support e-mail address or on the technical support phone line available at the EPLS web site provided in paragraph (d) of this section.

(d) The EPLS is available at <http://epls.gov>.

9.405 [Amended]

■ 6. Amend section 9.405 by—
a. Removing from paragraph (b) “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the EPLS” in its place; and

b. Removing from paragraphs (d)(1) and (d)(4) “List of Parties Excluded from

Federal Procurement and Nonprocurement Programs” and adding “EPLS” in their place.

9.405-2 [Amended]

■ 7. Amend section 9.405-2 by removing from paragraphs (b) introductory text, (b)(2), and (b)(3) “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the EPLS” in their place.

PART 22—APPLICATIONS OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1025 [Amended]

■ 8. Amend the first sentence of section 22.1025 by removing “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “Excluded Parties List System” in its place.

PART 28—BONDS AND INSURANCE

28.203-7 [Amended]

■ 9. Amend section 28.203-7 in paragraphs (c) and (d) by removing “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the Excluded Parties List System” in their place.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.202-2 [Amended]

■ 10. Amend section 44.202-2 in paragraph (a)(13) by removing “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the Excluded Parties List System” in its place.

44.303 [Amended]

■ 11. Amend section 44.303 in paragraph (c) by removing “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “Excluded Parties List System” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.209-6 [Amended]

■ 12. Amend section 52.209-6 by revising the date of the clause to read “(JAN 2005)” removing from the introductory text of paragraph (c) “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “Excluded Parties List System” in its place; and removing from paragraphs (c)(2) and (c)(3) “on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs” and adding “in the Excluded Parties List System” in their place.

52.213-4 [Amended]

■ 13. Amend section 52.213-4 by revising the date of the clause to read "(JAN 2005)"; and by removing from paragraph (b)(2)(i) of the clause "(July 1995)" and adding "(JAN 2005)" in its place.

[FR Doc. 04-27634 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 12, 13, and 15**

[FAC 2001-26; FAR Case 2003-022; Item III]

RIN 9000-AJ88

**Federal Acquisition Regulation;
Special Emergency Procurement
Authority**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert the interim rule published in the **Federal Register** at 69 FR 8312, February 23, 2004, to a final rule with changes. The rule amends the Federal Acquisition Regulation (FAR) to implement the special emergency procurement authorities of Section 1443 of the Services Acquisition Reform Act of 2003 (Pub. L. 108-136, Title XIV, codified at 41 U.S.C. 428a), and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. Section 822 of the Fiscal Year 2005 Defense Authorization Act further increased the threshold amounts for any contract to be awarded and performed, or purchases to be made, outside the United States.

Also, under section 1443, the head of the contracting activity carrying out a

procurement of supplies or services to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack may treat such supplies or services as a commercial item.

DATES: Effective Date: January 19, 2005.

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. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAC 2001-26, FAR case 2003-022.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (SARA) (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. Section 1443 also authorizes the expanded use of Simplified Acquisition and Commercial Items procedures. Section 822 authorized a higher micro-purchase and simplified acquisition threshold for any contract to be awarded and performed, or purchases to be made, outside the United States, for the same purposes as authorized under section 1443 of SARA.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 69 FR 8312, February 23, 2004. The 60-day comment period for the interim rule ended April 23, 2004. Three comments were received; they are addressed below. Section 822 of the Fiscal Year 2005 Defense Authorization Act was enacted after publication of the interim rule. As a result, this final rule incorporates the increased thresholds provided by section 822.

One commenter recommended that the Councils seek a Governmentwide waiver from the Secretary of Labor from application of FAR clauses 52.222-26, Equal Opportunity, and 52.222-36, Affirmative Action for Workers With Disabilities, so that the purchase card could be used without having to also issue a purchase order with these clauses. The final rule does not adopt this suggestion because the FAR already authorizes the agency head to waive the

inclusion of these clauses when deemed to be in the interest of national security (FAR 22.807(a)(1) and 22.1403(b), respectively).

The same commenter suggested that the final rule address the fact that the Service Contract Act requires clauses in all service contracts above \$2,500. The final rule does not adopt this suggestion because neither SARA nor the Fiscal Year 2005 Defense Authorization Act suggested that these acquisitions are exempt from statutory requirements.

Another commenter questioned why the interim rule did not include contingency operations in the increased limitation on use of simplified acquisition procedures, as authorized by Section 1443. The final rule has been amended to include the procurement of commercial supplies and services in support of contingency operations in the increased limitation on use of simplified acquisition procedures. However, services and supplies procured in support of a contingency operation must meet the definition of a commercial item in FAR 2.101 for the increased limitation to apply.

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

B. Regulatory Flexibility Act

This final rule 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 limitations are limited to procurements that are entered into in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. 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 final 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 is no significant alternative to the final rule that would accomplish the stated beneficial objective.

The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as follows:

1. *Description of the reasons why action by the agency is being considered.* This final rule revises the Federal Acquisition Regulation (FAR) in order to implement

Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies and services to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. Section 822 increases the micro-purchase threshold and simplified acquisition threshold for any contract to be awarded and performed, or purchases to be made, outside the United States.

2. *Succinct statement of the objectives of, and legal basis for, the final rule.* This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

3. *Description of, and, where feasible, estimate of the number of small entities to which the final rule will apply.* The increased thresholds are limited to procurements that are to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. There are no data available on the number of procurements that will be eligible. However, we expect the number of small entities that will be impacted by the increased thresholds to this limited class of procurements to be very small. In addition, although not required by the statute, the final rule raises the small business set-aside ceilings for purchases made under the authority of Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a). Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 is unlikely to affect small businesses in the United States as it applies outside the United States.

4. *Description of projected reporting, record keeping, and other compliance requirements of the final 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 reporting, record keeping, or other compliance requirements for this final rule.

5. *Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the final rule.* This rule does not duplicate, overlap, or conflict with other relevant Federal rules.

6. *Description of any significant alternatives to the final rule, which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the final rule on small entities.* There are no significant alternatives to the final rule that would accomplish the stated objectives yet further reduce impact on small entities. The rule includes only FAR text revisions required to implement the statute.

The FAR Secretariat has submitted a copy of the Final 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 2001–26, FAR case 2003–022) in correspondence.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 2, 12, 13, and 15

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

Interim Rule Adopted as Final With Changes

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 10, 12, 13, 15, 19, and 25 which was published in the **Federal Register** at 69 FR 8312, February 23, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 12, 13, and 15 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)(2) by revising the definitions “Micro-purchase threshold” and “Simplified acquisition threshold” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

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

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

(2) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in 13.201(g)(1), except for construction subject to the Davis-Bacon Act (41 U.S.C. 428a)—

(i) \$15,000 in the case of any contract to be awarded and performed, or

purchase to be made, inside the United States; and

(ii) \$25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

Simplified acquisition threshold means \$100,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (41 U.S.C. 428a), the term means—

(1) \$250,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(2) \$1 million for any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 12.203 by revising the last sentence to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$5 million (\$10 million for acquisitions as described in 13.500(e)), including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.000 by revising the second sentence to read as follows:

13.000 Scope of part.

* * * Subpart 13.5 provides special authority for acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$5 million (\$10 million for acquisitions as described in 13.500(e)), including options. * * *

■ 5. Amend section 13.003 by revising paragraphs (c)(1)(ii) and (g)(2) to read as follows:

13.003 Policy.

* * * * *

(c)(1) * * *

(ii) \$5 million (\$10 million for acquisitions as described in 13.500(e)), including options, for acquisitions of commercial items using Subpart 13.5.

* * * * *

(g) * * *

(2) \$5 million (\$10 million for acquisitions as described in 13.500(e)),

for commercial items, use any appropriate combination of the procedures in Parts 12, 13, 14, and 15 (see paragraph (d) of this section).

* * * * *

■ 6. Amend section 13.201 by removing "\$15,000." from the end of paragraph (g)(1) and adding "—" in its place; and adding paragraphs (g)(1)(i) and (g)(1)(ii) to read as follows:

13.201 General.

* * * * *

(g)(1) * * *

(i) \$15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) \$25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

■ 7. Amend section 13.303–5 by revising paragraph (b)(2) to read as follows:

13.303–5 Purchases under BPAs.

* * * * *

(b) * * *

(2) The limitation for individual purchases for commercial item acquisitions conducted under Subpart 13.5 is \$5 million (\$10 million for acquisitions as described in 13.500(e)).

* * * * *

■ 8. Amend section 13.500 by revising the first sentence of paragraph (a); and adding paragraph (e) to read as follows:

13.500 General.

(a) This subpart authorizes, as a test program, use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5 million (\$10 million for acquisitions as described in 13.500(e)), including options, if the contracting officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items. * * *

* * * * *

(e) Under 41 U.S.C. 428a, the simplified acquisition procedures authorized by this test program may be used for acquisitions that do not exceed \$10 million when—

(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack; or

(2) The acquisition will be treated as an acquisition of commercial items in accordance with 12.102(f)(1).

■ 9. Amend section 13.501 by revising paragraph (a)(1)(ii) to read as follows:

13.501 Special documentation requirements.

(a) * * *

(1) * * *

(ii) Prepare sole source justifications using the format at 6.303–2, modified to reflect an acquisition under the authority of the test program for commercial items (section 4202 of the Clinger-Cohen Act of 1996) or the authority of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

15.403–1 [Amended]

■ 10. Amend section 15.403–1 in paragraph (c)(3)(ii) by removing "(Pub. L. 108–136, Sec. 1443)" and adding "(41 U.S.C. 428a)" in its place.

[FR Doc. 04–27635 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, and 52

[FAC 2001–26; FAR Case 2004–010; Item IV]

RIN 9000–AK04

Federal Acquisition Regulation; Notification of Employee Rights Concerning Payment of Union Dues or Fees

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 Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees. The rule requires Government contractors and subcontractors to post notices, in all plants and offices, whether or not used in performing work that supports a Federal contract, informing their employees that under Federal law they

cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes.

DATES: *Effective Date:* December 20, 2004.

The Department of Labor's final rule implementing Executive Order 13201 was published on March 29, 2004, with an effective date of April 28, 2004. This rule amending the FAR is the formal notification to contracting officers to insert the Executive Order 13201 clause in covered solicitations issued on or after the effective date of this rule.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before February 18, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2001–26, FAR case 2004–010, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: farcase.2004-010@gsa.gov. Include FAC 2001–26, FAR case 2004–010 in the subject line of the message.

- Fax: 202–501–4067.

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

Instructions: Please submit comments only and cite FAC 2001–26, FAR case 2004–010, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

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 2001–26, FAR case 2004–010.

SUPPLEMENTARY INFORMATION:

A. Background

On April 13, 1992, President George H. W. Bush issued Executive Order (E.O.) 12800. E.O. 12800 required unionized Federal contractors to post a notice in the workplace that workers are

not required to join or support a union and threatened sanctions against contractors who did not comply. The next month, the Councils issued an interim rule implementing E.O. 12800 (57 FR 20373–20375, May 12, 1992).

However, E.O. 12800 was revoked on February 1, 1993, by President Clinton's E.O. 12836 (58 FR 7045, February 3, 1993). On March 2, 1993, the Councils issued a final rule (58 FR 12140) eliminating the interim rule.

On February 17, 2001, President George W. Bush issued E.O. 13201 (66 FR 11221, February 22, 2001). This Executive order revoked President Clinton's E.O. 12836 and reasserts the notification provisions and sanctions of E.O. 12800.

On October 1, 2001, the Department of Labor (DoL) published a proposed rule implementing E.O. 13201 (66 FR 50010). DoL finalized its implementing rule on March 29, 2004 (69 FR 16376).

E.O. 13201 is designed to promote economy and efficiency in Government procurement due to a better-informed American workforce. E.O. 13201 contains requirements similar, but not identical, to those in E.O. 12800.

The interim rule amends the FAR to—

- Provide a new FAR subpart on Notification of Employee Rights Concerning Payment of Union Dues or Fees;

- Add a clause at 52.222–39 to be included in every solicitation and contract, other than purchases that do not exceed the simplified acquisition threshold and contracts covered by an exemption granted by the Secretary of Labor. The new clause applies to contracts (commercial or non-commercial) and subcontracts (commercial or non-commercial) that exceed the simplified acquisition threshold;

- Amend the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, in order to include the new 52.222–39 clause; and

- Amend the clause at 52.244–6, Subcontracts for Commercial Items, in order to include the new 52.222–39 clause.

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

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities

within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule merely requires contractors to post notices and to insert a clause in subcontracts and purchase orders requiring subcontractors and vendors to post the notices also. The notices advise the contractors' and subcontractors' nonunion member employees of their rights under existing law concerning use of their union dues or fees where a union security agreement is in place. The rule provides sanctions for noncompliance, but full compliance with the Executive order and any related rules, regulations, and orders of the Secretary of Labor is expected of all contractors. Further, this interim rule is only implementing the DoL final rule. The Secretary of Labor has certified to the Chief Counsel for Advocacy at the Small Business Administration that the DoL final rule will not substantially change existing obligations for Federal contractors. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 22, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2001–26, FAR case 2004–010), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the interim rule contains information collection requirements; however, this rule's changes do not impose additional information collection requirements to the paperwork burden previously submitted to the Office of Management and Budget (OMB) and approved on November 15, 2004, under OMB Control Number 1215–0203. The DoL has identified the burdens associated with the filing and processing of complaints by complainants and contractors in the notice of final rulemaking at 69 FR 16376, March 29, 2004. The Councils believe that the package submitted by DoL meets the requirement imposed by the Paperwork Reduction Act and sufficiently covers this interim rule and no further action is necessary.

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 Executive Order 13201 and the DoL rule at 29 CFR part 470 effective April 28, 2004. 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, 22, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 22, 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)(2) in the definition “United States” by redesignating paragraphs (4) and (5) as (5) and (6), respectively, and adding a new paragraph (4) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

United States, when used in a geographic sense, means the 50 States and the District of Columbia, except as follows:

* * * * *

(4) For use in Subpart 22.16, see the definition at 22.1601.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 3. Add Subpart 22.16, consisting of sections 22.1600 through 22.1605, to read as follows:

Subpart 22.16—Notification of Employee Rights Concerning Payment of Union Dues or Fees

Sec.

22.1600 Scope of subpart.

22.1601 Definitions.

22.1602 Policy.

22.1603 Exemptions granted by the Secretary of Labor.

22.1604 Compliance investigations and sanctions for violations.

22.1605 Contract clause.

22.1600 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 13201, February 17, 2001.

22.1601 Definitions.

As used in this subpart—
Secretary means the Secretary of Labor, U.S. Department of Labor.
United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.1602 Policy.

Executive Order 13201 generally requires contractors to post a notice informing employees of their rights concerning payment of union dues or fees and to include this requirement in subcontracts and purchases that exceed the simplified acquisition threshold.

22.1603 Exemptions granted by the Secretary of Labor.

(a) The Secretary may grant exemptions from the requirements of this subpart, including the requirement to include the clause at 52.222–39, or parts of that clause, in contracts. Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 470.3.

(b) The requirements of this subpart do not apply to contracts or subcontracts or purchases that do not exceed the simplified acquisition threshold.

22.1604 Compliance investigations and sanctions for violations.

The Secretary may investigate any contractor, subcontractor, or vendor to determine if any of the requirements of the clause at 52.222–39 have been violated. The procedures for conducting the investigations and effecting the sanctions are in 29 CFR part 470, Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures. If the Secretary determines that there has been a violation, the Secretary may, to the extent authorized by 29 CFR 470.14 (which, in part, requires coordination between the head of the agency and the Secretary), direct that the contract be cancelled, terminated, or suspended in whole or in part. The Secretary may also declare the contractor ineligible for further Government contracts. Each contracting agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary’s functions.

22.1605 Contract clause.

Insert the clause at 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees, in all solicitations and contracts, except—

(a) Acquisitions that do not exceed the simplified acquisition threshold. For indefinite quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold; or

(b) Contracts covered by an exemption granted by the Secretary of Labor. A contracting agency may modify the clause at 52.222–39, if necessary, to reflect an exemption granted by the Secretary (see 22.1603(a)).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Amend section 52.212–5 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (b)(21) through (b)(34) as (b)(22) through (b)(35), respectively, and adding a new paragraph (b)(21);
- c. In the introductory text of paragraph (e)(1), by removing “paragraphs (i) through (vi)” and adding “paragraphs (i) through (vii)” in its place; and redesignating paragraphs (e)(1)(v) and (e)(1)(vi) as (e)(1)(vi) and (e)(1)(vii), respectively, and adding a new paragraph (e)(1)(v) to read as follows:

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

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (DEC 2004)

* * * * *

(b) * * *

(21) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201).

* * * * *

(e)(1) * * *

(v) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201).

* * * * *

52.213–4 [Amended]

- 5. Amend section 52.213–4 by removing from the clause heading “(Oct 2004)” and adding “(DEC 2004)” in its place; and removing “(July 2004)” from paragraph (a)(2)(vi) of the clause and adding “(DEC 2004)” in its place.
- 6. Add section 52.222–39 to read as follows:

52.222–39 Notification of Employee Rights Concerning Payment of Union Dues or Fees.

As prescribed in 22.1605, insert the following clause:

NOTIFICATION OF EMPLOYEE RIGHTS CONCERNING PAYMENT OF UNION DUES OR FEES (DEC 2004)

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

(b) Except as provided in paragraph (e) of this clause, during the term of this contract, the Contractor shall post a notice, in the form of a poster, informing employees of their rights concerning union membership and payment of union dues and fees, in conspicuous places in and about all its plants and offices, including all places where notices to employees are customarily posted. The notice shall include the following information (except that the information pertaining to National Labor Relations Board shall not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151–188)).

Notice to Employees
 Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address or toll free number:

National Labor Relations Board
 Division of Information
 1099 14th Street, N.W.
 Washington, DC 20570
 1–866–667–6572
 1–866–316–6572 (TTY)

To locate the nearest NLRB office, see NLRB’s website at <http://www.nlr.gov>.

(c) The Contractor shall comply with all provisions of Executive Order 13201 of February 17, 2001, and related implementing regulations at 29 CFR part 470, and orders of the Secretary of Labor.

(d) In the event that the Contractor does not comply with any of the requirements set forth in paragraphs (b), (c), or (g), the Secretary may direct that this contract be cancelled, terminated, or suspended in whole or in part, and declare the Contractor ineligible for further Government contracts in accordance with procedures at 29 CFR part 470, Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures. Such other sanctions or remedies may be imposed as are provided by 29 CFR part 470, which implements Executive Order 13201, or as are otherwise provided by law.

(e) The requirement to post the employee notice in paragraph (b) does not apply to—

(1) Contractors and subcontractors that employ fewer than 15 persons;

(2) Contractor establishments or construction work sites where no union has been formally recognized by the Contractor or certified as the exclusive bargaining representative of the Contractor's employees;

(3) Contractor establishments or construction work sites located in a jurisdiction named in the definition of the United States in which the law of that jurisdiction forbids enforcement of union-security agreements;

(4) Contractor facilities where upon the written request of the Contractor, the Department of Labor Deputy Assistant Secretary for Labor-Management Programs has waived the posting requirements with respect to any of the Contractor's facilities if the Deputy Assistant Secretary finds that the Contractor has demonstrated that—

(i) The facility is in all respects separate and distinct from activities of the Contractor related to the performance of a contract; and

(ii) Such a waiver will not interfere with or impede the effectuation of the Executive order; or

(5) Work outside the United States that does not involve the recruitment or employment of workers within the United States.

(f) The Department of Labor publishes the official employee notice in two variations; one for contractors covered by the Railway Labor Act and a second for all other contractors. The Contractor shall—

(1) Obtain the required employee notice poster from the Division of Interpretations and Standards, Office of

Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5605, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs;

(2) Download a copy of the poster from the Office of Labor-Management Standards website at <http://www.olms.dol.gov>; or

(3) Reproduce and use exact duplicate copies of the Department of Labor's official poster.

(g) The Contractor shall include the substance of this clause in every subcontract or purchase order that exceeds the simplified acquisition threshold, entered into in connection with this contract, unless exempted by the Department of Labor Deputy Assistant Secretary for Labor-Management Programs on account of special circumstances in the national interest under authority of 29 CFR 470.3(c). For indefinite quantity subcontracts, the Contractor shall include the substance of this clause if the value of orders in any calendar year of the subcontract is expected to exceed the simplified acquisition threshold. Pursuant to 29 CFR part 470, Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures, the Secretary of Labor may direct the Contractor to take such action in the enforcement of these regulations, including the imposition of sanctions for noncompliance with respect to any such subcontract or purchase order. If the Contractor becomes involved in litigation with a subcontractor or vendor, or is threatened with such involvement, as a result of such direction, the Contractor may request the United States, through the Secretary of Labor, to enter into such litigation to protect the interests of the United States.

(End of clause)

■ 7. Amend section 52.244-6 by revising the date of the clause; redesignating paragraph (c)(1)(v) as (c)(1)(vi), and adding a new paragraph (c)(1)(v) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (DEC 2004)

* * * * *

(c)(1) * * *

(v) 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201). Flow down as required in

accordance with paragraph (g) of FAR clause 52.222-39).

* * * * *

[FR Doc. 04-27636 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2001-26; FAR Case 2003-010; Item V]

RIN 9000-AJ90

Federal Acquisition Regulation; Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements

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 change the approval authority of Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies.

DATES: Effective Date: January 19, 2005.

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. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAC 2001-26, FAR case 2003-010.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies. This change is being made in order for DOD to streamline and transform itself to more effectively achieve its mission. The Pilot Mentor-Protégé Program was established under Section 831 of Pub. L. 101-510, the National Defense Authorization Act for Fiscal Year 1991 (10 U. S. C. 2302 note). The purpose of the Program is to provide incentives to major Department of Defense (DoD) contractors to assist protégé firms in

enhancing their capabilities to satisfy DoD and other contract and subcontract requirements. Under the Mentor-Protégé Program, eligible companies approved as mentor firms will enter into mentor-protégé agreements with eligible protégé firms to provide appropriate developmental assistance to enhance the capabilities of the protégé firms to perform as subcontractors and suppliers. DoD may provide the mentor firm with either cost reimbursement or credit against applicable subcontracting goals established under contracts with DoD or other Federal agencies.

The Department of Defense, in an effort to streamline and transform itself in order to more effectively achieve its mission and in recognition that the Military Departments have the necessary expertise to manage programs efficiently, is transferring the management of the Mentor Protégé program to the Military Departments and Defense Agencies. The Office of the Secretary of Defense will maintain oversight and policy development responsibilities.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 18244, April 6, 2004, with request for comments. One respondent submitted a comment that was outside the scope of the rule and no action was taken. The Councils agreed to convert the proposed rule to a final rule.

Accordingly, the FAR is amended to state that the Director, Small and Disadvantaged Business Utilization of the cognizant DoD Military Department or Defense Agency, will be the approval authority for mentor-protégé agreements.

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 removes a restriction, thus allowing DoD to make a minor policy change.

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 19

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

■ 1. The authority citation for 48 CFR part 19 is revised to read as follows:

PART 19—SMALL BUSINESS PROGRAMS

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

■ 2. Amend section 19.702 by revising paragraph (d) to read as follows:

19.702 Statutory requirements.

* * * * *

(d) As authorized by 15 U.S.C. 637(d)(11), certain costs incurred by a mentor firm in providing developmental assistance to a protégé firm under the Department of Defense Pilot Mentor-Protégé Program, may be credited as if they were subcontract awards to a protégé firm for the purpose of determining whether the mentor firm attains the applicable goals under any subcontracting plan entered into with any executive agency. However, the mentor-protégé agreement must have been approved by the Director, Small and Disadvantaged Business Utilization of the cognizant DoD military department or defense agency, before developmental assistance costs may be credited against subcontract goals. A list of approved agreements may be obtained at http://www.acq.osd.mil/sadbu/mentor_protege/ or by calling (703) 588-8631.

[FR Doc. 04-27637 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAC 2001-26; FAR Case 2001-018; Item VI]

RIN 9000-AJ77

Federal Acquisition Regulation; Applicability of the Cost Principles and Penalties 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) by increasing the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement.

DATES: Effective Date: January 19, 2005.

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. Richard C. Loeb at (202) 208-3810. Please cite FAC 2001-26, FAR case 2001-018.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 66988 on November 28, 2003, with request for comments. The Councils proposed to amend the FAR to: (1) remove the requirement to apply the cost principles and procedures at FAR Part 31 when pricing a contract if cost or pricing data are not obtained; (2) add a definition to FAR Part 31 for fixed-price contracts, subcontracts, and modifications; and (3) increase the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement (FAR Part 42). Three respondents submitted comments on the proposed FAR rule; a discussion of the comments are provided below. The Councils considered all comments and decided not to adopt the proposed revisions to FAR Parts 15 and 31, and to convert the proposed rule at FAR Part 42 to a final rule. Differences between

the proposed rule and final rule are discussed in comments 1, 2, and 3, below.

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.

Public Comments:

Applicability of FAR Part 31

1. *Comment:* Two of the three respondents believe the change should not be made.

The first respondent urged the withdrawal of the proposed rule and expressed the position that the need for the proposed change was not clearly and fully disclosed. The respondent strongly believes that the Government's prenegotiation objective for cost based fixed-price contracts should continue to be predicated on the consistent application of applicable FAR Part 31 cost principles. Whether a contractor's submitted cost data is "certified" or "uncertified" should not alter the basis for determining the Government's prenegotiation objective, or a determination on whether the negotiated fixed-price is fair and reasonable.

The respondent noted that FAR Part 31 has more than just unallowable costs within it, e.g., allocability, consistency, direct vs. indirect, and accounting methods. The respondent also made the following points:

- If FAR Subpart 31.2 policies and procedures are not consistently applied to cost-based fixed-price contracts, what are the alternate policies, procedures and principles to be applied when performing a "cost analysis" of the "uncertified" information other than cost or pricing data?
- What fundamental constructs will the proposing contractor have to comply with?
- What will guide the cost analyst and/or auditor when performing the "cost analysis" of the contractor's uncertified data?

After referencing the Councils' stated goal "...to reduce Government unique regulations when the risk to the Government is low," the respondent opined:

When negotiating fixed-price contracts based on a prenegotiation objective that was predicated on a "cost analysis" of contractor submitted information other than cost or pricing cost data, the respondent believes that the risk to the Government is higher, not lower, than if "certified" cost or pricing

data had been obtained. Without certified data, there is less assurance that contractor submitted data are current, complete and accurate.

The respondent concluded that FAR Part 31 contract cost principles should continue to be applied to pricing contracts whenever cost data is submitted to support a contract price, regardless of whether the contract type is fixed-price.

The second respondent believes that the Government's policy objective should be clarified, and that the mention of cost analysis is potentially confusing and unnecessary. The respondent characterized the phrasing of the proposed rule as terribly awkward (due to using the passive voice) and suggested alternative language.

The third respondent was concerned that the proposed coverage at FAR 31.000 appears to restrict in some way the underlying Truth in Negotiations Act (TINA) mandate to obtain cost or pricing data in the first place (as to both negotiated contracts and negotiated modifications).

Councils' response: Concur that the proposed change should not be made. The Councils believe that the Government needs a consistent playing field when dealing with cost data whether "certified" or not. The Councils are also concerned that the proposed language could be construed as limiting the Government's use of FAR Part 31 for its prenegotiation positions. This would adversely affect any requests for audit support made by the contracting officer. The General Accepted Government Auditing Standards (GAGAS) under attestation standards AT 101.23, "Suitability of Criteria," require auditors to have objective, measurable, complete, and relevant criteria to apply during their work. The Councils believe that the guidance in FAR Part 31 meets these requirements, as General Accepted Accounting Principles (GAAP) alone does not go to the level necessary to support contract pricing. Therefore, the Councils have withdrawn the proposed revisions to FAR Parts 15 and 31.

Definition of fixed-price contracts

2. *Comment:* Two respondents believe the proposed FAR 31.001 definition of fixed-price contracts, subcontracts and modifications would lead to confusion in the area of Time-and-Material (T&M) type contracting actions.

The first respondent stated that it strongly opposes the proposed "redefinition" of fixed-price contracts to include the fixed hourly portion of a T&M and labor-hour (LH) contract, and that it flies in the face of law and common sense. The respondent cited

GSBCA decision CACI, Inc.—Federal v. General Services Administration, dated December 13, 2002, to support its position that T&M/LH contracts are not fixed-price. The respondent believes that the Council's attempt to rationalize a portion a T&M/LH contract as "fixed-price" is a shameful capitulation to contractors interests, and an abrogation of the Council's duty to taxpayers.

The second respondent was concerned the proposed definition may impact T&M orders placed under GSA's Multiple Award Schedule (MAS) contracts. The proposed definition would include the fixed hourly rate portion of the T&M and LH contracts and subcontracts in FAR Subpart 16.6. The respondent believes this may suggest that time-and-material orders with a fixed labor hour component are fixed-price in nature for any contracting or FAR purpose. GSA mandates that all T&M orders placed under MAS contracts include the contract clause at FAR 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts. This clause provides contracting officers with an ability to require more substantiation of hours worked under a time-and-materials order. Because such task orders have fixed labor components, the respondent is concerned that contracting officers may—based on this proposed FAR change—consider such task orders to be fixed price and not invoke the controls attendant with this clause or other necessary safeguards to the use of such vehicles.

Councils' response: Partially concur. The Councils believe there is a limited risk that contracting officers could be confused by the inclusion of the "fixed rate portion" of a T&M contracting action in the proposed definition. However, due to the Council's decision not to adopt the proposed revisions discussed at Comment 1, above, this definition is no longer required.

Dollar threshold for assessing penalties—FAR 42.709

3. *Comment:* One respondent stated that it had no objection to the proposed change in the threshold from the current \$500,000 to \$550,000 to adjust for inflation. The other two respondents did not address the proposed change.

Councils' response: Concur. The Councils agree that the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement should be increased from \$500,000 to \$550,000, to adjust for inflation. This increase is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(1). Therefore, the dollar threshold amounts

in FAR 42.709(b) and FAR 42.709-6 are increased from \$500,000 to \$550,000.

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 use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles discussed in this rule.

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 42

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 42 as set forth below:

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 1. The authority citation for 48 CFR part 42 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).

42.709 and 42.709-6 [Amended]

■ 2. Amend sections 42.709(b) and 42.709-6 by removing “\$500,000” and adding “\$550,000” in its place. [FR Doc. 04-27638 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 41, 44, 51, and 52

[FAC 2001-26; Item VII]

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 (FAR) in order to make editorial changes.

DATE: *Effective Date:* December 20, 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 2001-26, Technical Amendments.

List of Subjects in 48 CFR Parts 11, 41, 44, 51, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 11, 41, 44, 51, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 11, 41, 44, 51, and 52 is revised to read as follows:

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

PART 11—DESCRIBING AGENCY NEEDS

11.201 [Amended]

■ 2. Amend section 11.201 in paragraph (d)(2)(i) by removing *http://assist.daps.mil* and adding *http://assist.daps.dla.mil* in its place.

PART 41—ACQUISITION OF UTILITY SERVICES

■ 3. Amend section 41.301 by revising the second sentence of paragraph (a) to read as follows:

41.301 Requirements.

(a) * * * The names and locations of GSA regional offices are available from the General Services Administration, Energy Center of

Expertise, 301 7th Street, SW., Room 4004, Washington, DC 20407.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.203 [Amended]

■ 4. Amend section 44.203 in paragraph (b)(1) by removing “16.301-3” and adding “15.404-4(c)(4)(i)” in its place.

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

51.102 [Amended]

■ 5. Amend section 51.102 by removing “FCSI” from paragraph (c)(1) and adding “FXS” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.219-1 [Amended]

■ 6. Amend section 52.219-1 by removing “19.307(a)(1)” from the introductory text and adding “19.308(a)(1)” in its place.

[FR Doc. 04-27639 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

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) 2001-26 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 2001-26, 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 2001-26

Item	Subject	FAR case	Analyst
*I	Electronic Representations and Certifications	2002-024	Zaffos.
II	Excluded Parties List System Enhancement	2002-023	Goral.
*III	Special Emergency Procurement Authority	2003-022	Zaffos.
IV	Notification of Employee Rights Concerning Payment of Union Dues or Fees (Interim)	2004-010	Goral.
V	Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements	2003-010	Cundiff.
VI	Applicability of the Cost Principles and Penalties for Unallowable Costs	2001-018	Loeb.
VII	Technical Amendments.		

Item I—Electronic Representations and Certifications (FAR Case 2002-024)

This final rule requires offerors to provide representations and certifications electronically via the BPN website; to update the representations and certifications as necessary, but at least annually, to keep them current, accurate and complete; and to make changes that affect only one solicitation by completing the appropriate sections of either paragraph (j) of FAR provision 52.212-3 or FAR provision 52.204-8, whichever is included in the solicitation. This change represents a conversion of a paper-based process to a more efficient electronic process to obtain offerors' representations and certifications. It will also significantly reduce the paperwork burden for both offerors and contracting officers.

Item II—Excluded Parties List System Enhancement (FAR Case 2002-023)

This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA's new searchable on-line electronic list of parties excluded from doing business with the Federal Government. The EPLS enables agencies to directly input data into this system and obviates the need for the hard copy List of Parties Excluded from Federal Procurement and Nonprocurement Programs. The EPLS will provide more up-to-date and readily accessible information to the contracting officer on parties excluded from doing business with the Federal Government.

Item III—Special Emergency Procurement Authority (FAR Case 2003-022)

This rule finalizes the interim rule 2003-022 by including under FAR subpart 13.5 the acquisition of supplies

and services that meet the definition of a commercial item in FAR 2.101, and which, as determined by the head of the agency, are to be used to support a contingency operation. This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and also incorporates the higher thresholds authorized by Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. This rule allows the contracting officer expanded use of Simplified Acquisition and Commercial Items procedures when acquiring supplies or services that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack.

Item IV—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004-010)

This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item V—Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements (FAR Case 2003-010)

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of the Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies and to make some minor changes for clarification. This change is being made in order for DoD to streamline and transform itself to more effectively achieve its mission.

Item VI—Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001-018)

This final rule increases the threshold at FAR 42.709(b) and FAR 42.709-6 from \$500,000 to \$550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement. The threshold was increased to reflect inflation and is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(l).

The rule is of importance to contracting officers and contractors who negotiate contracts and modifications, and determine costs in accordance with FAR Part 31 contract cost principles.

Item VII—Technical Amendments

Editorial changes are made at FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1), and in the introductory text of FAR provision 52.219-1 in order to update references.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

[FR Doc. 04-27640 Filed 12-17-04; 8:45 am]

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