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**Friday,
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Part IV

Department of Defense

**General Services
Administration**

**National Aeronautics and
Space Administration**

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

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010-0076, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-39; Introduction

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

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005-39. 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 2005-39 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

LIST OF RULES IN FAC 2005-39

Item	Subject	FAR case	Analyst
I	Extend Use of Simplified Acquisition Procedures for Certain Commercial Items	2009-035	Jackson.
II	Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items.	2008-012	Chambers.
III	Use of Standard Form 26 - Award/Contract	2008-040	Jackson.
IV	Enhanced Competition for Task- and Delivery-Order Contracts-Section 843 of the Fiscal Year 2008 National Defense Authorization Act.	2008-006	Clark.
V	Trade Agreements—Costa Rica, Oman, and Peru	2008-036	Sakalos.
VI	Payments Under Fixed-Price Architect-Engineer Contracts	2008-015	Neurauter.
VII	Technical Amendment		

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 number and subject set forth in the documents following these item summaries.

FAC 2005-39 amends the FAR as specified below:

Item I—Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035)

This final rule amends the FAR to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010. The rule extends for two more years the commercial items test program in FAR subpart 13.5. The program was to expire January 1, 2010.

Item II—Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012)

This final rule adopts, with minor changes, the interim rule published in the **Federal Register** at 74 FR 11826 on March 19, 2009. The interim rule amended the FAR to implement section 814 of the NDAA for FY 2008. Section 814 requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the Truth in Negotiations Act (TINA) threshold for

cost or pricing data. By linking the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold at FAR 15.403-4, whenever the TINA threshold is adjusted the threshold for cost or pricing data on non-commercial modifications of commercial items will be automatically adjusted as well.

Item III—Use of Standard Form 26 - Award/Contract (FAR Case 2008-040)

This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR subparts 15.5 and 53.2 to clarify that block 18 of the form should not be used to award a negotiated procurement. No change is made to existing policy or procedures.

Item IV—Enhanced Competition for Task- and Delivery-Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006)

This final rule adopts, with changes, the interim rule published in the **Federal Register** at 73 FR 54008 on September 17, 2008. The interim rule amended FAR subpart 16.5 to implement section 843 of the NDAA for FY 2008. The provisions of section 843 include (1) Limitation on single award task- or delivery-order contracts greater than \$100 million; (2) Enhanced

competition for task and delivery orders in excess of \$5 million; and (3) Restriction on protests in connection with issuance or proposed issuance of a task or delivery order except for a protest on orders on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of \$10 million. Several changes are made to the FAR as result of public comments on the interim rule. FAR 16.503 is amended to clarify that a requirements contract is awarded to one contractor. FAR 16.504(c)(1)(ii)(D)(3) is amended to clarify that the agency-head determination to award a single-award task- or delivery-order contract over \$100 million does not apply to an architect-engineer task- or delivery-order contract awarded pursuant to FAR subpart 36.6. The Councils also revised FAR 16.504(c)(1)(ii)(D)(3) to state that the requirement for a determination for a single-award contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single award task- or delivery-order contract greater than \$100 million is required in addition to the Justification and Approval (J&A) required by FAR subpart 6.3 when a procurement will be

conducted as other than full and open competition.

Item V—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008–036)

The Councils have adopted as final, without change, an interim rule published in the **Federal Register** at 74 FR 28426 on June 15, 2009, amending the FAR to implement the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

This final rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements.

Item VI—Payments Under Fixed-Price Architect-Engineer Contracts (FAR Case 2008–015)

This rule amends FAR 52.232–10, Payments under Fixed-Price Architect-Engineer Contracts, to revise and clarify the retainage requirements. The contracting officer can withhold up to 10 percent of the payment due in any billing period when the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. However, withholding the entire 10 percent is not required, and no withholding is required if the contractor's performance has been satisfactory. The changes clarify that retainage is optional and any amounts retained should not be held over beyond the satisfactory completion of the instant contract.

Item VII—Technical Amendment

An editorial change has been made at FAR 14.202–4(a)(3).

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-39 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 2005-39 is effective March 19, 2010, except for Items III, IV, and VI, which are effective April 19, 2010.

Dated: March 12, 2010.

Linda W. Neilson,

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

Dated: March 11, 2010.

Rodney P. Lantier,

Acting Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Dated: March 8, 2010.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010–5984 Filed 3–18–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 13

[FAC 2005–39; FAR Case 2009–035; Item I; Docket 2010–0080, Sequence 1]

RIN 9000–AL52

Federal Acquisition Regulation; FAR Case 2009–035, Extend Use of Simplified Acquisition Procedures for Certain Commercial Items

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise subpart 13.5, “Test Program for Certain Commercial Items,” to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010 (Pub. L. 111–84). The rule extends the program for two more years. The program was to expire January 1, 2010.

DATES: Effective Date: March 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208–4949. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2009–035.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to revise section 13.500(d) to implement section 816 of the NDAA for FY 2010. Section 816 of the NDAA for FY 2010 strikes out “2010” in subsection (e) of section 4202 of the Clinger-Cohen Act of 1996 (Division D of Pub. L. 104–106, 10 U.S.C. 2304 note) as amended by section 822 of the NDAA for FY 2008 (Pub. L. 110–181) and inserts “2012.” FAR subpart 13.5 authorizes as a test program, the use of simplified procedures for the acquisition of certain commercial items in amounts greater than the simplified acquisition threshold, but not exceeding \$5.5 million, (\$11 million for acquisitions described in FAR 13.500(e)) including options, if the contracting officer can reasonably expect that offers will include commercial items. FAR subpart 13.500(d) authorizes the contracting officer to issue solicitations under this subpart until January 1, 2010. This final rule extends this authority to January 1, 2012.

B. Decision to Issue a Final Rule

This case implements section 816 of the NDAA for FY 2010. It merely extends the end date of the Commercial Item Test Program from January 1, 2010, to January 1, 2012. Therefore, because there is no change in policy or procedure, the Councils determined to issue a final rule without comment.

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

C. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98–577, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in parts 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 2005–39, FAR Case 2009–035) in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management

and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 13

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 13 as set forth below:

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 1. The authority citation for 48 CFR part 13 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).

13.500 [Amended]

■ 2. Amend section 13.500 by removing from paragraph (d) “January 1, 2010” and adding “January 1, 2012” in its place.

[FR Doc. 2010–5985 Filed 3–18–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

[FAC 2005–39; FAR Case 2008–012; Item II; Docket 2008–0001, Sequence 23]

RIN 9000–AL12

Federal Acquisition Regulation; FAR Case 2008–012, Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with minor changes, an interim rule which amended the Federal Acquisition Regulation (FAR) to implement section 814 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008. Section 814 required the harmonization of the thresholds for cost or pricing data. Specifically, section 814 required alignment of the threshold for cost or pricing data on non-commercial modifications of

commercial items with the Truth In Negotiation Act (TINA) threshold for cost or pricing data.

DATES: *Effective Date:* March 19, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2008–012.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 11826 on March 19, 2009, to implement section 814 of the NDAA for FY 2008. Section 814 implemented two areas of clarification with regards to the submission of cost or pricing data on non-commercial modifications of commercial items.

The comment period closed on May 18, 2009, with one comment received. The respondent opined that the addition of the new FAR text “at the time of contract award” was unclear. The respondent indicated that a contract’s initial price subsequently changes based upon modifications and inquired if the total price “at time of contract award” included subsequent modifications that changed the initial contract price. The respondent also highlighted the example of an indefinite delivery-indefinite quantity (IDIQ) contract where orders are issued and inquired whether “at the time of contract award” related to issuance of the IDIQ contract or individual orders placed under this IDIQ contract. The respondent also offered examples of possible revised language.

The Councils believe that, with minor changes, the language in the interim rule is appropriate. Section 814 of the NDAA for FY 2008 required the insertion of the language “at time of contract award” after the language “total price of contract”, which is already contained in FAR 15.403–1. This language is being added to clarify at what point during the life of the contract that the cost or pricing threshold should be applied under FAR 15.403–1. The Councils believe that the language “at the time of contract award” clearly indicates that subsequent modifications, other than those which meet the triggering thresholds of TINA themselves, that change a contract’s price are not factored into determining when the cost or pricing threshold should be applied under FAR 15.403–1. In the case of IDIQ contracts, it is commonly understood that it is the

estimated total value of orders for the specified period at the time of contract award, as well as the individual value of any subsequent discrete orders, to which the TINA thresholds apply. Consequently, the final rule language reflects only minor editorial changes.

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.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this 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.*, since it is harmonizing FAR 15.403–1 with other parts of the FAR and should actually reduce the administrative burden on contractors by not requiring them to track two separate dollar thresholds for submitting cost or pricing data. It is also increasing this dollar threshold relative to the submittal of cost or pricing data in this situation and thus contractors will experience a reduced administrative burden since they no longer will be required to submit cost or pricing data on this lower threshold amount.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 15

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 11826 on March 19, 2009, is adopted as a final rule with the following changes:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 15 continues to read as follows:

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

■ 2. Amend section 15.403–1 by revising paragraphs (c)(3)(iii)(B) and (c)(3)(iii)(C) to read as follows:

15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

(c) * * *

(3) * * *

(iii) * * *

(B) For acquisitions funded by DoD, NASA, or the Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining cost or pricing data in 15.403-4 or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or the Coast Guard, such modifications of a commercial item are not exempt from the requirement for submission of cost or pricing data on the basis of the exemption provided for at FAR 15.403-1(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining cost or pricing data in 15.403-4 or 5 percent of the total price of the contract at the time of contract award.

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[FR Doc. 2010-5986 Filed 3-18-10; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 15 and 53**

[FAC 2005-39; FAR Case 2008-040; Item III; Docket 2010-0081, Sequence 1]

RIN 9000-AL48

**Federal Acquisition Regulation; FAR
Case 2008-040, Use of Standard Form
26 - Award/Contract**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR parts 15 and 53 instructions for use of the Standard Form (SF) 26 to strengthen the prohibition against using block 18 of the

form when awarding a negotiated procurement and emphasize that block 18 should only be checked when awarding a sealed bid contract. In addition, the final sentence of the current FAR 53.214 is being amended because the updated SF 26 was issued in April 2008, making the sentence unnecessary.

DATES: *Effective Date:* April 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208-4949. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-39, FAR Case 2008-040.

SUPPLEMENTARY INFORMATION:**A. Background**

This case was initiated to clarify an inconsistency in the use of the SF 26 by contracting officers. The SF 26 requires the contracting officer to complete block 17 for negotiated or sealed bid procurements or block 18 for sealed bid procurements, as applicable. Although block 18 of the form is intended for use only with sealed bid procurements, it is regularly (and improperly) being used with negotiated procurements. This has resulted in negotiated procurements being awarded unilaterally without proper documentation.

FAR 53.214(a) prescribes the SF 26 for use in contracting for supplies and services by sealed bidding (except for construction and architect-engineer services). The SF 26 is used to award sealed bid contracts after obtaining bids using a SF 33, Solicitation, Offer, and Award. FAR 14.408-1(d)(1) specifies that, if an offer made using a SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document using the SF 26.

This case is intended to address those instances where contracting officers have mistakenly checked block 18 to award negotiated, not sealed bid, contracts. This error can create the potential for disputes in those situations where the Government's intent was not to accept the terms of the offer in its entirety, as the current wording of block 18 may imply.

The Councils believe that revisions to instructions for use of the form, at FAR subparts 15.5 and 53.2, along with improved training and emphasis on the proper use of the SF 26, will eliminate the issue. Thus, FAR 15.509 is being revised to add "Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used." FAR 53.214(a) is revised by deleting the no-longer-necessary phrase "Pending

issuance of a new edition of the form, the reference in 'block 1' should be amended to read '15 CFR 700'" and adding "Block 18 may only be used for sealed-bid procurements." In addition, a sentence is added at FAR 53.215-1(a) to read "Block 18 may not be used for negotiated procurements." This change does not prohibit the use of the SF 26 for awarding negotiated procurements, it only prohibits the use of block 18 of the SF 26 when awarding negotiated procurements. The Councils have opened a separate FAR case to address the actual changes to the SF 26 form. FAR Case 2009-029 is a proposed rule on which the public will have the opportunity to comment.

Decision to Issue a Final Rule

This case does not change the current uses of the SF 26. It merely clarifies the existing instructions for use of the form. Therefore, because there is no change in policy or procedure, the Councils determined to issue a final rule without public comment.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98-577, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in parts 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 2005-39, FAR Case 2008-040) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 15 and 53

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 15 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 15 and 53 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 15—CONTRACTING BY NEGOTIATION

15.509 [Amended]

■ 2. Amend section 15.509 by removing from the first sentence “appropriate.” and adding “appropriate. Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used.” in its place.

PART 53—FORMS

53.214 [Amended]

■ 3. Amend section 53.214 by removing from the second sentence in paragraph (a) the phrase “Pending issuance of a new edition of the form, the reference in “block 1” should be amended to read “15 CFR 700.”” and adding “Block 18 may only be used for sealed-bid procurements.” in its place.

53.215–1 [Amended]

■ 4. Amend section 53.215–1 by removing from paragraph (a) “15.509.” and adding “15.509. Block 18 may not be used for negotiated procurements.” in its place.

[FR Doc. 2010–5987 Filed 3–18–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–39; FAR Case 2008–006; Item IV; Docket 2008–0001, Sequence 25]

RIN 9000–AL05

Federal Acquisition Regulation; FAR Case 2008–006, Enhanced Competition for Task- and Delivery-Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final with changes the interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 843, Enhanced Competition for Task and Delivery Order Contracts, of the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (FY08) (Pub. L. 110–181). Section 843 of the FY08 NDAA stipulates several requirements regarding enhancing competition within Federal contracting.

DATES: *Effective Date:* April 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. William Clark, Procurement Analyst, at (202) 219–1813. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2008–006.

SUPPLEMENTARY INFORMATION:

A. Background

Section 843, Enhanced Competition for Task and Delivery Order Contracts, of the FY08 NDAA includes several requirements regarding enhancing competition within the Federal contracting framework. The provisions of section 843 include:

(1) Limitation on single-award task- and delivery-order contracts greater than \$100 million;

(2) Enhanced competition for task and delivery orders in excess of \$5 million; and

(3) Restriction on protests in connection with issuance or proposed issuance of a task- or delivery-order except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of \$10 million.

The interim rule was published in the **Federal Register** at 73 FR 54008 on September 17, 2008. The majority of the amendments to the FAR were made at publication of the interim rule. The Councils believe that, as a result of the interim rule, contracting offices will need more time to: carefully consider single versus multiple awards for task- or delivery-order contracts valued in excess of \$100 million; perform debriefings for orders over \$5 million; and respond to and defend against additional protests for orders over \$10 million. The public comments received resulted in several changes to the interim rule.

Requirements contracts. The Councils amended the language at FAR 16.503(a) to clarify that a requirements contract is awarded to one contractor. This change is made to dispel the implication at FAR 16.503(b)(2) that a requirements contract may be awarded to multiple sources.

IDIQ contracts. The Councils also added language at FAR 16.504(c)(1)(ii)(D)(3)(i) to read that the requirement for a determination for a single-award IDIQ contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single-award task- or delivery-order contract greater than \$100 million is required in addition to the justification and approval (J&A) required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition. The language in the interim rule appears to suggest that a J&A pursuant to FAR subpart 6.3 is required whenever you have a single award greater than \$100 million, which is not true when the procurement provides for full and open competition. This change is not considered significant but merely a clarification of the interim rule.

Architect-engineer contracts. Lastly, the Councils added language at FAR 16.504(c)(1)(ii)(D)(3)(ii) to clarify that the agency-head determination does not apply to architect-engineer task- or delivery-order contracts awarded pursuant to FAR subpart 36.6.

Eight respondents submitted comments on the interim rule. The comments are summarized below, with the corresponding responses.

Comment 1. “Architect-Engineer Services Exception.” FAR 16.500(d) states that the statutory multiple-award preference is not applicable to the procurement of architect-engineer (A-E) services when such services are procured in accordance with the procedures of FAR subpart 36.6. The FAR subpart 36.6 procedures will result in a single award to the most highly qualified firm and it seems moot to obtain the head of agency determination when procuring A-E services. The commenter requests revision of FAR 16.504(c)(1)(ii)(D)(1) to add procurement of an A-E contract pursuant to FAR subpart 36.3 as a fifth reason for an agency-head determination to award a single-award contract that exceeds \$100 million.

Response: The Councils do not agree that a fifth reason should be added to FAR 16.504(c)(1)(ii)(D)(1), as the list of conditions is statutory. However, the Councils added language at FAR 16.504(c)(1)(ii)(D)(3)(ii) to clarify that

the requirement for an agency-head determination to award a single-award task- or delivery-order contract over \$100 million does not apply to A-E task- or delivery-order contracts awarded in accordance with FAR subpart 36.6.

Comment 2. "Delegation of Determination." FAR

16.504(c)(1)(ii)(D)(1) requires the head of the agency to execute a written determination for an award to a single source for a task- or delivery-order contract in an amount estimated to exceed \$100 million. The commenter suggests that requiring the head of the agency to make the determination, without allowing for any designee to perform the function, is too high a level of approval than is necessary.

Response: The statute does not prohibit the delegation of this authority. In accordance with FAR 1.108(b), delegation of authority, each authority is delegable unless specifically stated otherwise. Each agency can determine whether to establish an internal policy to delegate the head of agency authority.

Comment 3. "Competitive but only One Offer Received." One commenter expresses concern that solicitations, which were issued using competitive procedures where only one offer or one acceptable offer is received, will also have to obtain a determination by the head of the agency before award can be made. According to the commenter, if there is no allowance for a designee to the agency-head approval, the respondent recommends that the agency-head approval be required before issuing solicitations for which the Government intends to make a single award over \$100 million.

Another commenter recommends another possible exception under FAR 16.504(c)(1)(ii)(D) would be when the competitive process, even though conducted allowing for multiple awards, results in only one offer or when a FAR part 15 style best value acquisition process results in only one offeror remaining in the competitive range after discussions or negotiations are concluded and/or when there is an indisputable best-value winner as the result of an effective competitive process.

Response: The law requires that no task- or delivery-order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless there is a written determination by the head of the agency. The agency-head determination is required when the single-source contract estimated to exceed \$100 million will be awarded under competitive or non-competitive procedures. As such, the Councils do

not agree with the recommendation to add another possible exception under FAR 16.504(c)(1)(ii)(D) for when the competitive process results in only one offer or offeror. Further, the rule neither prohibits the delegation of the agency determination nor does it preclude the agency from making the determination before issuing the solicitation.

Comment 4. "Congressional Notification." According to one commenter, getting the agency-head approval early in the process (and dealing with associated congressional concerns early in the process) is highly preferable to going through the time and expense of soliciting offers, evaluating proposal(s), and then possibly having approval withheld. The commenter states that refusing to make award to a vendor who submits an acceptable proposal after it has put significant expense into preparing a proposal may open up the Government to litigation and additional bid and proposal costs, as well. Additionally, the commenter states that requiring congressional notification (see FAR 16.504(c)(1)(ii)(D)(2)) under such conditions seems to be excessive for a circumstance in which multiple awards were contemplated, but only one award can be made.

Response: It is the agency's responsibility to determine when to obtain the determination. Congressional notification is only required within 30 days after the determination when citing public interest due to exceptional circumstances as the reason for awarding a single-source task- or delivery-order contract estimated to exceed \$100 million. Timely congressional notification should be included in agency approval procedures under these circumstances.

Comment 5. "Unusual and Compelling Urgency." In the event of a FAR subpart 6.3 exception for a single contract award over \$100 million including an unusual and compelling urgency exception, the commenter expresses concern about the time required and the burden to get the head of agency determination.

Response: The agency-head determination for a single-award task- or delivery-order contract over \$100 million is required by law. In instances where such a contract will be made using one of the exceptions to full and open competition at FAR subpart 6.3, both the applicable J&A and the agency-head determination are required. In certain situations, an agency may consider establishing procedures to process the J&A and the determination together.

Comment 6. "Agency-Head Approval before Solicitation Issuance."

Furthermore, if the determination is not delegable, the commenter recommends that agency-head approval be required before issuing a solicitation for which the Government intends to make a single award over \$100 million. The commenter states that early approval is preferable prior to issuing the solicitation, thus saving significant expense for bid and proposal costs and possible litigation if an award is not made from the solicitation because the head of agency does not approve a single-source award.

Response: The law requires that the head of the agency must make a determination before award. It is the agency's responsibility to determine at which stage prior to award this determination should be accomplished.

Comment 7. "Court of Federal Claims Override."

One commenter states that "The rule should provide clear notice that the Government Accountability Office (GAO) has sole jurisdiction over any bid protest of task and delivery orders valued at more than \$10 million under multiple award indefinite-delivery indefinite-quantity (IDIQ) contracts and that the bid protest limitations applicable to these orders extend to agency decisions to invoke exceptions under the Competition in Contract Act's (CICA) mandatory stay provisions (sometimes referred to as a 'CICA override') in connection with the award of a task- or delivery-order." The commenter expresses concern that, regardless of the section 843 provision giving the Comptroller General of the United States exclusive jurisdiction over orders in excess of \$10 million, the Court of Federal Claims (COFC) may conclude that it has jurisdiction.

Response: The Councils do not have authority to circumscribe the jurisdiction of the COFC. The rule does provide a notice that protest of an order in excess of \$10 million may only be filed with GAO in accordance with the procedures at FAR 33.104.

Comment 8. "Rule of Two for Small Business." Two commenters request a clarification of this rule against the recent GAO decision in Delex Systems, Inc. The commenters believe that the GAO decision is based on a misinterpretation of the FAR and fails to adequately consider that neither Congress nor the FAR Council provided any indication in the detailed task- and delivery-order rules and procedures that the rule of two for small business set-asides applies to task and delivery orders. The commenters request a revision to FAR 16.505 to state explicitly that awards of task and

delivery orders under multiple-award IDIQ contracts are not subject to the rule of two set out at FAR 19.502–2(b).

Response: The issue regarding the “Rule of Two” is considered to be outside the scope of this case.

Comment 9. “Part 16 Should Not Be Subject to Part 15 Standards.” One commenter states that “The rule should state explicitly that task- and delivery-orders issued under IDIQ contracts are subject only to FAR 16.505 standards and procedures and not to FAR Part 15 standards.” The commenter requests a revision to clarify that the ordering processes under FAR 16.505, as amended by the interim rule, are intended to be streamlined and subject only to the procedures in that section. Also, the commenter wants the FAR revised to explicitly state that evaluations must satisfy those standards set out in FAR 16.505 and that FAR part 15 standards do not apply. The commenter suggests that these clarifications will prevent the use of the bid protest process to conduct end runs around the clear regulatory intent of FAR subpart 16.5.

Response: The Councils do not agree. Where it is appropriate and avoids repetition, references to the applicable FAR part 15 are stated in FAR 16.505. Also, the Councils do not believe it is necessary to revise FAR 16.505 to explicitly state that FAR part 15 standards do not apply, as the statement at FAR 16.505(b)(1)(ii) that the competition requirements in FAR subpart 15.3 do not apply to the ordering process is sufficient.

Comment 10. “Greater Flexibility and Exceptions Needed for Single-Award IDIQ.” Two commenters recommend that the rule’s one-size-fits-all approach should be revised to provide greater flexibility for agencies to use single-award IDIQ contracts when appropriate. IDIQ contracts are used for system-of-system efforts, performance-based acquisitions, and other similar acquisitions because they provide flexibility to fund the contracts incrementally or on a per-order basis, as the performance term proceeds and/or to account for inclusion of progressively more detailed technical requirements in the prospective order’s statement of work as the technology matures or the term progresses.

Response: The law provides the conditions for awarding a single-source task- or delivery-order contract in an amount estimated to exceed \$100 million. FAR 16.504(c)(1)(ii)(D) implements these statutory conditions.

Comment 11. “Eliminate 6.3 Procedures - Sole Source Justification.” Two commenters recommend that the

interim rule should be amended to delete FAR 16.504(c)(1)(ii)(D)(3) because the reference to FAR subpart 6.3 does not explain why it is necessary in the rule.

Response: The Councils do not agree to delete FAR 16.504(c)(1)(ii)(D)(3). If a single-source task- or delivery-order contract estimated to exceed \$100 million will be awarded using other than full and open competition, the contracting officer must comply with FAR subpart 6.3 and FAR 16.504(c)(1)(ii)(D). FAR 16.504(c)(1)(ii)(D)(3) is amended to read that the requirement for a determination for a single-award contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single-award task- or-delivery order contract greater than \$100 million is required in addition to the J&A required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition. The language in the interim rule could have been read to require that a J&A pursuant to FAR subpart 6.3 is needed whenever there is a single-award greater than \$100 million, which is not true when the procurement provides for full and open competition.

Comment 12. “Eliminate Limitation on Single-Award Requirements Contract.” One commenter states that the rule should be revised to eliminate the limitation on single-award requirements contracts because this restriction is not mandated by section 843 and is inconsistent with requirements contracts.

Response: The Councils do not agree that requirements contracts should be excluded from the rule. Section 843 of FY08 NDAA applies to task- or delivery-order contracts in an amount estimated to exceed \$100 million (including all options). FAR 16.501–2(a) states: “Pursuant to 10 U.S.C. 2304d and section 303K of the Federal Property and Administrative Services Act of 1949, requirements contracts and indefinite-quantity contracts are also known as delivery order contracts or task order contracts.” Per FAR 16.501–2(a), the Councils applied the section 843 provisions to requirements contracts.

Comment 13. “Use of Single-Award Approach when in Government’s Best Interest.” The commenter recommends the use of a single-award IDIQ whenever it would be in the Government’s best interests. According to the commenter, there are situations in which, although a second contractor may be nominally capable of performing the task- and

delivery-orders under the IDIQ contract, the Government determines that one contractor is superior both in technical merit and cost/price in all areas under the anticipated scope of work. In those situations, it does not make sense in terms of costs and efficiency to require the contracting officer to issue two contracts when there will be no actual competition for the task- and delivery-orders. The commenter states that the contracting officer may be forced to make multiple awards because the situation does not fit within any of the exceptions in FAR 16.504(c)(1)(ii)(D)(1).

Response: The condition at FAR 16.504(c)(1)(ii)(D)(1)(iv) allowing the head of the agency to award a single-source contract estimated to exceed \$100 million because it is “in the public interest” due to exceptional circumstances equates to the “Government’s best interests”. Similar to the authority at FAR 6.302–7, public interest may be cited when none of the other conditions at FAR 16.504(c)(1)(ii)(D)(1) applies. Congress wants to be informed when this exception is used. The conditions in FAR 16.504(c)(1)(ii)(D)(1) do not prevent an agency from making a single award. If the agency cannot cite FAR 16.504(c)(1)(ii)(D)(1)(iii) where only one source is qualified and capable of performing the work at a reasonable price to the Government, then nothing prevents the Government from making the determination to award the contract pursuant to FAR 16.504(c)(1)(ii)(D)(1)(iv), provided Congress is subsequently notified. However, the commenter is not describing a situation where the second contractor has an unreasonable price, but a situation where the second contractor has a price higher than the first contractor. Because the situation is not a firm-fixed-price situation (or FAR 16.504(c)(1)(ii)(D)(1)(ii) would be used) the second contractor’s prices on a particular order could be lower than the first contractor’s prices; also the presence of the second contractor will encourage the first contractor to keep its prices lower.

Comment 14. “Clarify Requirements Clause.” The commenter states that, without additional implementation language, it is assumed that without a determination under FAR 16.504(c)(1)(ii)(D), it will be a violation of FAR to issue requirements contracts over \$100 million. The commenter further states that it is assumed that all contracts over \$100 million will be multiple-award IDIQ contracts under FAR 16.504(c)(1)(ii)(D). If the assumptions are correct, the commenter requests additional clarifying language

in FAR 16.503 to state that requirements contracts are not authorized over \$100 million unless a determination is granted. In addition, if the intent is to allow multiple-award "requirements" contracts, the commenter requests that an alternate to FAR 52.216–21 be added to the ruling that defines how a multiple-award requirements contract will be implemented.

Response: The Councils do not believe a change to FAR 52.216–21 is required as a result of this rule. The FAR does not preclude single-award task- or delivery-order requirements contracts over \$100 million, it just requires a written determination by the head of the agency. FAR 16.503(b)(2) already states that requirements contracts are not authorized over \$100 million unless a determination is granted. The Councils amended the language at FAR 16.503(a) to clarify that requirements contracts are awarded to one contractor. This change is made to dispel the implication at FAR 16.503(b)(2) that a multiple-award requirements contract may be awarded. See also response to Comment 12.

Comment 15. "Expand Coverage to all Indefinite-Delivery Contracts." The commenter states that task- or delivery-order contracts include all types of indefinite-delivery contracts (See FAR 16.501–1 and FAR 16.501–2(a)). Therefore, the commenter recommends the rule apply to all three types of indefinite-delivery contracts.

Response: FAR 16.501–1 defines a "delivery order contract" and "task order contract" as one that does not procure or specify a firm quantity of supplies or services, respectively. FAR 16.501–2(a) specifies that requirements and indefinite-quantity contracts are also known as task or delivery order contracts. IDIQ contracts are not included. Accordingly, the rule is applied only to requirements and indefinite-quantity contracts.

Comment 16. "Change Terminology." The commenter states that it appears the intent of the law is to require the determination to use a single source on an indefinite-delivery contract as part of the initial acquisition planning. To avoid confusion concerning when the determination is required, the reference to "task or delivery order contract" could be changed to either "indefinite delivery contract", or "basic indefinite delivery contract".

Response: The Councils do not concur. The rule implements section 843 of Pub. L. 110–181, which applies to task- or delivery-order contracts in an amount estimated to exceed \$100 million (including all options). The changes to FAR 16.503 and 16.504 do

not apply to the task- or delivery-orders issued under such contracts.

Comment 17. "Clarify Grammar as a Result of Use of Semicolons." The commenter requests that FAR 16.504(a)(1)(ii)(D)(1) be clarified by inserting either "and" or "or" after each semicolon. Several interpretations exist because of the semicolons. One contracting activity believes one of four exceptions must be met, while other contracting activities require some combination of the exceptions to be met.

Response: The listing of the subparagraphs at FAR 16.504(a)(1)(ii)(D)(1) uses a semicolon with an "or" before the last subparagraph, which is consistent with FAR drafting conventions. Either one or a combination of the items can be cited in the agency-head determination.

Comment 18. "Fair Opportunity Clarification." The commenter recommends inserting "the requirements in 16.505(b)(1)(ii), and" in 16.505(b)(1)(iii) between "shall include," and "at a minimum" to ensure that the user does not ignore the mandatory policy for orders exceeding \$3,000.

Response: The requirements at FAR 16.505(b)(1)(iii) cover actions above \$5 million. The procedures at 16.505(b)(1)(iii) build on the requirements at 16.505(b)(1)(ii) and are not mutually exclusive.

Comment 19. "Clarify Applicability to Cost-Type Contracts." The commenter asks whether FAR 16.504(c)(1)(ii)(D)(1)(ii) means that single-award cost-type task- or delivery-order contracts over \$100 million are abolished.

Response: Cost-type single-award task- or delivery-order contracts over \$100 million are not abolished by this rule, but must be supported by an agency-head determination in accordance with FAR 16.504(c)(1)(ii)(D)(1)(i), 16.504(c)(1)(ii)(D)(1)(iii), or 16.504(c)(1)(ii)(D)(1)(iv).

Comment 20. "Agency-Head Exception Process." One commenter states that this agency-head exception process is not needed because there is already an existing regulatory process for deciding on the efficacy of multiple awards and because this added process bears no relationship to any problem identified with task-order competitions. According to the commenter, the interim rule only adds to the confusion in agencies over the task-order competition process, including blurring the authority of the contracting officer as a gatekeeper to decide what acquisitions should not be multiple awards at the outset.

Response: Section 843 of the FY08 NDAA establishes the requirement for the head of the agency to make a written determination when awarding a single-source contract greater than \$100 million. This rule implements the law. Individual agency regulations or procedures may delegate this authority. The law did not change the contracting officer's determination during acquisition planning as to whether multiple awards are appropriate. Therefore, the Councils did not make such a change in the rule.

Comment 21. "Use of Exception Terms." One commenter states that the interim rule is unclear because the existing exception terms of art are inconsistent with the new exceptions. According to the commenter, it is instructive that the exception factors listed in 16.504(c)(1)(ii)(B) for contracting officer planning purposes and those listed under 16.504(c)(1)(ii)(D) for head of the contracting activity (HCA) purposes at the award stage are not identical. In the interests of clarity, the Government should consolidate the terms of art used for exceptions at different stages of the acquisition and create a definitional section for consistency and to explain those terms of art.

Response: The Councils do not concur with the commenter's recommendation to "consolidate the terms of art" in FAR 16.504(c)(1)(ii)(B) and FAR 16.504(c)(1)(ii)(D). Each of the terms used in FAR 16.504(c)(1)(ii)(B) represents the unique character of the actions required by the contracting officer in determining whether multiple awards are appropriate based on criteria established in the regulatory implementation of the Federal Acquisition Streamlining Act (see 41 U.S.C. 253h(d)(3)(B) and 10 U.S.C. 2304a(d)(3)(B)). The terms used in FAR 16.504(c)(1)(ii)(D) list the criteria for the head of the agency to make a determination in accordance with section 843 of the FY08 NDAA. Congress could have used the terms in FAR 16.504(c)(1)(ii)(B) to mirror the terms in section 843, but it chose not to do so. Instead, the Congress tailored selected criteria in FAR 16.504(c)(1)(ii)(B) to include in section 843.

Comment 22. "Regulatory Flexibility Analysis." The interim rule states that a Regulatory Flexibility Analysis (RFA) "is unnecessary because the rule does not change any existing regulations affecting small businesses." One respondent disagrees with this assessment. According to the commenter, since it is reasonable to conclude that many small businesses

will be impacted by this rule, especially insofar as the bid protest and debriefing rights are concerned, it appears careless to ignore the requirements of the RFA. Among other things, an RFA requires an analysis of alternatives and a discussion of overlapping and duplicative rules. Given that there are already a number of rules governing the fair opportunity to compete for task- and delivery-orders on multiple-award contracts in the FAR and other agency FAR supplements, the commenter believes that "it would make sense to conduct due diligence on those existing regulations if only to eliminate those that may no longer be required and to shed light on the need for the prohibition of a single award of a task order contract over \$100 million in the first place."

Response: The interim rule did not ignore the requirements of the Regulatory Flexibility Act (RFA). The Councils obtained review of the statements under the RFA by the Small Business Administration Office of Advocacy. The rule is not expected to have a significant economic impact on a substantial number of small entities. The rule encourages and enhances competition equally for both small and other than small businesses. Insofar as the bid protests are concerned, the GAO did not change its Bid Protest Regulations (See **Federal Register** at 73 FR 32427 published on June 9, 2008) as a result of section 843; the Councils have not modified the protest procedures in FAR part 33 to impact small businesses either way. The debriefing procedures cited to follow at FAR 15.506 for orders exceeding \$5 million provide information to offerors so they may improve its future offers, which is a benefit for both small and large businesses. Further, the Councils sought comments from small businesses on the affected FAR part 16. Only this comment was received.

Comment 23. "Sunset Provision." One commenter believes that, because the single-award prohibition may not add continuing value to the acquisition process over time, a sunset provision that parallels the protest sunset (three years) should be inserted to account for the possibility that, in the future, either no single-award exceptions are being processed or, conversely, too many single-award exceptions are being processed. Factually and legally, that would indicate that the single-award prohibition is either unnecessary because none are being processed, or conversely, that it is too restrictive and/or being applied too broadly by agency personnel leading to a proliferation of agency-head determinations to make a single task-order contract award. In

either case, the commenter believes that it would only serve to emphasize that prohibiting single awards does not address any of the goals of the interim rule and thus should be sunset.

Response: The Councils do not concur with adding such a sunset provision. The commenter's recommendation goes beyond the provisions as enacted by section 843 of the FY08 NDAA.

Comment 24. "Override." The commenter requests that the final rule clarify that a protest of a solicitation for, or award of, a task- or delivery-order timely filed in accordance with the Competition in Contracting Act, 31 U.S.C. 3551 *et seq.*; should trigger an automatic stay of performance.

Response: This rule implements section 843. Section 843 did not address "stay of performance" under the Competition in Contracting Act, 31 U.S.C. 3551 *et seq.*

Comment 25. "Monetary Threshold for Protests." The commenter states that "section 843 does not provide any express guidance on how the parties should value task or delivery orders when determining whether an order exceeds the threshold value for purposes of protest jurisdiction. This lack of clarity could lead to challenges to GAO's authority to hear a protest." The commenter requests that the final rule clarify how the monetary threshold for a task- or delivery-order protest will be calculated. The commenter offers that the Councils could consider clarifying the rule to indicate the \$10 million threshold is based upon the offers received by the agency so that agencies cannot avoid protest jurisdiction by valuing a solicitation slightly under the statutory threshold and so that protest jurisdiction is not affected by adjustments made to offers during the course of the evaluation.

Response: The Councils believe GAO will handle issues concerning its jurisdiction.

Comment 26. "Section 843 Restricts Use of Single-Award IDIQ." The commenter states that, in anticipation of the issuance of the interim rules pursuant to guidance from the Office of the Secretary of Defense in May 2008, several Department of Defense commands had already stated informally (and anecdotally had begun to act on their belief) that section 843 (in the form of FAR 16.504) effectively prohibits them from concluding either during the planning process or at time of award that a single-award task- or delivery-order contract estimated over \$100 million dollars would ever be justifiable, preemptively cutting off any thoughtful analysis of the facts and

foreclosing any exceptions at the planning stages, in effect pushing the decisions upstream to the HCA at time of award where acquisition law and regulation may not be as well known as at the contracting officer level and where the timing of any such decision will become less of an acquisition decision and more of a political one.

Response: The contracting officer determination, at the acquisition-planning stage, on whether multiple awards are appropriate is required by statute. This determination is separate from the determination by the agency head to award a task- or delivery-order single contract over \$100 million, which is required by a different statute. Each agency is responsible for ensuring it meets the requirements of both determinations when applicable. As such, questions or concerns regarding agency implementation of section 843 should be directed to that agency.

Comment 27. "Determination to Use Multiple-Award Contracts." This contract-type "gap" is recognized in the existing regulation, and the FAR currently has a regime where the contracting officer is required to examine the efficacy of multiple awards as part of a stepped planning process. There are several process points at which conditions or exceptions to multiple awards can be applied per the contracting officer's discretion.

Response: It is incumbent upon the contracting officer, as required by FAR 16.504, to determine the feasibility of establishing single- or multiple-award contracts. In the instance where a single-award task- or delivery-order contract over \$100 million will be made, the requirements of FAR 16.504(c)(1)(i)(D) must be addressed.

Comment 28. "Use of Mandatory Exceptions for Multiple-Award Contracts." This list of mandatory exceptions appears to cover just about any contingency affecting the requirements and, at one time, is both comprehensive and broad enough to allow a contracting officer great flexibility to judge the merits of making multiple awards. The commenter states that a contracting officer may determine that a class of acquisitions is not appropriate for multiple awards, but that exception appears to be rarely, if ever, used. In fact, according to the commenter, there is scant data on the use of any of the contracting officer multiple-award contract exception processes whatsoever, so it is difficult to determine whether the contracting officers actually perform such a decisional function. Conversely, though there has been no report that those authorities have been abused one way or

the other, the interim rule would render moot any planning-stage decision the contracting officer would make if the award were over \$100 million.

Response: The acquisition planning team (e.g., contracting officer, program office, customers) is tasked to define the exact strategy to support the acquisition requirement. The rule does not render moot the contracting officer's decision in the acquisition-planning process. The contracting officer is still required by FAR 16.504 to determine the feasibility of establishing single- or multiple-award contracts.

Comment 29. "Head of Agency Override of Contracting Officer Determination." According to one commenter, although the interim rule may be designed to facilitate a proper level of quality assurance over certain Government actions designed to increase competition for task orders, and is not reflective of any failure by the private sector in its transactional conduct, it is wholly possible and very likely that an agency head could veto a single IDIQ award at time of award, presumably long after a contracting officer may have determined that multiple awards are not in the Government's best interest and for reasons that the head of the agency may not be held accountable to explain. The commenter suggests that one way to deal with that lack of transparency would be to allow any contracting officer's written determination that a multiple-award contract is not appropriate made at the acquisition planning stages to have great presumptive weight in any internal agency deliberations for the agency-head exception process or require that the agency-head determination be published if contrary to the contracting officer's initial determination.

Response: The Councils do not agree that the written determination by the head of the agency should be published when it differs from the contracting officer's initial determination to award a single IDIQ contract. This is not required by section 843. Further, the purpose of the rule is to encourage competition and to make the highest levels of the agency aware of the use of a single-award task- or delivery-order contract greater than \$100 million. If a contracting officer's initial determination to award a single IDIQ contract is later overturned, this decision would need to be substantiated and justified and would be completely in line with the rule's goal of encouraging competition and the use of multiple awards under IDIQ contracts valued over \$100 million. Whether these determinations are releasable to

the public/private sector is determined by the Freedom of Information Act. Lastly, the approval authority to award a single-award task- or delivery-order contract greater than \$100 million rests with the head of the agency per FAR 16.504(c)(1)(ii)(D) and, to the extent the head of the agency considers the acquisition-planning determination on whether multiple awards are appropriate by the contracting officer is within his or her discretion; however, the law does not require such consideration. Contracting officers should be fully engaged or involved in the decision-making process.

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.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule enhances competition for small and large business, and the information that will be provided in debriefings on procurements over \$5 million will benefit firms by enabling them to improve future offers. In addition, the Councils sought comments from small businesses on the affected FAR part 16 at the publication of the interim rule in the **Federal Register** at 73 FR 54008 on September 17, 2008. One comment was received and is discussed at Comment 22.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 73 FR 54008 on September 17, 2008, is adopted as a final rule with the following changes:

PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 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).

16.501–1 [Amended]

■ 2. Amend section 16.501–1 by adding “-” between the words “Delivery” and “order” in the definition of “Delivery order contract” and between the words “Task” and “order” in the definition of “Task order contract”.

16.501–2 [Amended]

■ 3. Amend section 16.501–2 in the last sentence of paragraph (a) by adding “-” between the words “delivery” and “order” and between the words “task” and “order”.

16.503 [Amended]

■ 4. Amend section 16.503 by removing from paragraph (a) introductory text “period” and adding “period (from one contractor)” in its place.

■ 5. Amend section 16.504 by revising paragraph (c)(1)(ii)(D)(3) to read as follows:

16.504 Indefinite-quantity contracts.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(D) * * *

(3) The requirement for a determination for a single-award contract greater than \$100 million:

(i) Is in addition to any applicable requirements of Subpart 6.3.

(ii) Is not applicable for architect-engineer services awarded pursuant to Subpart 36.6.

* * * * *

[FR Doc. 2010–5989 Filed 3–18–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2005–39; FAR Case 2008–036; Item V; Docket 2009–019, Sequence 1]

RIN 9000–AL23

Federal Acquisition Regulation; FAR Case 2008–036, Trade Agreements—Costa Rica, Oman, and Peru

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

and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

DATES: *Effective Date:* March 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. 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 2005-39, FAR case 2008-036.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published an interim rule in the **Federal Register** at 74 FR 28426 on June 15, 2009. No public comments were received in response to the interim rule.

The interim rule added Costa Rica, Oman, and Peru to the definition of “Free Trade Agreement country”. The rule also deleted Costa Rica from the definition of “Caribbean Basin country” because, in accordance with section 201(a)(3) of Pub. L. 109-53, when the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA—DR) agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act.

The excluded services for the Oman and Peru Free Trade Agreements (FTAs) are the same as for the Bahrain FTA, CAFTA-DR, Chile FTA, and North American Free Trade Agreement. Costa Rica has the same thresholds as the other CAFTA-DR countries.

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.

B. Regulatory Flexibility Act

The Department of Defense, General Services Administration, and 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 acquisitions that are set aside for small businesses are exempt from trade agreements. In addition, the Department of Defense only applies the trade agreements to the non-defense items listed at the Defense Federal Acquisition Regulation Supplement 225.401-70. No comments were received relating to impact on small business concerns.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply, and this rule is added to the certification and information collection requirements in the provisions at FAR 52.212-3, 52.225-4, 52.225-6, and 52.225-11 currently approved under Office of Management and Budget clearance 9000-0136 (Commercial Item Acquisition; FAR sections affected are part 12 and provisions 52.212-1 and 52.212-3), 9000-0130 (Buy America Act, Trade Agreements Act Certificate; FAR section affected is provision 52.225-4), 9000-0025 (Buy American Act, Trade Agreements Act Certificate; FAR section affected is provision 52.225-6), and 9000-0141 (Buy America Act—Construction; FAR sections affected are subpart 25.2 and provisions 52.225-9 and 52.225-11) respectively. The impacts of this change on information collection requirements are negligible. No comments were received on the burden or number of entities affected by this rulemaking.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 25 and 52, which was published in the **Federal Register** at 74 FR 28426 on June 15, 2009, is adopted as a final rule without change.

[FR Doc. 2010-5990 Filed 3-18-10; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2005-39; FAR Case 2008-015; Item VI; Docket 2009-0015, Sequence 1]

RIN 9000-AL26

Federal Acquisition Regulation; FAR Case 2008-015, Payments Under Fixed-Price Architect-Engineer Contracts

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the withholding of payment requirements under FAR 52.232-10. This FAR change was initiated by the Small Business Administration (SBA) Advocacy Office and is a part of the SBA, Office of Advocacy’s Regulatory Review and Reform Initiative, or r3 initiative. The r3 program was established to help small businesses address the cumulative Federal regulatory burden.

DATES: *Effective Date:* April 19, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Suzanne Neurauter, Procurement Analyst, at 202-219-0310. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-39, FAR case 2008-015.

SUPPLEMENTARY INFORMATION:

A. Background

The FAR at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, currently requires contracting officers to withhold 10 percent of the amounts due on each voucher; however, payment can be made in full during any month in which the contracting officer determines the performance to be satisfactory. The Government retains the withheld amount until the contracting officer determines that the work has been satisfactorily completed. The contracting officer may release excess withheld amounts to the contractor when the contracting officer determines

that the work is substantially complete or when the contracting officer determines that the amount retained is in excess of the amount adequate for the protection of the Government's interests.

This final rule revises FAR 52.232-10 to permit contracting officers to use their judgment regarding the amount of payment withheld to apply under fixed-price architect-engineer (A-E) contracts (based on an assessment of the contractor's performance under the contract) so that the withheld amount will be applied at the level necessary to protect the Government's interests. This is in contrast to the current requirement that contracting officers withhold 10 percent on all payments. Thus, this final rule revises paragraph (b) of the contract clause at FAR 52.232-10 to state that contracting officers shall withhold up to 10 percent of the payment due only if the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. The amount of withholding shall be determined based upon the contractor's performance record. This final rule also makes several related editorial changes including one that clarifies that the contractor will be paid any unpaid balance due to include withheld amounts at the successful completion of the A-E services work.

Discussion and Analysis

A proposed rule was published in the *Federal Register* at 74 FR 20666 on May 5, 2009. The FAR Secretariat received eight (8) responses to the proposed rule from seven (7) respondents. These responses included a total of 34 comments on 13 issues. Each issue is discussed in the following sections.

1. Support for the proposed revision.

Four respondents wrote in support of the proposed rule. One respondent commended the Councils for following through on the change, which was initially undertaken as part of the SBA's r3 initiative, a tool for small business stakeholders to suggest needed reforms.

2. Clearly distinguish A-E contracts from construction contracts.

Two respondents recommended that the FAR clearly distinguish between A-E contracts and construction contracts, pointing out that A-E services are not construction services.

Response: The Councils thought this would be unnecessary, given that FAR part 36 addresses the two types of contracts separately, even assigning a separate subpart, subpart 36.6, for A-E contracts. Both A-E and construction are thoroughly, and separately, defined at FAR 2.101, in terms that do not overlap. No change to the FAR is needed.

3. Require contracting officers to release excess retainage once work is substantially complete.

Response: This change, requested by three respondents, has been made in paragraph (c) of the clause. The clause at FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, requires (not merely "authorizes") payment by the Government of "the unpaid balance of any money due for work under the statement, including all withheld amounts" upon satisfactory completion and final acceptance of "all the work done by the Contractor under the 'Statement of Architect-Engineer Services.'" The "Statement of Architect-Engineer Services" is the statement of work for the instant A-E contract; it does not include any follow-on construction contract. The rule also deletes the second sentence of FAR 52.232-10(c), which allowed the Government to retain some monies due until "satisfactory completion and final acceptance of the construction work".

The matter of the Government's acceptance of the work is addressed at item 10 below.

4. Adopt retainage requirements similar to those for fixed-price contracts with the rest of the construction industry.

One respondent recommended that the Councils "adopt FAR requirements identical to those for fixed-price contracts made with the rest of the construction industry."

Response: The Councils note that other respondents rejected treating A-E services as a type of construction service. Further, the Councils believe that retainage for A-E contracts is now predicated on contracting officers determining if retainage is necessary to protect the Government's interests and ensure satisfactory completion of the contract. Any such retainage is to be released in full, not partially, upon satisfactory completion of the A-E statement of work.

5. Consider past performance in retainage decisions.

Three respondents asked that past performance (on previous contracts) be taken into consideration when negotiating whether retainage will be applied to a fixed-price A-E contract.

Response: The Councils partially concur. Past performance is taken into account in selecting the successful offeror and making the contract award. In effect, contracting officers are considering performance to date on the instant contract when deciding whether to retain and in assessing whether current performance is satisfactory.

6. Proposed rule removes a mandatory requirement designed to protect the Government's financial interests.

One respondent, a Government agency, disagreed with the proposed rule, stating that it removes a mandatory requirement designed to (a) protect the financial interest of the Government in a fixed-price contract, (b) apply a uniform withholding of payments to all contractors; and (c) provide an incentive for contractors to complete the contract obligation in a timely manner.

Response: Retainage was a mandatory 10 percent unless performance was satisfactory during that month. The rule continues to require retainage when determined necessary to protect the Government's interests and ensure satisfactory completion of the contract.

7. Proposed rule fails to provide statutory authority.

One respondent stated that the proposed rule fails to provide the statutory authority for this clause or for retainage on Federal A-E contracts.

Response: Title 40 of the United States Code, chapter 11, Selection of Architects and Engineers, is the statutory authority for FAR coverage on A-E contracts. The authority for retainage on A-E contracts is not statutory but is included in the FAR to ensure the Government's interests are protected until final delivery and acceptance of these types of services is made.

8. Proposed rule inappropriately uses the term "design work".

Two respondents believe that the proposed rule loosely and inappropriately uses the term "design work", while the retainage requirement is applied to all types of A-E contracts, not just those for design services. A third respondent states that all A-E services should be covered by the revised retainage rule.

Response: The Councils agree, noting that the definition of A-E services at FAR 2.101 includes other services such as surveying and mapping, consultations, and plans and specifications (see item 9 below). The final rule has deleted the term "design" in the two places it is used in FAR 52.232-10(c) of the proposed rule.

9. Specifically include "surveying, mapping, and geospatial".

One respondent requested that the term "surveying, mapping, and geospatial" be specifically included in the rule and in FAR 52.232-10.

Response: Any revisions to the definition of A-E services are outside the scope of this case. The Councils note that A-E services are defined at FAR 2.101.

10. Add requirements to ensure prompt and timely review and acceptance of deliverables from A-E contractors.

Four respondents commented upon the need for prompt and timely review and acceptance by the Government of deliverables under A-E contracts.

Response: The Councils take no position on this question because it is outside the scope of this case, which was limited to the question of retainage on A-E contracts. Other FAR clauses such as FAR 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, deal with these requirements.

11. Eliminate retainage altogether, except for cause, and require contracting officer to bear burden of proving that any withholding of fee is necessary.

Three respondents expressed opposition to the concept of mandatory retainage. One respondent opposed the use of any fee withholding requirement, and another respondent asked the Councils to clarify that retainage is now discretionary, not mandatory.

Response: The Councils agree that retainage remains an option, one that depends on the contractor's performance on the instant contract. If the contractor's performance is satisfactory, there need not be any retainage at all for the period. The revised paragraph (b) of FAR 52.232–10 states that contracting officers "shall require a withholding from amounts due under paragraph (a) of this clause of up to 10 percent only if the Contracting Officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract." (Emphasis added). This means that, if performance is satisfactory for the period, then retainage could be zero. Also, some amount less than 10 percent could be retained.

The third respondent compared A-E retainage to the payments for fixed-price construction contracts and claimed that the burden of proof remains on the contracting officer to justify withholding a portion of a construction contractor's fee, while this is not the case for A-E contracts.

Response: The Councils disagree with respondent, because the revised FAR 52.232–10(b), quoted above, makes it clear that contracting officers must make a decision each performance period, based on the contractor's performance, whether to retain any amount and, if so, how much—up to 10 percent of the vouchered amount—to retain.

12. Fee withholding should be different for task orders under

indefinite-delivery/indefinite-quantity (IDIQ) contracts.

Four respondents commented that IDIQ contracts should be treated differently. One respondent noted that some small A-E firms believe that the current regulation may not be consistent with IDIQ contracting practices. This comment is supported by four other comments received on this same point. One respondent claimed that retainage for individual task orders under an IDIQ contract is, at times, currently held until the entire IDIQ contract is complete.

Response: Retainage should be related to the contractor's performance on the individual task or delivery order and, in order to be compliant with the requirements of FAR 52.232–10, the contractor must be paid any unpaid balance upon satisfactory completion of the work under that contract, whether it is a task or delivery order or a stand-alone contract. However, this is a matter of educating contracting officers rather than changing policy; the policy is correct, but its execution needs improving.

13. Impact on small businesses.

One respondent disagreed with the proposed rule's finding that the proposed change would not have a significant impact on small firms.

Response: While the Councils agree that there were some cases during contract administration where the retainage in the mandatory amount of 10 percent was not justified, the changes made in this rule do not rise to the level of a significant impact on a substantial number of small entities.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. There are approximately 230,000 architect-engineer firms, many of which are small businesses. This rule actually eases the impact on such firms, but not to the point of having a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 52

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

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

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

■ 2. Amend section 52.232–10 by revising the date of the clause and paragraphs (a), (b), and (c) to read as follows:

52.232–10 Payments under Fixed-Price Architect-Engineer Contracts.

* * * * *

PAYMENTS UNDER FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS APR 2010.

(a) Estimates shall be made monthly of the amount and value of the work and services performed by the Contractor under this contract which meet the standards of quality established under this contract. The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher, the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer shall require a withholding from amounts due under paragraph (a) of this clause of up to 10 percent only if the Contracting Officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. The amount withheld shall be determined based upon the Contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer shall release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all the work done by the Contractor under the "Statement of Architect-Engineer Services", the Contractor will be paid the unpaid balance of any

money due for work under the statement, including all withheld amounts.

* * * * *

[FR Doc. 2010-5991 Filed 3-18-10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 14

[FAC 2005-39; Item VII; Docket FAR 2010-0078; Sequence 1]

Federal Acquisition Regulation; Technical Amendment

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

ACTION: Final rule.

SUMMARY: This document makes an amendment to the Federal Acquisition Regulation in order to make an editorial change.

DATES: *Effective Date:* March 19, 2010.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat, 1800 F Street, NW., Room 4041, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-39, Technical Amendment.

SUPPLEMENTARY INFORMATION: This document makes an amendment to the Federal Acquisition Regulation in order to make an editorial change.

List of Subjects in 48 CFR Part 14

Government procurement.

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 14 as set forth below:

PART 14—SEALED BIDDING

■ 1. The authority citation for 48 CFR part 14 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).

14.202-4 [Amended]

■ 2. Amend section 14.202-4 by removing from paragraph (a)(3) “subdivision (e)(1)(ii) below” and adding “paragraph (d)(1)(ii) of this section” in its place.

[FR Doc. 2010-5992 Filed 3-18-10; 8:45 am]

BILLING CODE 6820-EP-S

and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-39 which amend the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2005-39 which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Hada Flowers, FAR Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010-0077, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-39; Small Entity Compliance Guide

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

LIST OF RULES IN FAC 2005-39

Item	Subject	FAR case	Analyst
I	Extend Use of Simplified Acquisition Procedures for Certain Commercial Items	2009-035	Jackson.
II	Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items.	2008-012	Chambers.
III	Use of Standard Form 26 - Award/Contract	2008-040	Jackson.
IV	Enhanced Competition for Task- and Delivery-Order Contracts-Section 843 of the Fiscal Year 2008 National Defense Authorization Act.	2008-006	Clark.
V	Trade Agreements—Costa Rica, Oman, and Peru	2008-036	Sakalos.
VI	Payments Under Fixed-Price Architect-Engineer Contracts	2008-015	Neurauter.
VII	Technical Amendment		

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 number and subject set forth in the documents following these item summaries.

FAC 2005-39 amends the FAR as specified below:

Item I—Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035)

This final rule amends the FAR to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010. The rule extends for two more years the commercial items test program in FAR subpart 13.5.

The program was to expire January 1, 2010.

Item II—Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012)

This final rule adopts, with minor changes, the interim rule published in the **Federal Register** at 74 FR 11826 on

March 19, 2009. The interim rule amended the FAR to implement section 814 of the NDAA for FY 2008. Section 814 requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the Truth in Negotiations Act (TINA) threshold for cost or pricing data. By linking the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold at FAR 15.403-4, whenever the TINA threshold is adjusted the threshold for cost or pricing data on non-commercial modifications of commercial items will be automatically adjusted as well.

Item III—Use of Standard Form 26 - Award/Contract (FAR Case 2008-040)

This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR subparts 15.5 and 53.2 to clarify that block 18 of the form should not be used to award a negotiated procurement. No change is made to existing policy or procedures.

Item IV—Enhanced Competition for Task- and Delivery-Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006)

This final rule adopts, with changes, the interim rule published in the *Federal Register* at 73 FR 54008 on September 17, 2008. The interim rule amended FAR subpart 16.5 to implement section 843 of the NDAA for FY 2008. The provisions of section 843 include (1) Limitation on single award task- or delivery-order contracts greater than \$100 million; (2) Enhanced competition for task and delivery orders

in excess of \$5 million; and (3) Restriction on protests in connection with issuance or proposed issuance of a task or delivery order except for a protest on orders on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of \$10 million. Several changes are made to the FAR as result of public comments on the interim rule. FAR 16.503 is amended to clarify that a requirements contract is awarded to one contractor. FAR 16.504(c)(1)(ii)(D)(3) is amended to clarify that the agency-head determination to award a single-award task- or delivery-order contract over \$100 million does not apply to an architect-engineer task- or delivery-order contract awarded pursuant to FAR subpart 36.6. The Councils also revised FAR 16.504(c)(1)(ii)(D)(3) to state that the requirement for a determination for a single-award contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single award task- or delivery-order contract greater than \$100 million is required in addition to the Justification and Approval (J&A) required by FAR subpart 6.3 when a procurement will be conducted as other than full and open competition.

Item V—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008-036)

The Councils have adopted as final, without change, an interim rule published in the *Federal Register* at 74 FR 28426 on June 15, 2009, amending the FAR to implement the Dominican Republic—Central America—United

States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

This final rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements.

Item VI—Payments Under Fixed-Price Architect-Engineer Contracts (FAR Case 2008-015)

This rule amends FAR 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, to revise and clarify the retainage requirements. The contracting officer can withhold up to 10 percent of the payment due in any billing period when the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. However, withholding the entire 10 percent is not required, and no withholding is required if the contractor's performance has been satisfactory. The changes clarify that retainage is optional and any amounts retained should not be held over beyond the satisfactory completion of the instant contract.

Item VII—Technical Amendment

An editorial change has been made at FAR 14.202-4(a)(3).

Dated: March 15, 2010.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 2010-5993 Filed 3-18-10; 8:45 am]

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