

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2011–0076, Sequence 2]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–50; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final and interim rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by DoD, GSA, and NASA in this Federal Acquisition Circular (FAC) 2005–50. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

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

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–50 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–50

Item	Subject	FAR case	Analyst
I	Proper Use and Management of Cost-Reimbursement Contracts (Interim)	2008–030	Sakalos.
II	Requirements for Acquisitions Pursuant to Multiple-Award Contracts (Interim)	2007–012	Clark.
III	Justification and Approval of Sole-Source 8(a) Contracts (Interim)	2009–038	Robinson.
IV	Additional Requirements for Market Research	2008–007	Sakalos.
V	Socioeconomic Program Parity (Interim)	2011–004	Morgan.
VI	Use of Commercial Services Item Authority	2008–034	Chambers.
VII	Trade Agreements Thresholds	2009–040	Davis.
VIII	Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns.	2009–025	Chambers.
IX	Compensation for Personal Services	2009–026	Chambers.
X	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item numbers and subject set forth in the documents following these item summaries. FAC 2005–50 amends the FAR as specified below:

Item I—Proper Use and Management of Cost-Reimbursement Contracts (FAR Case 2008–030) (Interim)

This interim rule amends the FAR to implement section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). This law aligns with the goal of the Presidential Memorandum on Government Contracting, issued on March 4, 2009, which is to reduce waste, fraud, and abuse in Government contracting. This rule provides internal regulatory guidance on the proper use and management of all contracts, specifically cost-reimbursement contracts. The rule identifies (1) circumstances when cost-reimbursement contracts are appropriate; (2) acquisition plan findings required to support the contract type selection; and (3) the acquisition resources necessary to award and manage a cost-reimbursement contract.

Item II—Requirements for Acquisitions Pursuant to Multiple-Award Contracts (FAR Case 2007–012) (Interim)

This interim rule amends the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). Section 863 mandates enhanced competition for orders placed under multiple-award contracts, including GSA’s Federal Supply Schedules. If an order over the simplified acquisition threshold does not follow the section 863 competitive procedures, section 863 requires that a notice and the determination of an exception be published in FedBizOpps within 14 days after award.

The interim rule relocates all procedures for establishing a Blanket Purchase Agreement (BPA) or placing an order under a BPA in one subsection, FAR 8.405–3. New BPAs must be established in accordance with the new competition standard. Orders over the simplified acquisition threshold against a new multiple-award BPA must meet the new competition standards; use is discretionary for existing multiple-award BPAs.

For orders under FAR part 16 task- and delivery-order contracts, orders over the simplified acquisition threshold must meet the new

competition procedures; each contract holder must receive notice of the intent to make a purchase.

Item III—Justification and Approval of Sole-Source 8(a) Contracts (2009–038) (Interim)

This interim rule amends the FAR to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84). Section 811 prohibits the award of a sole-source contract in an amount over \$20 million under the 8(a) program authority (15 U.S.C. 637(a)) without first obtaining a written Justification and Approval (J&A) approved by an appropriate official and making public the J&A and related information. This is a new internal Government requirement for the development and approval of a sole-source J&A for 8(a) sole-source awards over \$20 million. It neither prohibits such awards nor increases the qualifications required of 8(a) firms. No automated systems are impacted.

Item IV—Additional Requirements for Market Research (FAR Case 2008–007)

This final rule adopts, with changes, the interim rule that amended the FAR to implement section 826 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 826, entitled “Market Research,”

established new requirements for agencies subject to Title 10, United States Code. As a matter of policy, this provision of law was applied to contracts awarded by all executive agencies. The rule requires that market research must be conducted before an agency places a task or delivery order in excess of the simplified acquisition threshold under an indefinite-delivery indefinite-quantity contract. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold. Among other changes, the final rule also deletes the language added to FAR 52.244-6 (Alternate I) and relocates it to a new FAR clause 52.210-1, Market Research.

Item V—Socioeconomic Program Parity (FAR Case 2011-004) (Interim)

This interim rule amends the FAR to implement section 1347 of the “Small Business Jobs Act of 2010” (Pub. L. 111-240) and the Small Business Administration regulations governing specific contracting and business assistance programs. Section 1347 changed the word “shall” to “may” at section 31(b)(2)(B) of the Small Business Act (15 U.S.C. 657a(b)(2)(B)), thereby permitting a contracting officer to use discretion when determining whether an acquisition will be restricted to a small business participating in the 8(a) Business Development Program, the Historically Underutilized Business Zone Program, or the Service-Disabled Veteran-Owned Small Business Program.

Item VI—Use of Commercial Services Item Authority (FAR Case 2008-034)

This final rule adopts, without change, an interim rule that implemented section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). Section 868 provides that the FAR shall be amended with respect to the procurement of commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. Such services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for these services.

The rule details the information the contracting officer may consider in

order to make this determination. The rule further details, when this determination cannot be made, the information which may be requested to determine price reasonableness.

Item VII—Trade Agreements Thresholds (FAR Case 2009-040)

This final rule adopts, without change, an interim rule that amended the FAR to adjust the thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements as determined by the United States Trade Representative, according to a pre-determined formula under the agreements.

Item VIII—Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009-025)

This final rule adopts, without change, the interim rule that amended the FAR to revise FAR 30.201-4(c), 30.201-4(d)(1), 52.230-4, and 52.230-6 to maintain consistency between FAR and Cost Accounting Standards (CAS) regarding the administration of the Cost Accounting Standard Board’s (CASB) rules, regulations and standards. This revision was necessitated by the CASB publishing a final rule in the **Federal Register** on March 26, 2008 (73 FR 15939) which implemented the revised clause, **Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns.**

Item IX—Compensation for Personal Services (FAR Case 2009-026)

This final rule adopts, without change, the interim rule that amended the FAR to align the existing FAR 31.205-6(q)(2)(i) through (vi) with the changes made in Cost Accounting Standards (CAS) Board standards 412 “Cost Accounting Standard for composition and measurement of pension cost,” and 415 “Accounting for the cost of deferred compensation.” Formerly, the applicable CAS standard for measuring, assigning, and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.001. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

Item X—Technical Amendments

Editorial changes are made at FAR 19.201, 52.212-3, and 52.212-5.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Federal Acquisition Circular (FAC) 2005-50 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-50 is effective March 16, 2011, except for Item IV which is effective April 15, 2011, and Item II which is effective May 16, 2011.

Dated: March 4, 2011.

Amy G. Williams,

Acting Deputy Director, Defense Procurement and Acquisition Policy (Defense Acquisition Regulations System).

Dated: March 4, 2011.

Joseph A. Neurauter,

Deputy Associate Administrator and Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Dated: February 28, 2011.

Sheryl J. Goddard,

Acting Assistant Administrator for Procurement National Aeronautics and Space Administration.

[FR Doc. 2011-5551 Filed 3-15-11; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 7, 16, 32, 42, and 50

[FAC 2005-50; FAR Case 2008-030; Item I; Docket 2011-0082, Sequence 1]

RIN 9000-AL78

Federal Acquisition Regulation; Proper Use and Management of Cost-Reimbursement Contracts

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. This law aligns

with the Presidential Memorandum on Government Contracting, issued on March 4, 2009, which directed agencies to save \$40 billion in contracting annually by Fiscal Year (FY) 2011 and to reduce the use of high-risk contracts. This rule provides regulatory guidance on the proper use and management of other than firm-fixed-price contracts (e.g., cost-reimbursement, time-and-material, and labor-hour).

DATES: *Effective Date:* March 16, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2008–030, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–030” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2008–030.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2008–030” on your attached document.

- *Fax:* (202) 501–4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case 2008–030, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Lori Sakalos, Procurement Analyst, at (202) 208–0498. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2008–030.

SUPPLEMENTARY INFORMATION:

I. Background

This case implements section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), enacted October 14, 2008. This law aligns with the President’s goal of reducing high-risk contracting as denoted in the March 4, 2009, Presidential Memorandum on Government Contracting.

Section 864 requires the FAR to be revised to address the use and management of cost-reimbursement contracts and identifies the following three areas that the Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council (Councils) should consider in amending the FAR—

(a) Circumstances when cost-reimbursement contracts are appropriate;

(b) Acquisition plan findings to support the selection of a cost-reimbursement contract; and

(c) Acquisition resources necessary to award and manage a cost-reimbursement contract.

1. *Guidance on Cost-reimbursement contracts.* As required, the Councils included additional coverage at FAR subpart 16.1, *Selecting Contract Types*, and at subpart 16.3, *Cost-Reimbursement Contracts*, to provide further guidance as to when, and under what circumstances, cost-reimbursement contracts are appropriate. Therefore, this rule makes the following changes:

- FAR 16.103, *Negotiating contract type*, is amended to revise paragraph (d) to reflect additional documentation when other than a firm-fixed-price contract type is selected.

- FAR 16.104, *Factors in selecting contract types*, is amended to add a new paragraph (e) to provide guidance to the contracting officer to consider combining contract types if the entire contract cannot be firm fixed-price.

- FAR 16.301–2, *Application*, is amended to provide guidance to the contracting officer as to the circumstances in which to use cost-reimbursement contracts as well as outlining the rationale for documentation for selecting this contract type.

- FAR 16.301–3, *Limitations*, is amended to (1) provide additional guidance to the contracting officer as to when a cost-reimbursement contract may be used, (2) ensure that all factors have been considered per FAR 16.104, and (3) ensure that adequate Government resources are available to award and manage this type of contract.

- FAR 7.104(e) also requires the designation of a properly trained contracting officer’s representative (COR) (or contracting officer’s technical representative (COTR)) prior to award of the contract or order.

2. *Identification of acquisition plan findings.* FAR 7.103, *Agency-head responsibilities*, is amended and renumbered to add new paragraphs 7.103(d), 7.103(f), and 7.103(j) to ensure that acquisition planners document the file to support the selection of the

contract type in accordance with FAR subpart 16.1; ensure that the statement of work is closely aligned with the performance outcomes and cost estimates; and obtain an approval and signature from the appropriate acquisition official at least one level above the contracting officer. FAR 7.105(b)(5)(iv) was added to discuss the strategy to transition from cost-reimbursement contracts to firm-fixed-price contracts. Although FAR 7.105(b)(5), *Acquisition considerations*, requires the acquisition plans to include a discussion of contract type selection and rationale, the Councils believe that a greater emphasis on the use of cost-reimbursement contracts should be added and included a new paragraph at FAR 7.105(b)(3), *Contract type selection*. Additionally, FAR 16.301–3(a) has been amended and renumbered.

3. *Acquisition workforce resources.* The Councils recognize that assigning adequate and proper resources to support the solicitation, award, and administration of other than firm-fixed-price contracts (cost-reimbursement, time-and-material, and labor-hour) contract is challenging. There is also great concern that a lack of involvement in contract oversight by program offices is primarily present in other than firm-fixed-price contracts. Therefore, from the outset, contracting officers should be assured, to the greatest extent practicable, that the right resources in number, kind, and availability be assigned to support other than firm-fixed-price contracts. The Councils consider that greater accountability for the management and oversight of all contracts, especially other than firm-fixed-price contracts, can be gained and improved by requiring that properly trained CORs or COTRs (see FAR 2.101(b)(2), *Definitions*) be appointed before award. Therefore, FAR 7.104, *General Procedures*, and FAR 16.301–3(a)(4)(i) are amended to reflect that prior to award of a contract, especially on other than firm-fixed price contracts, at least one COR or COTR qualified in accordance with FAR 1.602–2 is designated. FAR 1.602–2, *Responsibilities*, is amended to add a new paragraph (d) outlining the requirement for the contracting officer to designate and authorize, in writing, a COR on contracts and orders, as appropriate. Additionally, a new section was added at FAR 1.604, *Contracting officer’s representative*, outlining the COR’s duties.

4. *Contract administration functions.* A new paragraph was added at FAR 42.302(a)(12) to require that the contracting officer determine the continuing adequacy of the contractor’s

accounting system during the entire period of contract performance. Also, paragraph (a)(12) was added to the list of functions at FAR 42.302(a) that cannot be retained and that must be delegated by the contracting officer when delegating contract administration functions to a contract administration office in accordance with FAR 42.202(a).

II. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule 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 section 864 affects only internal Government operations and requires the Government to establish internal guidance on the proper use and management of all contracts especially other than firm-fixed-price contracts (*e.g.*, cost-reimbursement, time-and-material, and labor-hour) and does not impose any additional requirements on small businesses.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business entities and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–50, FAR Case 2008–030) in correspondence.

IV. Paperwork Reduction Act

The changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and

compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, enacted October 14, 2008, directs that it must be implemented within 270 days from enactment. This rule is also urgent because this law requires the Inspector General to conduct a compliance review for each executive agency, one year after the regulations have been promulgated, on the use of cost-reimbursement contracts and include the results of their findings in the IG's next semiannual report. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA 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 1, 2, 7, 16, 32, 42, and 50

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 7, 16, 32, 42, and 50 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 7, 16, 32, 42, and 50 continues to read as follows:

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

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. Amend section 1.602–2 by adding paragraph (d) to read as follows:

1.602–2 Responsibilities.

* * * * *

(d) Designate and authorize, in writing, a contracting officer's representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate. However, the contracting officer is not precluded from retaining and executing the COR duties as appropriate. *See* 7.104(e). A COR—

(1) Must be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the Office of Management and Budget memorandum entitled “The Federal Acquisition Certification for Contracting Officer Technical Representatives” dated November 26, 2007, or for DoD, DoD Regulations, as applicable;

(3) Must be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with department/agency guidelines;

(4) May not be delegated responsibility to perform functions that have been delegated under 42.202 to a contract administration office, but may be assigned some duties at 42.302 by the contracting officer;

(5) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract; and

(6) Must be designated in writing, with copies furnished to the contractor and the contract administration office—

(i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;

(ii) Identifying the limitations on the COR's authority;

(iii) Specifying the period covered by the designation;

(iv) Stating the authority is not redelegable; and

(v) Stating that the COR may be personally liable for unauthorized acts.

■ 3. Amend section 1.603 by revising the section heading to read as follows:

1.603 Selection, appointment, and termination of appointment for contracting officers.

* * * * *

■ 4. Add section 1.604 to read as follows:

1.604 Contracting Officer's Representative (COR).

A contracting officer's representative (COR) assists in the technical monitoring or administration of a contract (*see* 1.602–2(d)). The COR shall maintain a file for each assigned contract. The file must include, at a minimum—

(a) A copy of the contracting officer's letter of designation and other documents describing the COR's duties and responsibilities;

(b) A copy of the contract administration functions delegated to a contract administration office which may not be delegated to the COR (*see* 1.602–2(d)(4)); and

(c) Documentation of COR actions taken in accordance with the delegation of authority.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 5. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition “Contracting officer's representative (COR)” to read as follows:

2.101 Definitions.

* * * * *
(b) * * *
(2) * * *

Contracting officer's representative (COR) means an individual, including a contracting officer's technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

* * * * *

PART 7—ACQUISITION PLANNING

■ 6. Amend section 7.102 by adding paragraph (a)(3) to read as follows:

7.102 Policy.

(a) * * *
(3) Selection of appropriate contract type in accordance with part 16.

* * * * *

■ 7. Amend section 7.103 by—

- a. Redesignating paragraphs (e) through (w) as paragraphs (g) through (y);
■ b. Redesignating paragraph (d) as paragraph (e);
■ c. Adding a new paragraph (d);
■ d. Revising newly redesignated paragraph (e);
■ e. Adding a new paragraph (f); and
■ f. Revising newly redesignated paragraph (j).

The added and revised text reads as follows:

7.103 Agency-head responsibilities.

* * * * *

(d) Ensuring that acquisition planners document the file to support the selection of the contract type in accordance with subpart 16.1.

(e) Establishing criteria and thresholds at which increasingly greater detail and formality in the planning process is required as the acquisition becomes more complex and costly, including for cost-reimbursement and other high-risk contracts (e.g., other than firm-fixed-price contracts) requiring a written acquisition plan. A written plan shall be prepared for cost reimbursement and other high-risk contracts other than firm-fixed-price contracts, although written plans may be required for firm-fixed-price contracts as appropriate.

(f) Ensuring that the statement of work is closely aligned with performance outcomes and cost estimates.

* * * * *

(j) Reviewing and approving acquisition plans and revisions to these plans to ensure compliance with FAR requirements including 7.104 and part 16. For other than firm-fixed-price contracts, ensuring that the plan is

approved and signed at least one level above the contracting officer.

* * * * *

■ 8. Amend section 7.104 by adding paragraph (e) to read as follows:

7.104 General procedures.

* * * * *

(e) The planner shall ensure that a COR is nominated by the requirements official, and designated and authorized by the contracting officer, as early as practicable in the acquisition process. The contracting officer shall designate and authorize a COR as early as practicable after the nomination. See 1.602–2(d).

■ 9. Amend section 7.105 by—

- a. Removing from the first sentence of the introductory text the words “see paragraph (b)(19)” and adding the words “see paragraph (b)(21)” in their place;
■ b. Redesignating paragraphs (b)(3) through (b)(21) as paragraphs (b)(4) through (b)(22), respectively;
■ c. Adding a new paragraph (b)(3);
■ d. Removing from newly redesignated paragraph (b)(5)(i) the words “contract type selection (see part 16);”;
■ e. Removing from newly redesignated paragraph (b)(5)(ii)(A) the words “see 7.103(t)” and adding the words “see 7.103(v)” in its place; and
■ f. Adding paragraph (b)(5)(iv).

The added text reads as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(3) Contract type selection. Discuss the rationale for the selection of contract type. For other than firm-fixed-price contracts, see 16.103(d) for additional documentation guidance. Acquisition personnel shall document the acquisition plan with findings that detail the particular facts and circumstances, (e.g., complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection. The contracting officer shall ensure that requirements and technical personnel provide the necessary documentation to support the contract type selection.

* * * * *

(5) * * *

(iv) For each contract (and order) contemplated, discuss the strategy to transition to firm-fixed-price contracts to the maximum extent practicable. During the requirements development stage, consider structuring the contract

requirements, e.g., contract line items (CLINS), in a manner that will permit some, if not all, of the requirements to be awarded on a firm-fixed-price basis, either in the current contract, future option years, or follow-on contracts. This will facilitate an easier transition to a firm-fixed-price contract because a cost history will be developed for a recurring definitive requirement.

* * * * *

PART 16—TYPES OF CONTRACTS

■ 10. Amend section 16.103 by revising paragraphs (d)(1) and (2) to read as follows:

16.103 Negotiating contract type.

* * * * *

(d) * * *

(1) Each contract file shall include documentation to show why the particular contract type was selected. This shall be documented in the acquisition plan, or if a written acquisition plan is not required, in the contract file.

(i) Explain why the contract type selected must be used to meet the agency need.

(ii) Discuss the Government's additional risks and the burden to manage the contract type selected (e.g., when a cost-reimbursement contract is selected, the Government incurs additional cost risks, and the Government has the additional burden of managing the contractor's costs). For such instances, acquisition personnel shall discuss—

(A) How the Government identified the additional risks (e.g., pre-award survey, or past performance information);

(B) The nature of the additional risks (e.g., inadequate contractor's accounting system, weaknesses in contractor's internal control, non-compliance with Cost Accounting Standards, or lack of or inadequate earned value management system); and

(C) How the Government will manage and mitigate the risks.

(iii) Discuss the Government resources necessary to properly plan for, award, and administer the contract type selected (e.g., resources needed and the additional risks to the Government if adequate resources are not provided).

(iv) For other than a firm-fixed price contract, at a minimum the documentation should include—

(A) An analysis of why the use of other than a firm-fixed-price contract (e.g., cost reimbursement, time and materials, labor hour) is appropriate;

(B) Rationale that detail the particular facts and circumstances (e.g.,

complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(C) An assessment regarding the adequacy of Government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and

(D) A discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future acquisitions for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

(v) A discussion of why a level-of-effort, price redetermination, or fee provision was included.

(2) Exceptions to the requirements at (d)(1) of this section are—

(i) Fixed-price acquisitions made under simplified acquisition procedures;

(ii) Contracts on a firm-fixed-price basis other than those for major systems or research and development; and

(iii) Awards on the set-aside portion of sealed bid partial set-asides for small business.

* * * * *

■ 11. Amend section 16.104 by—

■ a. Redesignating paragraphs (e) through (k) as paragraphs (f) through (l), respectively;

■ b. Adding a new paragraph (e);

■ c. Removing from newly redesignated paragraph (f) the words “incentives to ensure” and adding the words “incentives tailored to performance outcomes to ensure” in their place;

■ d. Removing from newly redesignated paragraph (g) the words “price adjustment terms” and adding the words “price adjustment or price redetermination clauses” in their place; and

■ e. Revising newly redesignated paragraph (i).

The added and revised text reads as follows:

16.104 Factors in selecting contract types.

* * * * *

(e) *Combining contract types.* If the entire contract cannot be firm-fixed-price, the contracting officer shall consider whether or not a portion of the contract can be established on a firm-fixed-price basis.

* * * * *

(i) *Adequacy of the contractor's accounting system.* Before agreeing on a contract type other than firm-fixed-price, the contracting officer shall

ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor may be critical—

(1) When the contract type requires price revision while performance is in progress; or

(2) When a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis. *See* 42.302(a)(12).

* * * * *

■ 12. Revise section 16.301–2 to read as follows:

16.301–2 Application.

(a) The contracting officer shall use cost-reimbursement contracts only when—

(1) Circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract (*see* 7.105); or

(2) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

(b) The contracting officer shall document the rationale for selecting the contract type in the written acquisition plan and ensure that the plan is approved and signed at least one level above the contracting officer (*see* 7.103(j) and 7.105). If a written acquisition plan is not required, the contracting officer shall document the rationale in the contract file. *See also* 16.103(d).

■ 13. Amend section 16.301–3 by revising paragraph (a) to read as follows:

16.301–3 Limitations.

(a) A cost-reimbursement contract may be used only when—

(1) The factors in 16.104 have been considered;

(2) A written acquisition plan has been approved and signed at least one level above the contracting officer;

(3) The contractor's accounting system is adequate for determining costs applicable to the contract; and

(4) Adequate Government resources are available to award and manage a contract other than firm-fixed-priced (*see* 7.104(e)) including—

(i) Designation of at least one contracting officer's representative (COR) qualified in accordance with 1.602–2 has been made prior to award of the contract or order; and

(ii) Appropriate Government surveillance during performance to provide reasonable assurance that efficient methods and effective cost controls are used.

* * * * *

PART 32—CONTRACT FINANCING

32.1007 [Amended]

■ 14. Amend section 32.1007 by removing from paragraph (a) “(*see* 42.302(a)(12))” and adding “(*see* 42.302(a)(13))” in its place.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 15. Amend section 42.302 by—

■ a. Removing from the introductory text of paragraph (a) the words “paragraphs (a)(5), (a)(9), and (a)(11)” and adding the words “paragraphs (a)(5), (a)(9), (a)(11), and (a)(12)” in their place;

■ b. Redesignating paragraphs (a)(12) through (a)(26) as paragraphs (a)(13) through (a)(27); and

■ c. Adding a new paragraph (a)(12) to read as follows:

42.302 Contract administration functions.

(a) * * *

(12) Determine the adequacy of the contractor's accounting system. The contractor's accounting system should be adequate during the entire period of contract performance. The adequacy of the contractor's accounting system and its associated internal control system, as well as contractor compliance with the Cost Accounting Standards (CAS), affect the quality and validity of the contractor data upon which the Government must rely for its management oversight of the contractor and contract performance.

* * * * *

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

50.205–1 [Amended]

■ 16. Amend section 50.205–1 by removing from the first sentence in paragraph (b) the words “(*see* FAR 7.105(b)(19)(v))” and adding the words “(*see* 7.105(b)(20)(v))” in their place.

[FR Doc. 2011–5552 Filed 3–15–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 5, 8, 16, 18, and 38**

[FAC 2005–50; FAR Case 2007–012; Item II; Docket 2011–0081, Sequence 01]

RIN 9000–AL93

**Federal Acquisition Regulation;
Requirements for Acquisitions
Pursuant to Multiple-Award Contracts**

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 863, entitled “Requirements for Purchase of Property and Services Pursuant to Multiple-Award Contracts,” mandates enhanced competition for orders placed under multiple-award contracts, including GSA’s Federal Supply Schedules (FSS). If an individual order over the simplified acquisition threshold does not follow the section 863 competitive procedures, section 863 requires that a notice of, and the determination to waive competition for, the order be published in FedBizOpps within 14 days after award. These FAR changes support the Administration’s commitment to strengthened competition and increased transparency.

DATES: *Effective Date:* May 16, 2011.

Applicability Date: (1) The changes in this rule apply to solicitations issued and contracts awarded on or after May 16, 2011 (*see* FAR 1.108(d)(1)). (2) The changes also apply to orders issued on or after the effective date of this regulation, without regard to whether the underlying contracts were awarded before May 16, 2011. (3) The changes apply to Blanket Purchase Agreements (BPAs) established under FSS contracts on or after May 16, 2011. (4) The ordering procedures for BPAs in FAR 8.405–3(c) are mandatory for BPAs established under FSS contracts on or after May 16, 2011 and discretionary for BPAs established under FSS contracts prior to the effective date.

Comment Date: Interested parties should submit written comments to the

Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2007–012, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2007–012” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2007–012.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2007–012” on your attached document.

- *Fax:* (202) 501–4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case 2007–012, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2007–012.

SUPPLEMENTARY INFORMATION:**I. Background***A. Overview*

This interim rule amends the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) enacted on October 14, 2008.

Section 863 mandated the development and publication of regulations in the FAR to enhance competition for the award of orders placed under multiple-award contracts. Section 863 specified enhancements that include—

- **Strengthening competition rules for placing orders under FSS and other multiple-award contracts to ensure both the provision of fair notice to contract holders and the opportunity for contract holders to respond** (similar to the procedures implemented for section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107)); and

- Providing notice in FedBizOpps of certain orders placed under multiple-award contracts, including FSS.

- The legislation builds on recommendations offered by the Acquisition Advisory Panel, which was established by section 1423 of the Services Acquisition Reform Act of 2003, (Pub. L. 108–136). The final report of the Acquisition Advisory Panel, issued in January 2007, can be accessed at <http://acquisition.gov/comp/aap/index.html>.

For each individual purchase of property or services in excess of the simplified acquisition threshold (SAT) that is made under a multiple-award contract, section 863 requires the provision of fair notice of intent to make a purchase (including a description of the work to be performed and the basis on which the selection will be made) to all contractors offering such property or services under the multiple-award contract. In addition, the statute requires that all contractors responding to the notice be afforded a fair opportunity to make an offer and have that offer fairly considered by the purchasing official. A notice may be provided to fewer than all contractors offering such property or services under a multiple-award contract if the notice is provided to as many contractors as practicable. When notice is provided to fewer than all the contractors, a purchase cannot be made unless—

- Offers were received from at least three qualified contractors; or
- A contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.

These requirements may be waived on the basis of a justification, including a written determination identifying the statutory basis for an exception to fair opportunity, that is prepared and approved at the levels specified in the FAR.

In considering regulatory changes to strengthen the use of competition in task- and delivery-order contracts, the Defense Acquisition Regulations Council and Civilian Agency Acquisition Council (Councils) sought to develop amendments that take increased and more effective advantage of competition, consistent with the general competition principles addressed in the President’s March 4, 2009, Memorandum on Government Contracting (available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government), while still preserving the efficiencies of these contract vehicles. For this reason, the

rule addresses several issues that are not expressly addressed in section 863, such as competition for the establishment and placement of orders under FSS BPAs. The changes, however, are not applicable to BPAs awarded pursuant to FAR part 13 or to orders awarded under FAR procedures other than those in FAR subparts 8.4 and 16.5.

In particular, this interim rule—

- Revises the “fair opportunity” competition requirements in FAR 16.505(b) (applicable to multiple-award task- and delivery-order contracts, other than FSS contracts) to require that, for orders exceeding the SAT, agencies (i) provide fair notice of intent to make the purchase to all contract holders, (ii) afford all contract holders a fair opportunity to submit offers and have those offers fairly considered, and (iii) justify an exception to fair opportunity with appropriate documentation and approval;

- Amends the procedures for ordering supplies and services under FSS contracts at FAR 8.405–1 and 8.405–2, when the order is above the SAT, to require that ordering activities—

- Receive at least three quotes, as a general matter, that can fulfill the requirement and fairly consider all quotes received; and

- Document the file to explain efforts made to obtain quotes from at least three FSS contractors that can fulfill the requirements if fewer than three quotes were received and e-Buy, an electronic FSS requirements posting tool, was not used;

- Establishes new competition procedures at FAR 8.405–3 for creating BPAs under FSS contracts and placing orders under the BPAs that—

- Create a preference for multiple-award BPAs, rather than single-award BPAs, generally modeled after the preference for multiple-award task- and delivery-order contracts in FAR 16.505;

- Allow single-award BPAs if (i) the agency considered multiple awards and the decision to make a single award is explained and documented in the acquisition plan and contract file, (ii) the estimated value of the BPA does not exceed \$100 million (including any options), with limited exception, and (iii) the ordering activity prepares a written determination before exercising an option and secures the approval of its competition advocate;

- Establish competition requirements for placing orders under multiple-award BPAs that require the ordering activity to (i) provide a Request for Quotation (RFQ) to all BPA holders

offering the required supplies or services under the BPA for orders over the SAT that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made, (ii) afford all BPA holders an opportunity to submit a quote, (iii) fairly consider all responses received, and (iv) make award in accordance with the selection procedures; and

- Restrict the circumstances when a BPA may be established based on a limited-source justification (*see also* FAR 8.405–6(a)(1)(i));

- Amends the contract award synopsis provisions at FAR 5.301 (with conforming changes at FAR 5.406, 8.405–6(a)(2), and 16.505(b)(2)(ii)(D)) to require publication and posting of actions supported by exceptions to fair opportunity at FAR 16.505(b)(2) for non-FSS task- and delivery-order contracts and limited-sources justifications at FAR 8.405–6 for FSS contracts, except when disclosure would compromise national security or create other security risks;

- Clarifies that ordering activities may seek a price reduction under FSS contracts at any time and that they shall seek a price reduction when placing an order or establishing a BPA that exceeds the SAT (*see* FAR 8.405–4); and

- Adds language explaining that the protest procedures found at FAR subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against an FSS contract.

Additional background on changes to strengthen competition rules under GSA’s FSS is provided in the following section B.

B. Strengthening Competition Rules Under FSS

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

Current language at FAR 8.405–1 provides competition guidance and ordering procedures for three categories of purchases:

- Orders at or below the micro-purchase threshold.
- Orders exceeding the micro-purchase threshold but not exceeding the maximum-order threshold identified in the schedule contract.
- Orders exceeding the maximum-order threshold.

This interim rule retains three categories of purchases but no longer employs the maximum-order threshold limitation as a point of reference to define the boundaries of the categories. Instead, the second and third categories

are bounded by the SAT. This change is required to ensure rules comply with the section 863 competition requirements. With respect to the competition requirements, existing requirements are retained in some instances and changed in others, as follows:

a. *Orders at or below the micro-purchase threshold.* Because the competition standards under section 863 begin at the SAT, the Councils agreed that no changes were needed to the procedures for orders at or below the micro-purchase threshold, *i.e.*, orders may be placed with any FSS contractor that can meet the agency’s needs.

b. *Orders exceeding the micro-purchase threshold but not exceeding the SAT.* In this category, an ordering activity may place an order with the FSS contractor that represents the best value after surveying at least three FSS contractors through GSA Advantage! by reviewing the catalogs or price lists of at least three FSS contractors, or by requesting quotations from at least three schedule contractors.

c. *Orders exceeding the SAT.* This interim rule changes competition requirements in this category to conform to the section 863 competition standards. The ordering activity must provide the RFQ to as many FSS contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirement and further ensure that all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. The terminology set forth in the statute is tailored to conform with the process under which the FSS Program operates. For example, section 863 uses language such as “each individual purchase of property or services,” whereas this rule uses the term “orders.” The ordering procedures at FAR 8.405–1(d) for orders exceeding the maximum-order threshold have been deleted because the section 863 competition standard supersedes those procedures. In addition, when an order exceeds the SAT, an ordering activity is now required to document the best-value determination with evidence of compliance with the ordering procedures. For example, there should be documentation to show whether at least three quotes were received. If fewer than three quotes were received, and e-Buy was not used (*see* discussion on e-Buy at paragraph 4. of this section), then the contracting officer must clearly explain, in the file documentation, the efforts made to obtain quotes from at

least three FSS contractors that can fulfill the requirement.

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

a. *Orders at or below the micro-purchase threshold.* The rules for orders at or below the micro-purchase threshold remain unchanged.

b. *Orders exceeding the micro-purchase threshold but not exceeding the SAT.* Consistent with current FAR requirements for orders of this size, the ordering activity must provide the RFQ (including the statement of work and evaluation criteria) to at least three FSS contractors that offer services that will meet the agency's needs. Otherwise, the ordering activity contracting officer must document the circumstances for restricting consideration of fewer than three schedule contractors that can fulfill the requirement, based on one of the reasons at FAR 8.405-6(a) and select the corresponding reason in FPDS.

c. *Orders exceeding the SAT.* This interim rule adds the new competition standards in accordance with section 863 for orders over the SAT that do not require statements of work. Here, the ordering activity must include the statement of work and evaluation criteria (e.g., experience and past performance) when providing the RFQ to FSS contractors that offer services that will meet the agency's needs or posting the RFQ on e-Buy.

3. *FAR 8.405-3, Blanket Purchase Agreements (BPAs).* This interim rule consolidates FSS BPA procedures into one subsection, FAR 8.405-3, and makes a number of changes to improve competition in the establishment of FSS BPAs and the placement of orders under such BPAs. (The Councils note that the rule addresses only FSS BPAs. This interim rule is not applicable to BPAs established under FAR part 13.) Although section 863 does not specifically address the treatment of BPAs established under FSS contracts, the Councils, after careful deliberation, decided to apply the basic competition procedures of section 863 to the establishment of BPAs under FSS contracts. Accordingly, if the anticipated value of the BPA is over the SAT, the ordering activity either must seek quotes from as many schedule contractors as practicable to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements or post the RFQ on e-Buy, unless these requirements are waived on the basis of a limited-sources justification that is prepared and approved in accordance with FAR 8.405-6.

a. *Single-award BPAs.* To encourage and facilitate competition when placing orders under BPAs, this interim rule establishes a preference for multiple-award BPAs rather than single-award BPAs. The ordering activity must consider several factors, including the benefits of on-going competition, when deciding how many BPAs are appropriate and document the decision in the acquisition plan or BPA file. A single-award BPA may be established only under certain circumstances. To further encourage the use of multiple-award BPAs, the Councils added a limitation that no single-award BPA with an estimated value exceeding \$100 million (including any options) may be awarded unless, under certain circumstances, the head of the agency makes a determination in writing, and the Councils limited the duration of single-award BPAs to one year. While a single-award BPA may include up to four one-year options, the exercise of each option will now require a written determination approved by the ordering activity competition advocate. This determination, which is required for all BPAs at least once a year, must address whether (1) the FSS contract upon which the BPA was established is still in effect; (2) the BPA still represents the best value; and (3) the estimated quantities/amounts have been exceeded and additional price reductions can be obtained.

b. *Orders under multiple-award BPAs.* This interim rule structures the ordering procedures for multiple-award BPAs according to dollar thresholds, i.e., orders under the micro-purchase threshold, orders over the micro-purchase threshold but under the SAT, and orders over the SAT. Orders at or below the micro-purchase threshold may be placed with any BPA holder that can meet the agency needs.

When an order is over the micro-purchase threshold but less than the SAT, the ordering activity must provide each multiple-award BPA holder a fair opportunity to be considered unless one of the exceptions at FAR 8.405-6(a)(1)(i) applies. The ordering activity contracting officer must document the circumstances when limiting consideration to less than all the multiple-award BPA holders.

For an order exceeding the SAT placed under a multiple-award BPA, the ordering activity shall provide an RFQ to all BPA holders offering the required supplies or services under the multiple-award BPA. The RFQ must include a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made. The ordering

activity shall: (1) Afford all BPA holders an opportunity to submit a quote; (2) fairly consider all responses received; and (3) make award in accordance with the selection procedures. The ordering activity must place orders using these procedures unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405-6.

The Councils note that the new competition standard for multiple-award BPAs is not applicable to orders placed under BPAs that were established on or before the effective date of this interim rule.

4. *E-Buy.* The Councils considered various methods for providing fair notice to all FSS contractors. FAR 8.402 currently requires the use of e-Buy, an electronic FSS requirements-posting tool, only when an order contains brand-name specifications. The Councils agreed that the use of e-Buy provides contracting officers with an efficient method of posting requirements to reach the widest audience of offerors that can fulfill the requirements, as well as a swift and easy means for contractors to submit responsive and responsible quotes. Therefore, this interim rule amends FAR 8.402(d) to identify e-Buy as one medium for providing fair notice while also providing offerors with a voluntary quoting system. The Councils agreed that posting the RFQ on e-Buy allows all FSS holders with the referenced FSS Special Item Number (SIN) to view the posting, thus satisfying the requirements for fair notice when placing an order or establishing a BPA under FAR subpart 8.4.

As explained previously in this section, the procedures for ordering supplies and services under FSS contracts (FAR 8.405-1 and 8.405-2) when the order is above the SAT, have been revised to require the receipt of at least three quotes that can fulfill the requirement and also require that all quotes received must be fairly considered. However, if e-Buy is used and fewer than three quotes are received, section 863 competition requirements are considered to have been met and the contracting officer may proceed with award. If e-Buy is not used and fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer must document a determination that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so.

5. *Other FSS ordering issues.* This interim rule retains current FAR

limitations that restrict the use of brand-name specifications to situations where a particular brand name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs. This interim rule also retains the list of factors to be considered when determining best value, such as past performance, special features required for effective program performance, delivery terms, and environmental and energy efficiency considerations, but adds a cross reference to FAR 8.405-4 to emphasize that ordering activities should seek price reductions when considering price.

C. Strengthening Competition Requirements for Task and Delivery Orders in FAR Subpart 16.5, Indefinite-Delivery Contracts

The changes made by this interim rule to FAR subpart 16.5 are fully addressed in section I.1. Overview, of this **Federal Register** document.

II. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule does not revise or change existing regulations pertaining specifically to small business concerns seeking Government contracts. DoD, GSA, and NASA believe the rule will benefit small entities by encouraging and enhancing competition.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-50, FAR Case 2007-012), in correspondence.

IV. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) was enacted on October 14, 2008. Section 863 required the FAR to be revised no later than one year after enactment, or October 14, 2009. Absent implementation of this interim rule, section 863 will not be implemented in the FAR and agencies will not be compliant with this provision. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 5, 8, 16, 18, and 38

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 8, 16, 18, and 38 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 8, 16, 18, and 38 continues to read as follows:

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

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Revise section 5.301 to read as follows:

5.301 General.

(a) Except for contract actions described in paragraph (b) of this section and as provided in 5.003, contracting officers must synopsize through the GPE the following:

(1) Contract awards exceeding \$25,000 that are—

(i) Covered by the World Trade Organization Government Procurement

Agreement or a Free Trade Agreement (*see* subpart 25.4); or

(ii) Likely to result in the award of any subcontracts. However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

(2) Certain contract actions greater than the simplified acquisition threshold as follows—

(i) Federal Supply Schedule (FSS) orders or Blanket Purchase Agreements supported by a limited-source justification (excluding brand name) in accordance with 8.405-6; or

(ii) Task or delivery orders awarded without providing fair opportunity in accordance with 16.505(b)(2).

(3) A notice is not required under this section if the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security.

(b) A notice is not required under paragraph (a)(1) of this section if—

(1) The award results from acceptance of an unsolicited research proposal that demonstrates a unique and innovative research concept and publication of any notice would disclose the originality of thought or innovativeness of the proposed research or would disclose proprietary information associated with the proposal;

(2) The award results from a proposal submitted under the Small Business Innovation Development Act of 1982 (Pub. L. 97-219);

(3) The contract action is an order placed under subpart 16.5 or 8.4, except *see* paragraph (a)(2) of this section;

(4) The award is made for perishable subsistence supplies;

(5) The award is for utility services, other than telecommunications services, and only one source is available;

(6) The contract action—

(i) Is for an amount not greater than the simplified acquisition threshold;

(ii) Was made through a means where access to the notice of proposed contract action was provided through the GPE; and

(iii) Permitted the public to respond to the solicitation electronically; or

(7) The award is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute pursuant to the exception to full and open competition authorized at 6.302-3.

(c) With respect to acquisitions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement, contracting officers must submit synopses in sufficient time to permit

their publication in the GPE not later than 60 days after award.

(d) Posting is required of the justifications for—

(1) Contracts awarded using other than full and open competition in accordance with 6.305;

(2) FSS orders or Blanket Purchase Agreements with an estimated value greater than the simplified acquisition threshold and supported by a limited-sources justification (see 8.405–6(a)); or

(3) Task or delivery orders greater than the simplified acquisition threshold and awarded without providing for fair opportunity in accordance with 16.505(b)(2)(ii)(B) and (D).

■ 3. Revise section 5.406 to read as follows:

5.406 Public disclosure of justification documents for certain contract actions.

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

(b) Limited-source justifications (excluding brand name) for FSS orders or blanket purchase agreements with an estimated value greater than the simplified acquisition threshold must be posted in accordance with 8.405–6(a)(2).

(c) Justifications for task or delivery orders greater than the simplified acquisition threshold and awarded without providing for fair opportunity must be posted in accordance with 16.505(b)(2)(ii)(D).

5.705 [Amended]

■ 4. Amend section 5.705 by removing from the introductory paragraph “5.301(b)(3) through (8)” and adding “5.301(b)(2) through (7)” in its place.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 5. Amend section 8.402 by revising paragraph (d) to read as follows:

8.402 General.

* * * * *

(d)(1) *e-Buy*, GSA’s electronic Request for Quotation (RFQ) system, is a part of a suite of on-line tools which complement GSA Advantage!. *E-Buy* allows ordering activities to post requirements, obtain quotes, and issue orders electronically. Posting an RFQ on *e-Buy*—

(i) Is one medium for providing fair notice to all schedule contractors offering such supplies and services as required by 8.405–1, 8.405–2, and 8.405–3; and

(ii) Is required when an order contains brand-name specifications (see 8.405–6).

(2) Ordering activities may access *e-Buy* at <http://www.ebuy.gsa.gov>. For more information or assistance on either GSA Advantage! or *e-Buy*, contact GSA at Internet e-mail address gsa.advantage@gsa.gov.

* * * * *

■ 6. Amend section 8.404 by—

■ a. Revising the last sentence in paragraph (a);

■ b. Redesignating paragraph (e) as paragraph (g);

■ c. Adding new paragraphs (e) and (f); and

■ d. Revising the newly redesignated paragraph (g).

The revised and added text reads as follows:

8.404 Use of Federal Supply Schedules.

(a) * * * Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsise the requirement; but see paragraph (g) of this section.

* * * * *

(e) The procedures under subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against a schedule contract.

(f) If the ordering activity issues an RFQ, the ordering activity shall provide the RFQ to any schedule contractor that requests a copy of it.

(g)(1) Ordering activities shall publicize contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(i) Notices of proposed MAS orders (including orders issued under BPAs) that are for “informational purposes only” exceeding \$25,000 shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for MAS orders (including orders issued under BPAs) shall follow the procedures in 5.705.

(2) When an order is awarded or a Blanket Purchase Agreement is established with an estimated value greater than the simplified acquisition threshold and supported by a limited-source justification at 8.405–6(a), the ordering activity contracting officer must—

(i) Publicize the action (see 5.301); and

(ii) Post the justification in accordance with 8.405–6(a)(2).

■ 7. Amend section 8.405 by adding a sentence to the end of the paragraph.

8.405 Ordering procedures for Federal Supply Schedules.

* * * For establishing BPAs and for orders under BPAs see 8.405–3.

■ 8. Amend section 8.405–1 by—

■ a. Adding to the end of paragraph (a) “For establishing BPAs and for orders under BPAs see 8.405–3.”

■ b. Revising paragraphs (c) and (d);

■ c. Redesignating paragraph (e) as paragraph (g);

■ d. Adding new paragraphs (e) and (f); and

■ e. Revising newly redesignated paragraph (g).

The added and revised text reads as follows:

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

* * * * *

(c) *Orders exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold.* Ordering activities shall place orders with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, an ordering activity shall:

(1) Consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three schedule contractors through the GSA Advantage! on-line shopping service, by reviewing the catalogs or pricelists of at least three schedule contractors, or by requesting quotations from at least three schedule contractors (see 8.405–5); or

(2) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at 8.405–6(a).

(d) *For proposed orders exceeding the simplified acquisition threshold.* (1)

Each order shall be placed on a competitive basis in accordance with (d)(2) and (3) of this section, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405–6.

(2) The ordering activity contracting officer shall provide an RFQ that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made (see 8.405–1(f)).

(3) The ordering activity contracting officer shall—

(i) Post the RFQ on *e-Buy* to afford all schedule contractors offering the required supplies or services under the appropriate multiple award schedule(s) an opportunity to submit a quote; or

(ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to

reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirement, the contracting officer shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirement could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(4) The ordering activity contracting officer shall ensure that all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ.

(e) When an order contains brand-name specifications, the contracting officer shall post the RFQ on e-Buy along with the justification or documentation as required by 8.405-6.

(f) In addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider, among other factors, the following:

- (1) Past performance.
 - (2) Special features of the supply or service required for effective program performance.
 - (3) Trade-in considerations.
 - (4) Probable life of the item selected as compared with that of a comparable item.
 - (5) Warranty considerations.
 - (6) Maintenance availability.
 - (7) Environmental and energy efficiency considerations.
 - (8) Delivery terms.
- (g) *Minimum documentation.* The ordering activity shall document—
- (1) The schedule contracts considered, noting the contractor from which the supply or service was purchased;
 - (2) A description of the supply or service purchased;
 - (3) The amount paid;
 - (4) When an order exceeds the simplified acquisition threshold, evidence of compliance with the ordering procedures at 8.405-1(d); and
 - (5) The basis for the award decision.

■ 9. Amend section 8.405-2 by—

- a. Adding a sentence to the end of paragraph (a);
- b. Removing from the first sentence in paragraph (b) “include the work” and adding “include a description of work” in its place;
- c. Revising the heading to paragraph (c)(2), and paragraphs (c)(2)(ii), (c)(2)(iii) and (c)(3);
- d. Revising the third sentence of paragraph (d);

- e. Removing from the end of paragraph (e)(6) the word “and”;
- f. Removing from the end of paragraph (e)(7)(ii) “order.” and adding “order; and” in its place; and
- g. Adding paragraph (e)(8).

The revised and added text reads as follows:

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

(a) * * * “For establishing BPAs and for orders under BPAs see 8.405-3.”

* * * * *

(c) * * *

(2) For orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold.

* * * * *

(ii) The ordering activity shall provide the RFQ (including the statement of work and evaluation criteria) to at least three schedule contractors that offer services that will meet the agency’s needs or document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at 8.405-6(a).

(iii) The ordering activity shall specify the type of order (*i.e.*, firm-fixed-price, labor-hour) for the services identified in the statement of work. The contracting officer should establish firm-fixed-prices, as appropriate.

(3) *For proposed orders exceeding the simplified acquisition threshold.* In addition to meeting the requirements of 8.405-2(c)(2)(i) and (iii), the following procedures apply:

(i) Each order shall be placed on a competitive basis in accordance with (c)(3)(ii) and (iii) of this section, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405-6.

(ii) The ordering activity contracting officer shall provide an RFQ that includes a statement of work and the evaluation criteria.

(iii) The ordering activity contracting officer shall—

(A) Post the RFQ on e-Buy to afford all schedule contractors offering the required services under the appropriate multiple-award schedule(s) an opportunity to submit a quote; or

(B) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination to explain that no additional contractors capable of

fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(C) Ensure all quotes received are fairly considered and award is made in accordance with the evaluation criteria in the RFQ.

(d) * * * Place the order with the schedule contractor that represents the best value (see 8.404(d) and 8.405-4).

* * *

(e) * * *

(8) When an order exceeds the simplified acquisition threshold, evidence of compliance with the ordering procedures at 8.405-2(c).

■ 10. Revise section 8.405-3 to read as follows:

8.405-3 Blanket purchase agreements (BPAs).

(a) *Establishment.* (1) Ordering activities may establish BPAs under any schedule contract to fill repetitive needs for supplies or services. Ordering activities shall establish the BPA with the schedule contractor(s) that can provide the supply or service that represents the best value.

(2) In addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider, among other factors, the following:

- (i) Past performance.
- (ii) Special features of the supply or service required for effective program performance.
- (iii) Trade-in considerations.
- (iv) Probable life of the item selected as compared with that of a comparable item.
- (v) Warranty considerations.
- (vi) Maintenance availability.
- (vii) Environmental and energy efficiency considerations.
- (viii) Delivery terms.

(3)(i) The ordering activity contracting officer shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs, rather than establishing a single-award BPA.

(ii) No single-award BPA with an estimated value exceeding \$103 million (including any options), may be awarded unless the head of the agency determines in writing that—

(A) The orders expected under the BPA are so integrally related that only a single source can reasonably perform the work;

(B) The BPA provides only for firm-fixed priced orders for—

(1) Products with unit prices established in the BPA; or

(2) Services with prices established in the BPA for specific tasks to be performed;

(C) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(D) It is necessary in the public interest to award the BPA to a single source for exceptional circumstances.

(iii) The requirement for a determination for a single-award BPA greater than \$103 million is in addition to any applicable requirement for a limited-source justification at 8.405-6. However, the two documents may be combined into one document.

(iv) In determining how many multiple-award BPAs to establish or that a single-award BPA is appropriate, the contracting officer should consider the following factors and document the decision in the acquisition plan or BPA file:

(A) The scope and complexity of the requirement(s);

(B) The benefits of on-going competition and the need to periodically compare multiple technical approaches or prices;

(C) The administrative costs of BPAs; and

(D) The technical qualifications of the schedule contractor(s).

(4) BPAs shall address the frequency of ordering, invoicing, discounts, requirements (e.g., estimated quantities, work to be performed), delivery locations, and time.

(5) When establishing multiple-award BPAs, the ordering activity shall specify the procedures for placing orders under the BPAs in accordance with 8.405-3(c)(2).

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

(7) *Minimum documentation.* The ordering activity contracting officer shall include in the BPA file documentation the—

(i) Schedule contracts considered, noting the contractor to which the BPA was awarded;

(ii) Description of the supply or service purchased;

(iii) Price;

(iv) Required justification for a limited-source BPA (see 8.405-6), if applicable;

(v) Determination for a single-award BPA exceeding \$100 million, if applicable (see (a)(3)(ii));

(vi) Documentation supporting the decision to establish multiple-award BPAs or a single-award BPA (see (a)(3)(iv));

(vii) Evidence of compliance with paragraph (b) of this section, for competitively awarded BPAs, if applicable; and

(viii) *Basis for the award decision.* This should include the evaluation methodology used in selecting the contractor, the rationale for any tradeoffs in making the selection, and a price reasonableness determination for services requiring a statement of work.

(b) *Competitive procedures for establishing a BPA.* This paragraph applies to the establishment of a BPA, in addition to applicable instructions in paragraph (a).

(1) *For supplies, and for services not requiring a statement of work.* The procedures of this paragraph apply when establishing a BPA for supplies and services that are listed in the schedule contract at a fixed price for the performance of a specific task, where a statement of work is not required (e.g., installation, maintenance, and repair).

(i) *If the estimated value of the BPA does not exceed the simplified acquisition threshold.* (A) The ordering activity shall:

(1) Consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three schedule contractors through the GSA Advantage! on-line shopping service, by reviewing the catalogs or pricelists of at least three schedule contractors, or by requesting quotations from at least three schedule contractors (see 8.405-5); or

(2) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at 8.405-6(a).

(B) The ordering activity shall establish the BPA with the schedule contractor(s) that can provide the best value.

(ii) *If the estimated value of the BPA exceeds the simplified acquisition threshold.* The ordering activity contracting officer:

(A) Shall provide an RFQ that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made.

(B)(1) Shall post the RFQ on e-Buy to afford all schedule contractors offering the required supplies or services under the appropriate multiple award schedule(s) an opportunity to submit a quote; or

(2) Shall provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When

fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(C) Shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. After seeking price reductions (see 8.405-4), establish the BPA with the schedule contractor(s) that provides the best value.

(D) The BPA must be established in accordance with paragraphs (b)(1)(ii)(B) and (C) of this section, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405-6.

(2) *For services requiring a statement of work.* This applies when establishing a BPA that requires services priced at hourly rates, as provided by the schedule contract. The applicable services will be identified in the Federal Supply Schedule publications and the contractor's pricelists.

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

(ii) *Type-of-order preference.* The ordering activity shall specify the order type (i.e., firm-fixed price, labor-hour) for the services identified in the statement of work. The contracting officer should establish firm-fixed prices, as appropriate.

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

(iv) *If the estimated value of the BPA does not exceed the simplified acquisition threshold.* The ordering activity shall provide the RFQ (including the statement of work and evaluation criteria) to at least three

schedule contractors that offer services that will meet the agency's needs.

(v) *If estimated value of the BPA exceeds the simplified acquisition threshold.* The ordering activity contracting officer—

(A) Shall post the RFQ on e-Buy to afford all schedule contractors offering the required supplies or services under the appropriate multiple-award schedule an opportunity to submit a quote; or

(B) Shall provide the RFQ, which includes the statement of work and evaluation criteria, to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements. When fewer than three quotes are received from schedule contractors that can fulfill the requirements, the contracting officer shall document the file. The contracting officer shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.

(vi) The ordering activity contracting officer shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform, and for determining that the proposed price is reasonable.

(vii) The BPA must be established in accordance with paragraph (b)(2)(iv) or (v), and with paragraph (b)(2)(vi) of this section, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405–6.

(viii) The ordering activity contracting officer shall establish the BPA with the schedule contractor(s) that represents the best value (*see* 8.404(d) and 8.405–4).

(3) After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

(c) *Ordering from BPAs.* The procedures in this paragraph (c) are not required for BPAs established on or before May 16, 2011. However, ordering activities are encouraged to use the procedures for such BPAs.

(1) *Single-award BPA.* If the ordering activity establishes a single-award BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.

(2) *Multiple-award BPAs.* (i) *Orders at or below the micro-purchase threshold.* The ordering activity may place orders at or below the micro-purchase threshold with any BPA holder that can meet the agency needs. The ordering activity should attempt to distribute any such orders among the BPA holders.

(ii) *Orders exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold.* (A) The ordering activity must provide each multiple-award BPA holder a fair opportunity to be considered for each order exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold unless one of the exceptions at 8.405–6(a)(1)(i) applies.

(B) The ordering activity need not contact each of the multiple-award BPA holders before placing an order if information is available to ensure that each BPA holder is provided a fair opportunity to be considered for each order.

(C) The ordering activity contracting officer shall document the circumstances when restricting consideration to less than all multiple-award BPA holders offering the required supplies and services.

(iii) *Orders exceeding the simplified acquisition threshold.* (A) The ordering activity shall place an order in accordance with paragraphs (c)(2)(iii)(A)(1), (2) and (3) of this paragraph, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 8.405–6. The ordering activity shall—

(1) Provide an RFQ to all BPA holders offering the required supplies or services under the multiple-award BPAs, to include a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made;

(2) Afford all BPA holders responding to the RFQ an opportunity to submit a quote; and

(3) Fairly consider all responses received and make award in accordance with the selection procedures.

(B) The ordering activity shall document evidence of compliance with these procedures and the basis for the award decision.

(3) *BPAs for hourly-rate services.* If the BPA is for hourly-rate services, the ordering activity shall develop a statement of work for each order

covered by the BPA. Ordering activities should place these orders on a firm-fixed price basis to the maximum extent practicable. All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

(d) *Duration of BPAs.* (1) Multiple-award BPAs generally should not exceed five years in length, but may do so to meet program requirements.

(2) A single-award BPA shall not exceed one year. It may have up to four one-year options. *See* paragraph (e) of this section for requirements associated with option exercise.

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

(e) *Review of BPAs.* (1) The ordering activity contracting officer shall review the BPA and determine in writing, at least once a year (*e.g.*, at option exercise), whether—

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

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

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

(2) The determination shall be included in the BPA file documentation.

(3) If a single-award BPA is established, the ordering activity contracting officer's annual determination must be approved by the ordering activity's competition advocate prior to the exercise of an option to extend the term of the BPA.

■ 11. Revise section 8.405–4 to read as follows:

8.405–4 Price reductions.

Ordering activities may request a price reduction at any time before placing an order, establishing a BPA, or in conjunction with the annual BPA review. However, the ordering activity shall seek a price reduction when the order or BPA exceeds the simplified acquisition threshold. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order or BPA.

■ 12. Revise section 8.405–6 to read as follows:

8.405–6 Limiting sources.

Orders placed or BPAs established under Federal Supply Schedules are exempt from the requirements in part 6. However, an ordering activity must justify its action when restricting

consideration in accordance with paragraphs (a) or (b) of this section—

(a) *Orders or BPAs exceeding the micro-purchase threshold based on a limited sources justification.* (1) *Circumstances justifying limiting the source.* (i) For a proposed order or BPA with an estimated value exceeding the micro-purchase threshold not placed or established in accordance with the procedures in 8.405–1, 8.405–2, or 8.405–3, the only circumstances that may justify the action are—

(A) An urgent and compelling need exists, and following the procedures would result in unacceptable delays;

(B) Only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized; or

(C) In the interest of economy and efficiency, the new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order or BPA must not have been previously issued under sole-source or limited-sources procedures.

(ii) See 8.405–6(c) for the content of the justification for an order or BPA exceeding the simplified acquisition threshold.

(2) *Posting.* (i) Within 14 days after placing an order or establishing a BPA exceeding the simplified acquisition threshold that is supported by a limited-sources justification permitted under any of the circumstances under paragraph (a)(1) of this section, the ordering activity shall—

(A) Publish a notice in accordance with 5.301; and

(B) Post the justification—

(1) At the GPE <http://www.fedbizopps.gov>;

(2) On the Web site of the ordering activity agency, which may provide access to the justification by linking to the GPE; and

(3) For a minimum of 30 days.

(ii) In the case of an order or BPA permitted under paragraph (a)(1)(i)(A) of this section, the justification shall be posted within 30 days after award.

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

against disclosure in 24.202 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 “Predisclosure Notification Procedures for Confidential Commercial Information” does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (a)(2)(i) and (ii) of this section.

(iv) This posting requirement does not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(b) *Items peculiar to one manufacturer.* An item peculiar to one manufacturer can be a particular brand name, product, or a feature of a product, peculiar to one manufacturer. A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer.

(1) Brand name specifications shall not be used unless the particular brand name, product, or feature is essential to the Government’s requirements, and market research indicates other companies’ similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency’s needs.

(2) *Documentation.* (i) For proposed orders or BPAs with an estimated value exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, the ordering activity contracting officer shall document the basis for restricting consideration to an item peculiar to one manufacturer.

(ii) For proposed orders or BPAs with an estimated value exceeding the simplified acquisition threshold see paragraph (c) of this section.

(3) *Posting.* (i) The ordering activity shall post the following information along with the Request for Quotation (RFQ) to e-Buy (<http://www.ebuy.gsa.gov>):

(A) For proposed orders or BPAs with an estimated value exceeding \$25,000, but not exceeding the simplified acquisition threshold, the documentation required by paragraph (b)(2)(i) of this section.

(B) For proposed orders or BPAs with an estimated value exceeding the

simplified acquisition threshold, the justification required by paragraph (c) of this section.

(ii) The posting requirement of paragraph (b)(3)(i) of this section does not apply when—

(A) Disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception;

(B) The nature of the file (e.g., size, format) does not make it cost-effective or practicable for contracting officers to provide access through e-Buy; or

(C) The agency’s senior procurement executive makes a written determination that access through e-Buy is not in the Government’s interest.

(c) *An order or BPA with an estimated value exceeding the simplified acquisition threshold.* (1) For a proposed order or BPA exceeding the simplified acquisition threshold, the requiring activity shall assist the ordering activity contracting officer in the preparation of the justification. The justification shall cite that the acquisition is conducted under the authority of the Multiple-Award Schedule Program (see 8.401).

(2) At a minimum, each justification shall include the following information:

(i) Identification of the agency and the contracting activity, and specific identification of the document as a “Limited-Sources Justification.”

(ii) Nature and/or description of the action being approved.

(iii) A description of the supplies or services required to meet the agency’s needs (including the estimated value).

(iv) The authority and supporting rationale (see 8.405–6(a)(1)(i) and (b)(1)) and, if applicable, a demonstration of the proposed contractor’s unique qualifications to provide the required supply or service.

(v) A determination by the ordering activity contracting officer that the order represents the best value consistent with 8.404(d).

(vi) A description of the market research conducted among schedule holders and the results or a statement of the reason market research was not conducted.

(vii) Any other facts supporting the justification.

(viii) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the restricted consideration before any subsequent acquisition for the supplies or services is made.

(ix) The ordering activity contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(x) Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or requirements or other rationale for limited sources) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(xi) For justifications under 8.405-6(a)(1), a written determination by the approving official identifying the circumstance that applies.

(d) *Justification approvals.* (1) For a proposed order or BPA with an estimated value exceeding the simplified acquisition threshold, but not exceeding \$650,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order or BPA with an estimated value exceeding \$650,000, but not exceeding \$12.5 million, the justification must be approved by the competition advocate of the activity placing the order, or by an official named in paragraph (d)(3) or (d)(4) of this section. This authority is not delegable.

(3) For a proposed order or BPA with an estimated value exceeding \$12.5 million, but not exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$85.5 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (d)(4) of this section.

(4) For a proposed order or BPA with an estimated value exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, over \$85.5 million), the justification must be approved by the senior procurement executive of the agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting as the senior procurement executive for the Department of Defense.

■ 13. Revise section 8.406-1 to read as follows:

8.406-1 Order placement.

(a) Ordering activities may place orders orally, except for—

(1) Supplies and services not requiring a statement of work exceeding the simplified acquisition threshold;

(2) Services requiring a statement of work (SOW); and

(3) Orders containing brand-name specifications that exceed \$25,000.

(b) Ordering activities may use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order supplies or services from schedule contracts.

(c) The ordering activity shall place an order directly with the contractor in accordance with the terms and conditions of the pricelists (see 8.402(b)). Prior to placement of the order, the ordering activity shall ensure that the regulatory and statutory requirements of the requiring agency have been applied.

(d) Orders shall include the following information in addition to any information required by the schedule contract:

(1) Complete shipping and billing addresses.

(2) Contract number and date.

(3) Agency order number.

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

(5) Discount terms.

(6) Delivery time or period of performance.

(7) Special item number or national stock number.

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

(9) Quantity and any variation in quantity.

(10) Number of units.

(11) Unit price.

(12) Total price of order.

(13) Points of inspection and acceptance.

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

(15) Marking requirements.

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

PART 16—TYPES OF CONTRACTS

■ 14. Amend section 16.505 by—

■ a. Revising paragraph (a)(1) and the fourth sentence of paragraph (b)(1)(ii);

■ b. Redesignating paragraphs (b)(1)(iii) and (b)(1)(iv) as paragraphs (b)(1)(iv) and (b)(1)(v), respectively;

■ c. Adding a new paragraph (b)(1)(iii); and

■ d. Revising paragraphs (b)(2) and (b)(5).

The revised and added text reads as follows:

16.505 Ordering.

(a) *General.* (1) In general, the contracting officer does not synopsise orders under indefinite-delivery contracts; except see 16.505(a)(10) and 16.505(b)(2)(ii)(D).

* * * * *

(b) * * *

(1) * * *

(ii) * * * If the order does not exceed the simplified acquisition threshold, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. * * *

(iii) *Orders exceeding the simplified acquisition threshold.* (A) Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis in accordance with paragraph (b)(1)(iii)(B) of this section, unless supported by a written determination that one of the circumstances described at 16.505(b)(2)(i) applies to the order and the requirement is waived on the basis of a justification that is prepared in accordance with 16.505(b)(2)(ii)(B);

(B) The contracting officer shall—

(1) Provide a fair notice of the intent to make a purchase, including a clear description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made to all contractors offering the required supplies or services under the multiple-award contract; and

(2) Afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

* * * * *

(2) *Exceptions to the fair opportunity process.* (i) The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$3,000 unless one of the following statutory exceptions applies:

(A) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(B) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

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

(D) It is necessary to place an order to satisfy a minimum guarantee.

(E) For orders exceeding the simplified acquisition threshold, a statute expressly authorizes or requires that the purchase be made from a specified source.

(ii) The justification for an exception to fair opportunity shall be in writing as specified in paragraphs (b)(2)(ii)(A) or (B) of this section.

(A) *Orders exceeding \$3,000, but not exceeding the simplified acquisition threshold.* The contracting officer shall document the basis for using an exception to the fair opportunity process. If the contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(B) *Orders exceeding the simplified acquisition threshold.* As a minimum, each justification shall include the following information and be approved in accordance with paragraph (b)(2)(ii)(C) of this section:

(1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for an Exception to Fair Opportunity."

(2) Nature and/or description of the action being approved.

(3) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(4) Identification of the exception to fair opportunity (*see* 16.505(b)(2)) and the supporting rationale, including a demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the exception cited. If the contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(5) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(6) Any other facts supporting the justification.

(7) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent acquisition for the supplies or services is made.

(8) The contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(9) Evidence that any supporting data that is the responsibility of technical or requirements personnel (*e.g.*, verifying the Government's minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(10) A written determination by the approving official that one of the circumstances in (b)(2)(i)(A) through (E) of this section applies to the order.

(C) *Approval.* (1) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$650,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order exceeding \$650,000, but not exceeding \$12.5 million, the justification must be approved by the competition advocate of the activity placing the order, or by an official named in paragraph (b)(2)(ii)(C)(3) or (4) of this section. This authority is not delegable.

(3) For a proposed order exceeding \$12.5 million, but not exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$85.5 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (b)(2)(ii)(C)(4) of this section.

(4) For a proposed order exceeding \$62.5 million (or, for DoD, NASA, and the Coast Guard, over \$85.5 million), the justification must be approved by the senior procurement executive of the

agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting as the senior procurement executive for the Department of Defense.

(D) *Posting.* (1) Except as provided in paragraph (b)(2)(ii)(D)(5) of this section, within 14 days after placing an order exceeding the simplified acquisition threshold that does not provide for fair opportunity in accordance with 16.505(b), the contract officer shall—

(i) Publish a notice in accordance with 5.301; and

(ii) Make publicly available the justification required at (b)(2)(ii)(B) of this section.

(2) The justification shall be made publicly available—

(i) At the GPE <http://www.fedbizopps.gov>;

(ii) On the Web site of the agency, which may provide access to the justifications by linking to the GPE; and

(iii) Must remain posted for a minimum of 30 days.

(3) In the case of an order permitted under paragraph (b)(2)(i)(A) of this subsection, the justification shall be posted within 30 days after award of the order.

(4) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 "Predisclosure Notification Procedures for Confidential Commercial Information" does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (1) and (3).

(5) The posting requirement of this section does not apply when disclosure would compromise the national security (*e.g.*, would result in disclosure of

classified information) or create other security risks.

* * * * *

(5) *Decision documentation for orders.* (i) The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

(ii) The contract file shall also identify the basis for using an exception to the fair opportunity process (*see* paragraph (b)(2)).

* * * * *

PART 18—EMERGENCY ACQUISITIONS

18.105 [Amended]

■ 15. Amend section 18.105 by removing “(See 8.405–3(a)(4))” and adding “(see 8.405–3(a)(6))” in its place.

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

■ 16. Amend section 38.101 by revising the second sentence in paragraph (e) to read as follows:

38.101 General.

* * * * *

(e) * * * The requirements of parts 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation and, generally, do not apply to orders and BPAs placed under resulting schedule contracts (except *see* 8.404).

[FR Doc. 2011–5553 Filed 3–15–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 15, and 19

[FAC 2005–50; FAR Case 2009–038; Item III; Docket 2010–0095, Sequence 1]

RIN 9000–AL55

Federal Acquisition Regulation; Justification and Approval of Sole-Source 8(a) Contracts

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010. This FAR change encourages agencies to maximize the effective use of competition by making certain that the proper Justification and Approval (J&A) is obtained prior to award of 8(a) sole-source contracts over \$20 million, as required by section 811.

DATES: *Effective Date:* March 16, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2009–038, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–038” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–038.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–038” on your attached document.

- *Fax:* (202) 501–4067.

- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case 2009–038, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Robinson, Procurement Analyst, at (202) 501–2658, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2009–038.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing an interim rule amending the FAR, to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), enacted October 28, 2009. Section 811 requires

a J&A prior to awarding a sole-source contract in an amount over \$20 million under the 8(a) program (15 U.S.C. 637(a)). This written J&A must be approved by an appropriate official and, after award, made public. Authorized by 15 U.S.C. 637(a), the 8(a) program enables contract awards to be made to small business concerns determined eligible for the 8(a) program by the Small Business Administration (SBA).

The requirement for a J&A is not a ceiling or a “cap” on sole-source awards over \$20 million for 8(a) contractors. The statute requires execution of a J&A documenting the reasons for making the award on a sole-source basis rather than competing among the small businesses in the 8(a) program. Prior to the enactment of section 811, a sole-source award of a new contract made using the 8(a) contracting authority did not require a J&A, regardless of the dollar value, and the new statute does not institute any requirement for a J&A for sole-source 8(a) awards that are less than or equal to \$20 million.

II. Discussion and Analysis

Section 811 became effective on the date of enactment, October 28, 2009. Section 811 addresses requirements for the J&A of sole-source contracts over \$20 million under the 8(a) small-business development program.

The Federal Acquisition Regulatory Council (FAR Council) held three Tribal consultation and outreach meetings to discuss rulemaking associated with section 811.

The meetings took place during October 2010 in Washington, DC; Albuquerque, New Mexico; and Fairbanks, Alaska (*see* the meeting notice that was published in the **Federal Register** on August 31, 2010 at 75 FR 53269). Transcripts of the meetings are available at http://www.acq.osd.mil/dpap/dars/section811_docs.html.

After the meetings, DoD, GSA, and NASA weighed the costs and benefits of publishing this rule as proposed or interim. The rule is being published as interim, rather than proposed, because the rule is implementing a statutory mandate, and the statutory date for issuance of regulations has already passed. Because this is an interim rule, the public will have another opportunity to comment. These additional comments could result in further changes in the final rule.

A frequently heard comment at the October meetings was a request that the FAR not use the 12 elements currently required at FAR 6.303–2 for J&As for less than full-and-open competition, but instead limit the elements to be addressed to the five elements listed in

section 811(b), which are set forth as follows:

(1) A description of the needs of the agency concerned for the matters covered by the contract;

(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract;

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned;

(4) A determination that the anticipated cost of the contract will be fair and reasonable; and

(5) Such other matters as the head of the agency concerned shall specify.

DoD, GSA, and NASA have drafted the interim FAR rule to adopt only these five elements. DoD, GSA, and NASA did not adopt the suggestions raised in the October meetings (1) not to include the fair and reasonable price determination and (2) not to allow agency heads to address any matter, without specific limits (the fifth element set out in section 811). A determination that the anticipated cost of a contract will be fair and reasonable is a universal requirement in Federal contracting; including the requirement in the J&A would be sensible, even if it were not specifically required by section 811.

A common issue raised in the meetings was that the fifth element, "Such other matters as the head of the agency concerned shall specify," was too broad. DoD, GSA, and NASA determined that it made sense to allow agency heads to identify other factors supporting the decision to make a sole-source 8(a) award. By retaining the wording from the statute, agency heads retain the discretion to consider such factors as Indian economic development or meeting agency small business contracting goals—both factors that participants in the October meetings offered as legitimate reasons to make a sole-source award.

Commenters at the meetings and in the written comments also requested that the "over \$20 million" threshold for requiring a J&A be applied only to the base year of a contract. For example, if a requirement was for \$75 million, with a base year estimate of \$15 million and four one-year \$15 million options, commenters stated their belief that the requirement should not need a J&A because the base-year amount was not over \$20 million. DoD, GSA, and NASA have declined to use the base year amount as the basis for determining the applicability of the J&A requirement. The FAR (1.108(c)) establishes the following rule:

• *Dollar thresholds.* Unless otherwise specified, a specific dollar threshold for the

purpose of applicability is the final anticipated dollar value of the action, including the dollar value of all options. If the action establishes a maximum quantity of supplies or services to be acquired or establishes a ceiling price or establishes the final price to be based on future events, the final anticipated dollar value must be the highest final priced alternative to the Government, including the dollar value of all options.

Unless there is a specific reason, such as a statutory requirement to establish the dollar value of a procurement using a different method, agencies will not deviate from this FAR convention.

Commenters also requested that the requirement for the agency head to approve the J&A be delegated down to a much lower level, such as the contracting officer. FAR 1.108(b) states the following:

• *Delegation of authority.* Each authority is delegable unless specifically stated otherwise. * * *

J&As are delegable, but there are limits on the redelegation authority based on the dollar value of the procurement; these are stated at FAR 6.304. The competition advocate for the procuring activity and the head of the procuring activity are included in the approval authorities to ensure the J&A is prepared and coordinated properly within the agency. Unless there is a specific reason, agencies will not deviate from the FAR convention at FAR 6.304.

A commenter was concerned about whether "fair and reasonable price" equates to "fair market price." The FAR provides various provisions to address the commenter's concern. The various techniques that contracting officers may use to determine that a price is fair and reasonable are described at FAR 15.404–1, Proposal analysis techniques. With regard to 8(a) contracts, FAR 19.202–6(b) states that contracting officers shall follow the procedures at FAR 19.807, which reads in pertinent part as follows:

Estimating fair market price.

• The contracting officer shall estimate the fair market price of the work to be performed by the 8(a) contractor.

• In estimating the fair market price for an acquisition other than those covered in paragraph (c) of this section, the contracting officer shall use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including certified cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency.

As required by the FAR, agencies will continue to use the existing regulations to evaluate prices offered for 8(a) contracts over \$20 million.

The changes made by the interim rule are summarized as follows:

(1) Cross references to the requirement for a J&A when the procurement is a sole-source 8(a) over \$20 million are added at FAR 6.204, entitled "Section 8(a) competition," FAR 6.302–5, entitled "Authorized or required by statute," and in 19.808–1, entitled "Sole source".

(2) FAR 6.302–5, which sets forth the situations in which other than full-and-open competition is authorized or required by statute, has been modified to clarify that, while 8(a) sole-source awards are still authorized, they now must be supported by a J&A prior to award when the total estimated contract amount is over \$20 million.

(3) Circumstances requiring a J&A for other than full-and-open competition have been expanded to include a new FAR 6.303–1(b) that includes the section 811(a) prohibition against awarding a sole-source 8(a) contract over \$20 million unless a written J&A is approved by the appropriate official and made public after award.

(4) FAR 6.303–2, Content, (of the J&A) has a new paragraph that lists the five required elements for the sole-source 8(a) J&A from section 811.

(5) FAR 19.808–1(a), Sole source, was revised to inform the contracting officer that the SBA may not accept for negotiation a sole-source 8(a) contract over \$20 million unless the requesting agency has completed a J&A in accordance with the requirements at FAR 6.303.

Other requirements of section 811 were reviewed by DoD, GSA, and NASA and determined to be fully covered by the existing FAR. The specific areas reviewed included—

(1) *The definition of a "covered procurement" at section 811(c)(1).* Review determined that covered procurements, for the purposes of section 811, are those made under the SBA's Section 8(a) program. Therefore, it was not necessary to define and use the term "covered procurement" in this rule.

(2) *The definition of "head of an agency" at section 811(c)(2).* Review of the statutory references in this section determined that the FAR-wide definition of this term at FAR 2.101 could be used.

(3) *The definition of "appropriate official" at section 811(c)(3).* The statutory references provided in this section equate to those currently in FAR 6.304, Approval of the Justification.

(4) *Requirement for synopses of proposed procurement actions.* The existing FAR synopsis requirements at subpart 5.2, Synopses of Proposed

Contract Actions, were reviewed. No change is proposed to FAR 5.202, Exceptions, or FAR 5.205, Special situations, because the statute did not modify the existing 8(a) synopsis requirements.

(5) Requirement at section 811(a)(3) to make the J&A and related information available to the public. This statutory requirement matches the J&A publication requirements added by the National Defense Authorization Act for Fiscal Year 2008, section 844, entitled "Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts" (FAR Case 2008-003). The latter FAR case added the requirement to FAR 6.305, Availability of the Justification. Any J&A issued for an 8(a) sole-source contract award over \$20 million will require posting in accordance with FAR 6.305, but no further change to that section is necessary.

Various commenters at the public meetings questioned whether contracting officers will be trained on the content of this rule implementing section 811. DoD, GSA, and NASA have prepared and submitted documentation to the Defense Acquisition University and the Federal Acquisition Institute to coordinate the appropriate changes in training curricula.

III. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to have a significant negative economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any requirements on the majority of small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. It is recognized that a very small number of businesses that have been awarded 8(a) contracts over the \$20 million threshold may be impacted. However, the rule does not limit the number of contracts or dollars awarded to these businesses. The rule may also indirectly benefit the 9,165, currently certified section 8(a) firms by improving their likelihood of a contract award through increased competition, but this impact is similarly considered not significant.

Also, the FAR Council has limited flexibility in this case as the rule

implements in the FAR statutory requirements mandated by section 811, Justification and Approval of Sole-Source Contracts, of the National Defense Authorization Act for Fiscal Year 2010.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610, (FAC 2005-50, FAR Case 2009-038) in correspondence.

V. Paperwork Reduction Act

The interim rule implements section 811, which prohibits the award of a sole-source contract in an amount over \$20 million under the 8(a) program authority (15 U.S.C. 637(a)) without the contracting officer first obtaining a written J&A approved by an appropriate official and making public the J&A and related information. This additional paperwork requirement is internal to the Government and does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) was enacted on October 28, 2009. Section 811 required the FAR to be revised no later than 180 days after enactment, or April 26, 2010. Absent implementation of this interim rule, section 811 will not be implemented in the FAR and agencies will not be compliant with this provision. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA 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 6, 15, and 19

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 6, 15, and 19 as set forth below:

■ 1. The authority citation for 48 CFR parts 6, 15, and 19 continues to read as follows:

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

PART 6—COMPETITION REQUIREMENTS

■ 2. Amend section 6.204 by adding a sentence to the end of paragraph (b) to read as follows:

6.204 Section 8(a) competition.

* * * * *

(b) * * * (But *see* 6.302-5 and 6.303-1 for sole source 8(a) awards over \$20 million.)

■ 3. Amend section 6.302-5 by revising paragraphs (b)(4) and (c)(2) to read as follows:

6.302-5 Authorized or required by statute.

* * * * *

(b) * * *

(4) Sole source awards under the 8(a) Program (15 U.S.C. 637), but *see* 6.303 for requirements for justification and approval of sole-source 8(a) awards over \$20 million. (*See* subpart 19.8.)

* * * * *

(c) * * *

(2) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304, except for—

(i) Contracts awarded under (a)(2)(ii) or (b)(2) of this subsection;

(ii) Contracts awarded under (a)(2)(i) of this subsection when the statute expressly requires that the procurement be made from a specified source. (Justification and approval requirements apply when the statute authorizes, but does not require, that the procurement be made from a specified source); or

(iii) Contracts less than or equal to \$20 million awarded under (b)(4) of this subsection.

* * * * *

■ 4. Amend section 6.303-1 by redesignating paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively; and adding a new paragraph (b) to read as follows:

6.303-1 Requirements.

* * * * *

(b) The contracting officer shall not award a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding \$20 million unless—

(1) The contracting officer justifies the use of a sole-source contract in writing in accordance with 6.303-2;

(2) The justification is approved by the appropriate official designated at 6.304; and

(3) The justification and related information are made public after award in accordance with 6.305.

* * * * *

■ 5. Amend section 6.303-2 by—

■ a. Redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively;

■ b. Adding a new paragraph (a);

■ c. Revising newly redesignated paragraph (b) introductory text; and

■ d. Adding a new paragraph (d).

The added and revised text reads as follows:

6.303-2 Content.

(a) Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited.

(b) As a minimum, each justification, except those for sole-source 8(a) contracts over \$20 million (*see* paragraph (d) of this section), shall include the following information:

* * * * *

(d) As a minimum, each justification for a sole-source 8(a) contract over \$20 million shall include the following information:

(1) A description of the needs of the agency concerned for the matters covered by the contract.

(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract (*see* 19.805-1).

(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

(4) A determination that the anticipated cost of the contract will be fair and reasonable.

(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

6.304 [Amended]

■ 6. Amend section 6.304 by removing from paragraph (a)(1) “6.303-2(a)(12)” and adding “6.303-2(b)(12)” in its place.

PART 15—CONTRACTING BY NEGOTIATION

15.607 [Amended]

■ 7. Amend section 15.607 by removing from paragraph (b)(2) “6.303-2(b)” and adding “6.303-2(c)” in its place.

PART 19—SMALL BUSINESS PROGRAMS

■ 8. Amend section 19.808-1 by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively; and adding a new paragraph (a) to read as follows:

19.808-1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds \$20 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.

* * * * *

[FR Doc. 2011-5554 Filed 3-15-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 10, 16, 44, and 52

[FAC 2005-50; FAR Case 2008-007; Item IV; Docket 2010-0086, Sequence 1]

RIN 9000-AL50

Federal Acquisition Regulation; Additional Requirements for Market Research

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 826, Market Research, of the National Defense Authorization Act for Fiscal Year 2008. Section 826 requires the head of an agency to take appropriate steps to ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of \$5 million for the procurement of items other than commercial items engages in market research as necessary before making purchases.

DATES: *Effective Date:* April 15, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-50, FAR Case 2008-007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 34277 on June 16, 2010, to implement section 826, Market Research, of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 826 establishes additional requirements in subsection (c) of 10 U.S.C. 2377. As a matter of policy, these requirements are extended to all executive agencies. Specifically, the head of the agency must conduct market research before issuing an indefinite-delivery indefinite-quantity task or delivery order for a noncommercial item in excess of the simplified acquisition threshold. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold for or on behalf of the Government. Three respondents submitted 16 comments on the interim rule.

II. Discussion/Analysis

Public Comments: A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Purpose

1. *Comment:* One respondent stated that the guidance does not appear to explain the end purpose of the market research. Another respondent, however, concluded that the FAR states the purpose of the market research twice, in FAR 44.402(b) and 10.001(a)(3). The second respondent stated that the purpose for conducting market research is “clearly described in Part 10 and there is no reason to repeat that same language elsewhere in the FAR.”

Response: The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) agree with the second respondent. FAR part 10 “prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services” (FAR 10.000). FAR 10.001(a)(3) lists the ways in which the

results of the market research may be used. We believe that the end purpose of market research is exhaustively covered in FAR part 10. We also agree that there is no need to repeat this material in FAR subpart 44.4, and the final rule removes the redundant material.

2. *Comment:* A respondent noted that competitively awarded indefinite-delivery indefinite-quantity contracts are priced as a result of market forces. Conducting market research prior to the award of individual task orders “will only be looking at the scope of Task Order* * * (and) is redundant to the market research already required by FAR for the (indefinite-delivery indefinite-quantity) contract.” It is unlikely to result in more competition or better pricing, according to the respondent.

Response: The Councils note that the purpose of market research is to effectively identify, on an on-going basis, the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency. The Councils disagree with the respondent’s contention that more competition or better pricing are unlikely to result. (Also see responses at II.F., Burden.)

B. Location in FAR

1. *Comment:* A respondent noted that, while FAR part 10 contains scant detail on market research, there are existing market research techniques and information embedded in chapter 2 of the DoD Commercial Item (CI) Handbook at <http://www.acq.osd.mil/dpap/Docs/cihandbook.pdf>. The respondent stated that the Handbook might be instructive for executive agencies to use as part of any training requirements.

Response: This comment is outside the scope of the FAR case. However, it has been forwarded to both the Defense Acquisition University and the Federal Acquisition Institute for their consideration. The current Commercial Item Handbook (version 1.0) was published November 2001 and is currently in revision.

2. *Comment:* A respondent stated its conclusion that the section 826 requirement for contractors with contracts exceeding \$5 million to perform market research for “other than commercial items” is misplaced because the title of FAR subpart 44.4 is “Subcontracts for Commercial Items and Commercial Components.” The respondent suggested that a better location for the statutory requirement would be at FAR 44.303.

Response: The Councils agree that the requirement was misplaced in FAR subpart 44.4 and have relocated the clause prescription to FAR part 10, Market Research (rather than FAR subpart 44.3, as suggested by the respondent). The statute and policy require contractors to conduct market research in certain circumstances (when the contract is over \$5 million for the procurement of items other than commercial items); whether the subcontract is for commercial or other than commercial items is immaterial to the contractor’s requirement to conduct market research. The statute encourages contractors and subcontractors to use commercial items. The FAR is amended to delete the subject of market research from subpart 44.4, and the “Scope of subpart” section, FAR 44.400, is being revised accordingly. The Councils believe that the coverage is better located in FAR part 10 rather than FAR subpart 44.3, as the respondent suggested, because the latter subpart is exclusive to Contractors’ Purchasing Systems Reviews.

3. *Comment:* A respondent stated that FAR 52.244–6 is intended to limit the clauses that a FAR part 15 prime contractor is required to flow down to a subcontractor selling commercial items. The respondent stated its belief that the new Alternate I to the clause is unnecessary. The respondent also concluded that the existing FAR part 10 market research language should not be restated there. Last, the respondent questioned the need for the added language about “procuring commercial items,” when the focus of section 826 is on procurement of “other than commercial items.”

Response: The Councils agree that Alternate I to FAR 52.244–6 is unnecessary and not relevant to subcontracts for commercial items. By removing discussion of market research from FAR subpart 44.4, there will no longer be a redundant discussion of FAR part 10 material in FAR subpart 44.4. The Councils agree with the respondent that the focus of section 826 is on the procurement of other than commercial items. Relocating the requirement for contractors to conduct market research to FAR part 10 better aligns the FAR coverage with the statute. The Councils have retained the requirement, at section 826(a) (10 U.S.C. 2377(c)(4)), for a contractor with a contract over \$5 million for the procurement of other than commercial items to conduct market research. However, the Councils have added the requirement as a new FAR clause, 52.210–1, Market Research, prescribed at FAR 10.003, Contract clause. Because

the statute requires the conduct of market research by a contractor awarded task orders or delivery orders over \$5 million for items other than commercial items, we have added a cross-reference to the requirement to FAR subpart 16.5.

C. Clarification of FAR Language

1. *Comment:* A respondent concluded that the interim rule confuses the prime contractor’s role in procuring supplies and services to support its deliverable to the Government, *i.e.*, subcontracting, with the unique and completely distinct role of a prime contractor holding a contract to operate a Government facility and act in the place of the Government in procuring supplies and services solely to support the activities at the Government facility, *i.e.*, acting as an agent of the Government.

Response: The Councils eliminated the “purchasing agent” language by deleting the Alternate I to FAR 52.244–6. The Councils also created a new FAR clause 52.210–1, Market Research.

2. *Comment:* A respondent noted that there is a significant difference between the section 826 requirement to conduct market research “as may be necessary” and the FAR 44.402(b) requirement to conduct market research “to the maximum extent practicable.” The respondent requested that the language from section 826 be used so that contractors will have the ability to tailor their market research as necessary to reflect their knowledge and experience of the supplies and services being procured.

Response: The Councils do not agree with the respondent. The Government has interpreted “as may be necessary” to mean “to the maximum extent practicable.” In any case, the term “to the maximum extent practicable” has been removed from the case, as the coverage for FAR 44.402(b) has been deleted from the rule.

D. Application

1. *Comment:* According to the respondent, mixing the discussion of a contractor’s possible roles of subcontracting and acting as the Government’s agent has created a lower standard for “agents.” As written, the respondent stated, the language requires contractors to perform the necessary market research whenever procuring other than commercial items, but purchasing agents are only required to perform market research when procuring other-than-commercial items with a value over the simplified acquisition threshold. The respondent questioned the need for this distinction.

Response: The Councils agree that there need not be any distinction

between the contractor acting as a subcontractor and the contractor "acting as a purchasing agent." The language has been removed from FAR subpart 44.4.

2. *Comment:* A respondent recommended requiring the conduct of market research prior to the award of each task order issued under an indefinite-delivery indefinite-quantity contract that was awarded on a sole-source basis.

Response: The Councils disagree with the respondent because the clear language of the statute, section 826(c), establishes a requirement for the conduct of market research appropriate to the circumstances prior to awarding a task order or delivery order in excess of the simplified acquisition threshold for the procurement of items other than commercial items. The statute does not limit the market research requirements to task orders or delivery orders awarded against sole-source indefinite-delivery contracts. Although this is mandatory for DoD and not for civilian agencies, the language was applied to civilian agencies for uniformity across the Government. See also the response to the second comment at II.A., Purpose, and the responses at II.E., Exceptions.

E. Exceptions

1. *Comment:* One respondent stated that the addition of a new paragraph (d) at FAR 10.001, Policy, only applies to "(A) contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and (B) disaster relief * * *". For that reason, the respondent believes that the same applicability should be added to FAR 44.402, as paragraph (d) outlines. The respondent noted that, without this change, there would be a negative impact on indefinite-delivery indefinite-quantity contracts.

Response: The respondent's assumptions about the applicability are not correct. The requirement for agencies to conduct market research for disaster relief and contingency operations already existed at FAR 10.001(a)(2).

2. *Comment:* A respondent claimed that indefinite-quantity contracts set aside for Small Business Administration (SBA) categories, such as the 8(a) program and small disadvantaged business, should be exempt from market research requirements because the intent is to facilitate the SBA in supporting these "specialty market segments." The respondent notes that this market segment historically is very committed and can be relied upon to self-police.

Response: The SBA's current socioeconomic programs offering eligible program participants contractual opportunities are the section 8(a) program, HUBZone program, and the service-disabled veteran-owned small business concern program. The SBA has finalized the regulations that will provide guidance for the women-owned small business Federal contract program. The rule was published in the **Federal Register** on October 7, 2010 (75 FR 66258). The SBA does not have a small and disadvantaged business (SDB) program offering SDB set-asides. However, the SBA's 8(a) firms may represent themselves as SDBs for Federal contracts and subcontracts to include task- and delivery-orders under indefinite-delivery contracts.

Performing market research for task- and delivery-orders will not diminish opportunities for agencies to establish set-asides for small-business concerns or, when appropriate, award sole-source contracts for indefinite-delivery contracts. Market research performed by prime contractors will also enhance subcontracting opportunities for small-business concerns. Careful attention to market-research strategies is an effective method for creating contract opportunities for small-business concerns. It provides them with an awareness of forthcoming procurements. In turn, the market research provides a vehicle for the small-business concern to market its capabilities to the Government and its contractors. FAR part 10 currently supports market research for small business concerns and requires agencies to take advantage of commercially available market research methods in order to effectively identify the capabilities of small businesses. The final rule will not limit an entity's ability to utilize the SBA's small business programs.

F. Burden

1. *Comment:* A respondent noted that at least one agency uses multiple-award contracts for construction. Each task order is competed, which the respondent stated ensures that "the full force of the marketplace is apparent in the pricing of competitiveness of each award." In addition, each prime contractor is continually reviewing the performance and prices of all its subcontractors. The respondent stated that having the Government perform additional market research in this market segment is a waste of time and money.

Response: The Councils do not agree with the respondent. Given the continuously changing circumstances and entry of new businesses, on-going

market research is not a waste of manpower and taxpayers' money. Further, the respondent addresses the Government's performance of additional market research, but the statute also places the on-going market research requirement on the prime contractor in these circumstances. There is no reason why a multiple-award construction contract should be treated any differently than any multiple-award contract.

2. *Comment:* A respondent expressed concern about the negative impact caused by the time and effort required for each market survey. Fiscal year-end solicitations and awards may be slowed to the point of making awards impossible.

Response: The Councils cannot waive statutory requirements simply because compliance will take time. In an effort to enhance uniformity and consistency, the DoD statutory mandate was intentionally extended to all executive agencies, consistent with Governmentwide applications being sought in other competition matters by the Office of Federal Procurement Policy. The Councils also point the respondent to FAR 10.002(b)(1), which notes that the "extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience." Further, the Councils note that FAR 10.002(b)(1) clearly states that the market research effort for a new task order or delivery order need not be *de novo* in every case; the "contracting officer may use market research conducted within 18 months before the award of any task or delivery order if the information is still current, accurate, and relevant" (emphasis added).

3. *Comment:* The respondent stated that the requirement for market research will greatly impede the award of task orders, slowing fiscal year-end awards to the point of impossibility and negatively impacting Base Operating Support/Service (BOS) contracts. The respondent noted that BOS contracts have performance-based elements that ensure the contractor has incentives for efficiencies that will result in substantive savings in cost and schedule. Time has proven that having a single contractor responsible for the full scope of a contract effort enables tradeoffs by the contractor that result in better overall performance and savings, according to the respondent, than would intermittent market research.

Response: Whatever the respondent's experience with BOS contracts containing performance-based elements, the Councils note that the statute requires the conduct of market research

for both single-award and multiple-award indefinite-delivery contracts. The point of having contractors conduct market research, as stated in the law, is to identify commercial or nondevelopmental items that may be available to meet the agency's needs, not to identify efficiency trade-offs within the contractor's operations. Both efforts can proceed in tandem.

Finally, this final rule makes several conforming changes and technical corrections as a result of public comments received:

1. The language added to FAR 52.244-6 (Alternate I) is relocated to a new FAR clause 52.210-1, Market Research;

2. A prescription for the new clause is added at FAR 10.003, Contract clause; and

3. A cross-reference for the clause is added at FAR 16.506(h) when the contract is over \$5 million for the procurement of items other than commercial items.

III. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA 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 of the high dollar threshold, non-applicability to contracts for commercial items (including commercial items that are services), and non-applicability to subcontracts for commercial items (including commercial items that are services). DoD, GSA, and NASA anticipate that the required market research is likely to increase the number of small businesses identified as able to provide commercial or nondevelopmental items as subcontractors. Any impact to small businesses is positive because their commercial and nondevelopmental items are more likely to be discovered as a result of these market research requirements. No comments were received from small entities in response to the invitation to do so included in the interim rule.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the

Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 10, 16, 44, and 52

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 10, 16, 44, and 52, which was published in the **Federal Register** at 75 FR 34277, June 16, 2010, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 10, 16, 44, 52 continues to read as follows:

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

PART 10—MARKET RESEARCH

■ 1. Amend section 10.001 by revising paragraph (d) to read as follows:

10.001 Policy.

* * * * *

(d) *See* 10.003 for the requirement for a prime contractor to perform market research in contracts in excess of \$5 million for the procurement of items other than commercial items in accordance with section 826 of Public Law 110-181.

■ 2. Add section 10.003 to read as follows:

10.003 Contract clause.

The contracting officer shall insert the clause at 52.210-1, Market Research, in solicitations and contracts over \$5 million for the procurement of items other than commercial items.

PART 16—TYPES OF CONTRACTS

■ 3. Amend section 16.506 by adding paragraph (h) to read as follows:

16.506 Solicitation provisions and contract clauses.

* * * * *

(h) *See* 10.001(d) for insertion of the clause at 52.210-1, Market Research, when the contract is over \$5 million for the procurement of items other than commercial items.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 4. Revise section 44.400 to read as follows:

44.400 Scope of subpart.

This subpart prescribes the policies limiting the contract clauses a contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with section 8002(b)(2) of Public Law 103-355.

44.402 [Amended]

■ 5. Amend section 44.402 by removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

■ 6. Revise section 44.403 to read as follows:

44.403 Contract clause.

The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts other than those for commercial items.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add section 52.210-1 to read as follows:

52.210-1 Market Research.

As prescribed in 10.003, insert the following clause:

Market Research (APR 2011)

(a) *Definition.* As used in this clause—
Commercial item and *nondevelopmental item* have the meaning contained in Federal Acquisition Regulation 2.101.

(b) Before awarding subcontracts over the simplified acquisition threshold for items other than commercial items, the Contractor shall conduct market research to—

(1) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(i) Meet the agency's requirements;

(ii) Could be modified to meet the agency's requirements; or

(iii) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(2) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level.

(End of clause)

52.244-6 [Amended]

■ 8. Amend section 52.244-6 by removing from the introductory text "44.403(a)," and adding "44.403," in its place; and removing Alternate I.

[FR Doc. 2011-5555 Filed 3-15-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 13 and 19**

[FAC 2005–50; FAR Case 2011–004; Item V; Docket 2011–0004, Sequence 1]

RIN 9000–AL88

**Federal Acquisition Regulation;
Socioeconomic Program Parity**

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 1347 of the “Small Business Jobs Act of 2010.” Section 1347 clarifies the contracting officer’s ability to use discretion when determining whether an acquisition will be restricted to small businesses participating in the 8(a), HUBZone, or service-disabled veteran-owned small business (SDVOSB) programs. There is no order of priority among small businesses in the 8(a) Business Development Program, the HUBZone Program, or the SDVOSB Program.

DATES: *Effective Date:* March 16, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before May 16, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–50, FAR Case 2011–004, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2011–004” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2011–004.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2011–004” on your attached document.

- *Fax:* (202) 501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–50, FAR Case

2011–004, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2011–004.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA are issuing an interim rule amending the FAR, to implement section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240). Section 1347 changed the word “shall” to “may” at section 31(b)(2)(B) of the Small Business Act (15 U.S.C. 657a(b)(2)(B)). This interim rule makes similar changes to the FAR, ensuring that the FAR clearly reflects the statutory relationship among the small business programs and eliminates any confusion on the part of contracting officers or others.

DoD, GSA, and NASA published a proposed rule under FAR Case 2006–034 in the **Federal Register** at 73 FR 12699, March 10, 2008, which would have amended the FAR to clearly reflect the Small Business Administration’s (SBA) interpretation of the Small Business Act and its agency regulations that no order of precedence applies when the contracting officer considers satisfying a requirement through an award to a HUBZone small business concern, a SDVOSB concern, or a small business participating in the 8(a) Program. The proposed rule was closed due to the Government Accountability Office’s and the Court of Federal Claims’ interpretation of the Small Business Act to require acquisitions to be set aside for HUBZone small businesses before setting aside acquisitions for other small business programs. See *Mission Critical Solutions v. U.S.*, 91 Fed. Cl. 386 (2010), and B–401057.

This rule does not address the women-owned small businesses and their relationship to the other small business programs. FAR Case 2010–015, Women-Owned Small Business Program, will be published as an interim rule with request for comments to implement the SBA’s Women-owned Small Business (WOSB) Federal Contract Program final rule, (75 FR 62258, October 7, 2010), which became effective on February 4, 2011. SBA’s rule provides parity for WOSBs with

SBA’s other small business contracting programs.

II. Discussion and Analysis

Section 1347 amended the language concerning HUBZone set asides by deleting the “shall” set aside in the statute and replacing that term with “may” set aside. This clarifies that contracting officers can exercise discretion when determining whether a requirement will be restricted to small business concerns under the 8(a), HUBZone or SDVOSB programs.

This interim rule is intended to address the recent statutory clarification and make clear that—

1. There is no order of precedence among the 8(a), HUBZone, or SDVOSB programs. However, if a requirement has been accepted by SBA under the 8(a) Program, it must remain in the 8(a) program unless SBA agrees to its release in accordance with 13 CFR 124, 125 and 126;

2. For acquisitions exceeding the simplified acquisition threshold, the contracting officer must consider a set-aside or sole source acquisition to a small business under the 8(a), HUBZone, or SDVOSB programs before the contracting officer proceeds with a small business set-aside. See FAR 19.203(c) and 19.502–2(b); and

3. The small business set-aside requirement of FAR 19.502–2(a) does not preclude award of a contract to a qualified 8(a) Program participant, HUBZone small business concern, or SDVOSB concern, because the SBA’s regulations give the contracting officer discretionary authority to use the 8(a), HUBZone, or SDVOSB, at dollar levels above the micro-purchase threshold and at or below the simplified acquisition threshold.

III. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

IV. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.*, because this rule revises the FAR to implement Section 1347 of the Small Business Jobs Act of 2010 governing specific contracting and business assistance programs which include the 8(a), HUBZone, and the SDVOSB programs.

The Regulatory Secretariat will be submitting a copy of the Interim

Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–50, FAR Case 2011–004) in correspondence.

The analysis is summarized as follows:

The purpose of this rule is to ensure that the FAR clearly reflects section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and to incorporate the SBA's interpretation of the Small Business Act and regulations promulgated thereunder. Following recent interpretations of the Small Business Act by the Government Accountability Office and the Court of Federal Claims, some in the acquisition community have been confused about whether there is an order of precedence that applies when deciding whether to satisfy a requirement through an award to a small business, a small business participating in the 8(a) Business Development Program, a HUBZone small business, or a SDVOSB. Section 1347 clarified that there is parity, rather than an order of precedence, and the purpose of this interim rule is to ensure that the FAR removes any uncertainty on the part of the contracting officer, small businesses, and others.

Small businesses that participate in Federal Government contracting are the entities that may be impacted by the rule. There should be no negative impact on small businesses as a whole. The number of contracts awarded overall to small businesses should not decrease as a result of this rule. However, it is possible that the clarity the rule provides could result in a difference in the number of contracts awarded to any particular category of small businesses.

Generally, all current and potential Government contractors must register in the Central Contractor Registration (CCR) database to be eligible for contract award and payment. There are approximately 349,992 small business firms; 9,303 HUBZone firms; 9,234 8(a) firms and 18,213 SDVOSB firms currently registered in CCR that may be affected by this final rule.

There are no significant alternatives that would reduce the impact on small businesses. This FAR rule is implementing section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240).

V. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the enactment of the Small Business Jobs Act of 2010 requires the implementation of section 1347. The statute was enacted on September 27, 2010. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA 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 13 and 19

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

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

■ 1. The authority citation for 48 CFR parts 13 and 19 continues to read as follows:

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

PART 13—SIMPLIFIED ACQUISITIONS PROCEDURES

■ 2. Amend section 13.003 by removing from paragraph (b)(1) “see 19.000” and adding “see 19.000, 19.203,” in its place; and by revising paragraph (b)(2) to read as follows:

13.003 Policy.

* * * * *

(b) * * *

(2) The contracting officer may make an award to a small business under the 8(a) Program (*see* subpart 19.8), or set aside for HUBZone small business concerns (*see* 19.1305) or service-disabled veteran-owned small business concerns (*see* 19.1405) an acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold and at or below the simplified acquisition threshold. The following contracting officer's decisions for acquisitions at or below the simplified acquisition

threshold are not subject to review under subpart 19.4:

(i) A decision not to make an award under the 8(a) Program (*see* subpart 19.8).

(ii) A decision not to set aside an acquisition for HUBZone small business or service-disabled veteran-owned small business concerns participation.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

19.202 [Amended]

■ 3. Amend section 19.202 by removing “Subpart 19.5, 19.8, or 19.13” and adding “subpart 19.5, 19.8, 19.13, or 19.14” in its place.

■ 4. Add section 19.203 to read as follows:

19.203 Relationship among small business programs.

(a) There is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), or Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14).

(b) *At or below the simplified acquisition threshold.* The requirement to exclusively reserve acquisitions for small business concerns at 19.502–2(a) does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, or SDVOSB Program. If the contracting officer does not proceed with a small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase.

(c) *Above the simplified acquisition threshold.* The contracting officer shall first consider an acquisition for the 8(a), HUBZone, or SDVOSB programs before using a small business set-aside (*see* 19.502–2(b)). However, if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless SBA agrees to its release in accordance with 13 CFR parts 124, 125 and 126.

(d) Small business set-asides have priority over acquisitions using full and open competition. *See* requirements for establishing a small business set-aside at subpart 19.5.

■ 5. Amend section 19.501 by removing paragraphs (c) and (d); redesignating paragraphs (e) through (i) as paragraphs (c) through (g), respectively; and revising the newly redesignated paragraph (c) to read as follows:

19.501 General.

* * * * *

(c) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, or service-disabled veteran-owned programs. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

* * * * *

■ 6. Amend section 19.502-2 by adding a new first sentence and revising the last sentence of paragraph (a); and by revising the first sentence in paragraph (b) to read as follows:

19.502-2 Total small business set-asides.

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). * * * The small business reservation does not preclude the award of a contract as described in 19.203.

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). * * *

* * * * *

■ 7. Amend section 19.800 by revising paragraph (e) to read as follows:

19.800 General.

* * * * *

(e) Before deciding to set aside an acquisition in accordance with subpart 19.5, the contracting officer may consider offering the acquisition to a small business under the 8(a) Program in accordance with 19.203.

* * * * *

19.804-2 [Amended]

■ 8. Amend section 19.804-2 by removing paragraph (a)(12); and redesignating paragraphs (a)(13) through (a)(16) as paragraphs (a)(12) through (a)(15), respectively.

■ 9. Amend section 19.1305 by—

- a. Revising paragraph (a);
- b. Removing paragraph (c);
- c. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively; and
- d. Removing from the newly redesignated paragraph (c) “(see subpart 19.5)” and adding “(see 19.203)” in its place.

The revised text reads as follows:

19.1305 HUBZone set-aside procedures.

(a) The contracting officer—
 (1) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied (see 19.203); and

(2) Shall consider HUBZone set-asides before considering HUBZone sole source awards (see 19.1306) or small business set-asides (see subpart 19.5).

* * * * *

■ 10. Amend section 19.1306 by revising the introductory text of paragraph (a) to read as follows:

19.1306 HUBZone sole source awards.

(a) A contracting officer may award contracts to HUBZone small business concerns on a sole source basis (see 6.302-5(b)(5)) before considering small business set-asides (see 19.203 and subpart 19.5), provided none of the exclusions at 19.1304 apply; and—

* * * * *

■ 11. Amend section 19.1405 by revising paragraph (a); and removing from paragraph (c) “(see Subpart 19.5)” and adding “(see 19.203)” in its place.

The revised text reads as follows:

19.1405 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer—
 (1) May set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business concerns when the requirements of paragraph (b) of this section can be satisfied (see 19.203); and

(2) Shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (see 19.1406) or small business set-asides (see subpart 19.5).

* * * * *

■ 12. Amend section 19.1406 by revising the introductory text of paragraph (a) to read as follows:

19.1406 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to service-disabled veteran-owned small business concerns on a sole source basis (see 6.302-5(b)(6)), before considering small business set-asides (see 19.203 and subpart 19.5) provided none of the exclusions of 19.1404 apply and—

* * * * *

[FR Doc. 2011-5556 Filed 3-15-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005-50; FAR Case 2008-034; Item VI; Docket 2009-0035, Sequence 1]

RIN 9000-AL44

Federal Acquisition Regulation; Use of Commercial Services Item Authority

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Section 868 provides that the FAR shall be amended with respect to the procurement of commercial services, specifically services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. **These services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such services.** The rule details the information the contracting officer may consider in order to make this determination.

DATES: *Effective Date:* March 16, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-50, FAR Case 2008-034.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 52852 on October 14, 2009, to implement section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. The comment period closed on December 14, 2009.

Four respondents submitted comments on the interim rule.

II. Discussion/Analysis

The analysis of public comments by the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) follows:

A. Agree With the Rule

Comment: One respondent agreed with the interim rule. The respondent believes including “services of a type” provides the Government with flexibility to access a wide variety of services with beneficial contracting methods.

Response: The Councils acknowledge the respondent’s agreement with the interim rule.

B. “Services of a Type”

Comment: One respondent suggests adding a definition for “services of a type” and/or providing examples of “services of a type.”

Response: The Councils do not agree that definitions or examples are necessary to implement this case. The FAR definition of a “commercial item” adequately addresses what is and is not a commercial item. The contracting officer’s determination that a service is considered a “service of a type” is a determination made based on the circumstances surrounding a particular acquisition and is made on a case-by-case basis.

C. Sold in the Commercial Marketplace

Comment: One respondent also suggests qualifying the two references to the “commercial marketplace” in FAR 15.403–1(c)(3)(ii)(A) as follows. The first reference would be followed by “by the offeror,” while the second reference would be followed by “by others than the offeror.”

Response: The respondent’s suggested language changes go beyond the statute.

D. Establishing Price Reasonableness

1. *Determination that the offeror has submitted sufficient information (15.403–1(c)(3)(ii)(A)).*

Comment: One respondent suggests that requiring a contracting officer determination that the offeror has submitted sufficient information to evaluate the reasonableness of the offered price will increase the contracting officer’s workload, may result in lengthy and unnecessary delays, and could reduce competition.

Response: The determination is required by statute.

2. *Other relevant information (15.403–1(c)(3)(ii)(C)).*

Comment: One respondent believes that if a service is “of a type” sold in the commercial market place, but price reasonableness cannot be established, then that service would not benefit from the Truth in Negotiations Act exception for commercial items, and that such an outcome would cause tremendous confusion among contracting officers and potential offerors of commercial items.

Response: If price reasonableness cannot be determined based on prices for similar commercial services, the services “of a type” cannot be determined to be commercial items (see 15.403–1(c)(3)(ii)(A)). In that case, the contracting officer would need to determine price reasonableness by requesting relevant cost or pricing data from the contractor.

Comment: One respondent suggests that the requirement to provide cost information other than cost or pricing data could prove difficult for industry vendors, which may diminish the field of vendors.

Response: Current FAR 15.402 policy requires that the contracting officer determine price reasonableness. This cost information can come in many forms (sales data, vendor quotations, historical data, etc.) and is usually on hand for a contractor. Consequently, providing this cost information will not present a burden sufficient to discourage industry vendors from seeking Government contracts.

Comment: One respondent believes that if the contracting officer can request cost data, this additional work could result in significant delays in contract award, contract delivery schedule problems and higher prices.

Response: The Councils acknowledge the respondent’s concern; however, the contracting officer is required to request appropriate cost or pricing data sufficient to determine price reasonableness.

E. Location of Coverage

Comment: One respondent suggested that this FAR change should be in FAR 15.403–3 in lieu of 15.403–1.

Response: The Councils believe the language belongs in FAR 15.403–1, since it is more closely aligned with the prohibition on obtaining cost or pricing data than the FAR section requiring information other than cost or pricing data. It is noted that these two sections complement each other and are often used congruently.

III. Executive Order 12866

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.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. This rule impacts the Government by requiring a new written determination by the contracting officer. The rule details the information the contracting officer may consider in order to make this determination. In addition, since the current FAR 15.403–3(a)(1) provides for contracting officers to obtain the relevant information necessary to determine price reasonableness, this final rule places no additional requirements on contractors.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0013, titled: Cost or Pricing Data Exemption.

List of Subjects in 48 CFR Part 15

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR part 15, which was published in the **Federal Register** at 74 FR 52852 on October 14, 2009, is adopted as a final rule without change.

[FR Doc. 2011–5557 Filed 3–15–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 22, 25, and 52**

[FAC 2005–50; FAR Case 2009–040; Item VII; Docket 2010–0092, Sequence 1]

RIN 9000–AL57

**Federal Acquisition Regulation; Trade
Agreements Thresholds****AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).**ACTION:** Final rule.**SUMMARY:** DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative.**DATES:** *Effective Date:* March 16, 2011.**FOR FURTHER INFORMATION CONTACT:**

Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2009–040.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 38689 on July 2, 2010, to incorporate increased thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative. Every two years, the trade agreements thresholds are adjusted according to a pre-determined formula under the agreements. These thresholds were effective on January 1, 2010. No public comments were received. DoD, GSA, and NASA have agreed to convert this FAR case from an interim to a final rule without change.

II. Executive Order 12866

This is a significant regulatory action and, therefore, was 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.

III. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the dollar threshold changes are designed to keep pace with inflation and thus maintain the status quo.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0130, titled: Buy American Act-Free Trade Agreements-Israeli Trade Act Certificate; 9000–0025, titled: Buy American Act, Trade Agreements Act Certificate; and 9000–0141, titled: Buy American Act-Construction.

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

Government procurement.

Dated: March 4, 2011.

Millisa Gary,*Acting Director, Office of Governmentwide
Acquisition Policy.***Interim Rule Adopted as Final Without
Change**

■ Accordingly, the interim rule amending 48 CFR parts 22, 25, and 52, which was published in the **Federal Register** at 75 FR 38689 on July 2, 2010, is adopted as a final rule without change.

[FR Doc. 2011–5558 Filed 3–15–11; 8:45 am]

BILLING CODE 6820–EP–P**DEPARTMENT OF DEFENSE****GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 30 and 52**

[FAC 2005–50; FAR Case 2009–025; Item VIII; Docket 2010–0087, Sequence 1]

RIN 9000–AL58

**Federal Acquisition Regulation;
Disclosure and Consistency of Cost
Accounting Practices for Contracts
Awarded to Foreign Concerns****AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).**ACTION:** Final rule.**SUMMARY:** DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to align it with a Cost Accounting Standards (CAS) Board clause, Disclosure and Consistency of Cost Accounting Practices-Foreign Concerns.**DATES:** *Effective Date:* March 16, 2011.**FOR FURTHER INFORMATION CONTACT:**

Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–50, FAR Case 2009–025.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 34283 on June 16, 2010, to maintain consistency between CAS and FAR in matters relating to disclosure requirements of CAS for contracts awarded to foreign concerns. Specifically, the interim rule was issued in response to the Cost Accounting Standard Board's March 26, 2008, publication of a final rule, which implemented the use of the clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns (73 FR 15939). The interim rule amended the FAR to align FAR clause 52.230–4 with the Cost Accounting Standards Board clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns. FAR clause 52.230–6, Administration of Cost Accounting

Standards, was also revised to include reference to FAR clause 52.230-4.

DoD, GSA, and NASA received no comments on the interim rule and have adopted the interim rule as a final rule without change.

II. Executive Order 12866

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.

III. 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 contracts and subcontracts with small businesses are exempt from the application of the Cost Accounting Standards.

IV. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 30 and 52

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 30 and 52, which was published in the **Federal Register** at 75 FR 34283 on June 16, 2010, is adopted as a final rule without change.

[FR Doc. 2011-5559 Filed 3-15-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-50; FAR Case 2009-026; Item IX; Docket 2010-0088, Sequence 1]

RIN 9000-AL54

Federal Acquisition Regulation; Compensation for Personal Services

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR). The interim rule aligned the FAR with the revised Cost Accounting Standards (CAS) Board standards "Cost Accounting Standard for composition and measurement of pension cost," and "Accounting for the cost of deferred compensation."

DATES: *Effective Date:* March 16, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-50, FAR Case 2009-026.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 34285 on June 16, 2010, to maintain consistency between CAS and FAR in matters relating to the administration of CAS. The interim rule aligned the existing FAR 31.205-6(q)(2)(i) and (ii) with revisions to CAS 412 "Cost Accounting Standards for composition and measurement of pension cost," and CAS 415 "Accounting for the cost of deferred compensation."

The CAS Board had specified that the accounting of Employee Stock Ownership Plan (ESOP) costs, regardless of type, would be covered by the provisions of CAS 415 only and not by CAS 412. The CAS Board also provided criteria in CAS 415 for measuring ESOP costs and assigning these costs to cost accounting periods.

DoD, GSA, and NASA received no comments on the interim rule and have adopted the interim rule as a final rule without change.

II. Executive Order 12866

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.

III. 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 affected small businesses are currently required to comply with CAS 412 and CAS 415. While small businesses are otherwise not subject to CAS, they are subject to selected standards for the purpose of determining allowability of costs under Government contracts. Among these standards are CAS 412 and CAS 415 as set forth in FAR 31.205-6(q). For small businesses currently using CAS 415, there will be no increase in cost or effort. For small businesses that must change from CAS 412 to CAS 415, the possible change from measuring costs in accordance with CAS 412 to CAS 415 would result, at most, in a negligible increase in administrative burden because of the similarities between CAS 412 and CAS 415. The potential increase of administrative effort, albeit minor, will be offset by the uniformity and consistency in accounting for deferred compensation costs achieved by this rule that will benefit all entities by reducing their administrative burden.

IV. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR part 31, which was published in the Federal Register at 75 FR 34285 on June 16, 2010, is adopted as a final rule without change.

[FR Doc. 2011-5560 Filed 3-15-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 18, 19, and 52

[FAC 2005-50; Item X; Docket 2011-0078; Sequence 1]

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 Regulations in order to make editorial changes.

DATES: Effective Date: March 16, 2011.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat, 1275 First Street, NE., 7th Floor, Washington, DC 20417, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-50, Technical Amendments.

SUPPLEMENTARY INFORMATION: In order to update certain elements in 48 CFR parts 18, 19, and 52, this document makes editorial changes to Federal Acquisition Regulations.

List of Subjects in 48 CFR Parts 18, 19, and 52

Government procurement.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 18, 19, and 52 as set forth below:

1. The authority citation for 48 CFR parts 18, 19, and 52 continues to read as follows:

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

PART 18-EMERGENCY ACQUISITIONS

18.204 [Amended]

2. Amend section 18.204 in paragraph (b) by removing "http://www.whitehouse.gov/omb/procurement/guides/emergency_acquisitions_guide.pdf" and adding "http://www.whitehouse.gov/sites/default/files/omb/assets/procurement_guides/emergency_acquisitions_guide.pdf" in its place.

PART 19-SMALL BUSINESS PROGRAMS

19.201 [Amended]

3. Amend section 19.201 in paragraph (b) by removing from the last sentence "http://www.arnet.gov/References/sbadjustments.htm" and adding "https://www.acquisition.gov/References/sbadjustments.htm" in its place.

PART 52-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Amend section 52.212-3 by:
a. Revising the date of the provision;
b. Removing from paragraph (c)(8)(ii) "(c)(9)(i)" and adding "(c)(8)(i)" in its place;
c. Removing from paragraph (c)(9)(ii) "(c)(10)(i)" and adding "(c)(9)(i)" in its place;
d. In Alternate I, revising the alternate date, introductory text, and first paragraph; and
e. In Alternate II, removing from the introductory text "(c)(9)(iii)" and adding "(c)(8)(iii)" in its place.

The revised text reads as follows:

52.212-3 Offeror Representations and Certifications-Commercial Items.

* * * * *

Offeror Representations and Certifications-Commercial Items (Mar 2011)

* * * * *

Alternate I * * *

As prescribed in 12.301(b)(2), add the following paragraph (c)(10) to the basic provision:

(10) (Complete if the offeror has represented itself as disadvantaged in paragraph (c)(4) or (c)(8) of this provision.)

* * * * *

5. Amend section 52.212-5 by revising the date of the clause; removing from paragraph (b)(17) "Apr 2008" and adding "(Dec 2010)" in its place; and redesignating paragraphs (b)(27) through

(b)(45) as (b)(28) through (b)(46), respectively; and adding a new paragraph (b)(27).

The revised and added text reads as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders-Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders-Commercial Items (MAR 2011)

(b) * * *

(27) 52.222-37, Employment Reports on Veterans (Sep 2010) (38 U.S.C. 4212).

* * * * *

[FR Doc. 2011-5561 Filed 3-15-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2011-0077, Sequence 2]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-50; 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 DoD, GSA, and NASA. This Small Entity Compliance Guide has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-50, which amend the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005-50, which precedes this document. These documents are also available via the Internet at http://www.regulations.gov.

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

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005-50 and the specific FAR case number. For

information pertaining to status or publication schedules, contact the

Regulatory Secretariat at (202) 501-4755.

LIST OF RULES IN FAC 2005-50

Item	Subject	FAR case	Analyst
I	Proper Use and Management of Cost-Reimbursement Contracts (Interim)	2008-030	Sakalos.
II	Requirements for Acquisitions Pursuant to Multiple-Award Contracts (Interim)	2007-012	Clark.
III	Justification and Approval of Sole-Source 8(a) Contracts (Interim)	2009-038	Robinson.
IV	Additional Requirements for Market Research	2008-007	Sakalos.
* V	Socioeconomic Program Parity (Interim)	2011-004	Morgan.
VI	Use of Commercial Services Item Authority	2008-034	Chambers.
VII	Trade Agreements Thresholds	2009-040	Davis.
VIII	Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns.	2009-025	Chambers.
IX	Compensation for Personal Services	2009-026	Chambers
X	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item numbers and subject set forth in the documents following these item summaries. FAC 2005-50 amends the FAR as specified below:

Item I—Proper Use and Management of Cost-Reimbursement Contracts (FAR Case 2008-030) (Interim)

This interim rule amends the FAR to implement section 864 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). This law aligns with the goal of the Presidential Memorandum on Government Contracting, issued on March 4, 2009, which is to reduce waste, fraud, and abuse in Government contracting. This rule provides internal regulatory guidance on the proper use and management of all contracts, specifically cost-reimbursement contracts. The rule identifies (1) circumstances when cost-reimbursement contracts are appropriate; (2) acquisition plan findings required to support the contract type selection; and (3) the acquisition resources necessary to award and manage a cost-reimbursement contract.

Item II—Requirements for Acquisitions Pursuant to Multiple-Award Contracts (FAR Case 2007-012) (Interim)

This interim rule amends the FAR to implement section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). Section 863 mandates enhanced competition for orders placed under multiple-award contracts, including GSA's Federal Supply Schedules. If an order over the simplified acquisition threshold does not follow the section 863 competitive procedures, section 863 requires that a notice and the

determination of an exception be published in FedBizOpps within 14 days after award.

The interim rule relocates all procedures for establishing a Blanket Purchase Agreement (BPA) or placing an order under a BPA in one subsection, FAR 8.405-3. New BPAs must be established in accordance with the new competition standard. Orders over the simplified acquisition threshold against a new multiple-award BPA must meet the new competition standards; use is discretionary for existing multiple-award BPAs.

For orders under FAR part 16 task- and delivery-order contracts, orders over the simplified acquisition threshold must meet the new competition procedures; each contract holder must receive notice of the intent to make a purchase.

Item III—Justification and Approval of Sole-Source 8(a) Contracts (2009-038) (Interim)

This interim rule amends the FAR to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84). Section 811 prohibits the award of a sole-source contract in an amount over \$20 million under the 8(a) program authority (15 U.S.C. 637(a)) without first obtaining a written Justification and Approval (J&A) approved by an appropriate official and making public the J&A and related information. This is a new internal Government requirement for the development and approval of a sole-source J&A for 8(a) sole-source awards over \$20 million. It neither prohibits such awards nor increases the qualifications required of 8(a) firms. No automated systems are impacted.

Item IV—Additional Requirements for Market Research (FAR Case 2008-007)

This final rule adopts, with changes, the interim rule that amended the FAR

to implement section 826 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 826, entitled "Market Research," established new requirements for agencies subject to Title 10, United States Code. As a matter of policy, this provision of law was applied to contracts awarded by all executive agencies. The rule requires that market research must be conducted before an agency places a task or delivery order in excess of the simplified acquisition threshold under an indefinite-delivery indefinite-quantity contract. In addition, a prime contractor with a contract in excess of \$5 million for the procurement of items other than commercial items is required to conduct market research before making purchases that exceed the simplified acquisition threshold. Among other changes, the final rule also deletes the language added to FAR 52.244-6 (Alternate I) and relocates it to a new FAR clause 52.210-1, Market Research.

Item V—Socioeconomic Program Parity (FAR Case 2011-004) (Interim)

This interim rule amends the FAR to implement section 1347 of the "Small Business Jobs Act of 2010" (Pub. L. 111-240) and the Small Business Administration regulations governing specific contracting and business assistance programs. Section 1347 changed the word "shall" to "may" at section 31(b)(2)(B) of the Small Business Act (15 U.S.C. 657a(b)(2)(B)), thereby permitting a contracting officer to use discretion when determining whether an acquisition will be restricted to a small business participating in the 8(a) Business Development Program, the Historically Underutilized Business Zone Program, or the Service-Disabled Veteran-Owned Small Business Program.

**Item VI—Use of Commercial Services
Item Authority (FAR Case 2008–034)**

This final rule adopts, without change, an interim rule that implemented section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). Section 868 provides that the FAR shall be amended with respect to the procurement of commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace. Such services may be considered commercial items only if the contracting officer has determined in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for these services.

The rule details the information the contracting officer may consider in order to make this determination. The rule further details, when this determination cannot be made, the information which may be requested to determine price reasonableness.

**Item VII—Trade Agreements
Thresholds (FAR Case 2009–040)**

This final rule adopts, without change, an interim rule that amended

the FAR to adjust the thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements as determined by the United States Trade Representative, according to a pre-determined formula under the agreements.

Item VIII—Disclosure and Consistency of Cost Accounting Practices for Contracts Awarded to Foreign Concerns (FAR Case 2009–025)

This final rule adopts, without change, the interim rule that amended the FAR to revise FAR 30.201–4(c), 30.201–4(d)(1), 52.230–4, and 52.230–6 to maintain consistency between FAR and Cost Accounting Standards (CAS) regarding the administration of the Cost Accounting Standard Board’s (CASB) rules, regulations and standards. This revision was necessitated by the CASB publishing a final rule in the **Federal Register** on March 26, 2008 (73 FR 15939) which implemented the revised clause, Disclosure and Consistency of Cost Accounting Practices—Foreign Concerns, in CAS-covered contracts and subcontracts awarded to foreign concerns.

Item IX—Compensation for Personal Services (FAR Case 2009–026)

This final rule adopts, without change, the interim rule that amended

the FAR to align the existing FAR 31.205–6(q)(2)(i) through (vi) with the changes made in Cost Accounting Standards (CAS) Board standards 412 “Cost Accounting Standard for composition and measurement of pension cost,” and 415 “Accounting for the cost of deferred compensation.” Formerly, the applicable CAS standard for measuring, assigning, and allocating the costs of Employee Stock Ownership Plans (ESOPs) depended on whether the ESOP met the definition of a pension plan at FAR 31.001. Costs for ESOPs meeting the definition of a pension plan at FAR 31.001 were covered by CAS 412, while the costs for ESOPs not meeting the definition of a pension plan at FAR 31.001 were covered by CAS 415. Now, regardless of whether an ESOP meets the definitions of a pension plan at FAR 31.001, all costs of ESOPs are covered by CAS 415.

Item X—Technical Amendments

Editorial changes are made at FAR 19.201, 52.212–3, and 52.212–5.

Dated: March 4, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

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