

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2011–0076; Sequence 7]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005–55; Introduction**

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

and National Aeronautics and Space Administration (NASA).

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

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by DoD, GSA, and NASA in this Federal Acquisition Circular (FAC) 2005–55. 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 2005–55 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–55

Item	Subject	FAR case	Analyst
I .....	Preventing Abuse of Interagency Contracts .....	2008–032	Sakalos.
II .....	Transition to the System for Award Management (SAM) .....	2011–021	Loeb.
III .....	Brand-Name Specifications .....	2005–037	Clark.
IV .....	Time-and-Materials and Labor-Hour Contracts for Commercial Items .....	2009–043	Sakalos.
V .....	Public Access to the Federal Awardee Performance and Integrity Information System .....	2010–016	Loeb.
VI .....	Updated Financial Accounting Standards Board Accounting References .....	2010–005	Chambers.
VII .....	Technical Amendments.		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item numbers and subject set forth in the documents following these item summaries. FAC 2005–55 amends the FAR as specified below:

**Item I—Preventing Abuse of Interagency Contracts (FAR Case 2008–032)**

This rule adopts as final, with changes, an interim rule that implemented section 865, Preventing Abuse of Interagency Contracts, of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). This final rule further amends FAR subpart 17.5 to make it clear that this rule only applies to interagency acquisitions when an agency needing supplies or services obtains them using another agency’s contract; or when an agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order. A business case analysis must be developed for the establishment and renewal of governmentwide acquisition contracts as well as for multi-agency contracts. Additionally, FAR 35.017 clarifies determination requirements when using a Federally Funded Research and Development Center. This rule does not impose any

information collection requirements on small business. There is no significant impact on small businesses because this rule is only applicable to internal operating procedures of the Government.

**Item II—Transition to the System for Award Management (SAM) (FAR Case 2011–021)**

The Integrated Acquisition Environment (IAE) systems are being transitioned to a new System for Award Management (SAM) architecture. This effort will transition the Central Contractor Registration (CCR) database, the Excluded Parties Listing System (EPLS), and the Online Representations and Certifications Application (ORCA) to SAM. The FAR change will indicate that these IAE systems and the Disaster Response Registry will now be accessed through <http://www.acquisition.gov>. This rule will not significantly affect small business, as the only impact on the public will be the Web site address that offerors/contractors will need to use.

**Item III—Brand-Name Specifications (FAR Case 2005–037)**

This final rule adopts, with changes, the interim rule that amended the FAR to fully implement Office of Management and Budget memoranda and policies on the use of brand-name specifications. The final rule clarifies that when applicable, the

documentation or justification and posting requirements for brand name items only apply to the portion of the acquisition that requires the brand name item. The final rule also adds a requirement to screen the brand name documentation or justification for contractor proprietary data. Further, the final rule requires the contracting officer to post the justifications for an order peculiar to one manufacturer under indefinite-delivery contracts. The rule will benefit small business entities by providing the opportunity for review of brand-name justification and approval documents for contracts and orders awarded noncompetitively, thereby increasing the opportunity for competition for future awards.

**Item IV—Time-and-Materials and Labor-Hour Contracts for Commercial Items (FAR Case 2009–043)**

This final rule amends the FAR to implement recommendations from the Government Accountability Office to: (1) Ensure that time-and-materials (T&M) and labor-hour (LH) contracts are used to acquire commercial services only when no other contract type is suitable, and (2) instill discipline in the determination of contract type with a view toward managing the risk to the Government. The requirement for a determination and findings when no other contract type is suitable is added to FAR 8.404, Use of Federal Supply Schedules. FAR 8.404 has also been

amended to address increases in the order ceiling price of T&M and LH contracts, to more closely conform to the language at FAR 12.207. In addition, FAR 16.201 is modified and FAR 16.600 is added to clarify that T&M and LH contracts are not types of fixed-price contracts. This rule will not have a significant economic impact on a substantial number of small entities.

#### **Item V—Public Access to the Federal Awardee Performance and Integrity Information System (FAR Case 2010–016)**

This rule adopts as final, with changes, an interim rule. The interim rule implemented section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212), enacted July 29, 2010. Section 3010 requires that the information in the Federal Awardee Performance and Integrity Information System (FAPIIS), excluding past performance reviews, shall be made publicly available. The interim rule notified contractors of this new statutory requirement for public access to FAPIIS.

In response to public comments, the final rule allows a 14-calendar-day delay before making the data available to the public. Contractors have 7 calendar days within those 14 calendar days to assert a disclosure exemption under the Freedom of Information Act. In addition, the FAPIIS system has been modified to allow more space for contractor comments. The rule does not impose any new requirements on small businesses.

#### **Item VI—Updated Financial Accounting Standards Board Accounting References (FAR Case 2010–005)**

This final rule amends the FAR sections 31.205–11, 31.205–36, 52.204–10, 52.212–5, and 52.213–4 to update references to authoritative accounting standards owing to the Financial Accounting Standards Board's Accounting Standards Codification of Generally Accepted Accounting Principles ("Codification of GAAP"). These revisions have no effect other than to simply replace the superseded references with updated references.

#### **Item VII—Technical Amendments**

Editorial changes are made at FAR 4.603, 8.402, 8.405–5, 8.703, 15.402, 15.403–1, 19.102, 19.402, 22.404–1, 22.1304, 22.1306, 23.205, 23.401, 28.203–3, 42.203, 52.202–1, 52.212–3, 52.219–22, and 52.228–11.

Dated: December 21, 2011.

#### **Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

Federal Acquisition Circular (FAC) 2005–55 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 2005–55 is effective January 3, 2012, except for Items I, II, III, IV, and VI which are effective February 2, 2012.

Dated: December 21, 2011.

#### **Richard Ginman,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: December 22, 2011.

#### **Mindy S. Connolly,**

*Chief Acquisition Officer, U.S. General Services Administration.*

Dated: December 20, 2011.

#### **William P. McNally,**

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

[FR Doc. 2011–33405 Filed 12–30–11; 8:45 am]

**BILLING CODE 6820–EP–P**

## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

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

#### **48 CFR Parts 2, 4, 7, 8, 9, 17, 18, 35, and 41**

[FAC 2005–55; FAR Case 2008–032; Item I; Docket 2010–0107, Sequence 1]

**RIN 9000–AL69**

#### **Federal Acquisition Regulation; Preventing Abuse of Interagency Contracts**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, to prevent abuse of interagency contracts.

**DATES:** *Effective Date:* February 2, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lori Sakalos, Procurement Analyst, at (202) 208–0498 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–55, FAR Case 2008–032.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 77733 on December 13, 2010, to implement paragraphs (b) and (d) of section 865 of the Duncan Hunter National Defense Authorization Act (NDAA). The rule is designed to ensure that the benefits of interagency acquisitions are consistently achieved.

The FAR changes are applicable to all interagency acquisitions issued under the Economy Act (31 U.S.C. 1535) as well as other authorities, in recognition that an increasing number of interagency acquisitions are conducted using authorities other than the Economy Act. This rule strengthens FAR subpart 17.5, Interagency Acquisitions by—

- Broadening the scope of coverage to address all interagency acquisitions that result in a contract action, but does not apply to Federal Supply Schedule (FSS) orders under \$500,000;

- Requiring agencies to support the decision to use an interagency acquisition with a determination that such action is the “best procurement approach;” and

- Directing that assisted acquisitions be accompanied by written agreements between the requesting agency and the servicing agency documenting the roles and responsibilities of the respective parties.

Five respondents submitted comments on the interim rule. Two of the respondents from the same organization provided duplicate comments.

##### **II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

###### *A. Summary of Significant Changes*

As a result of public comments, changes were made to the interim rule to—

1. Make it clear that FAR subpart 17.5 applies to interagency acquisitions

when an agency needing supplies or services obtains them using another agency's contract; or when an agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order. The subpart does not apply to interagency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction;

2. Revise FAR 35.017 to permit that when a nonsponsoring agency requests, under the authority of the Economy Act, the use of a Federally Funded Research and Development Center (FFRDC), the nonsponsoring agency may incorporate the determination required by FAR 17.502-1(a) into the determination and finding justification required by FAR 17.502-2(c);

3. Expand the requirement for business-case analysis when creating multi-agency contracts (MACs) to include governmentwide acquisition contracts (GWACs). Therefore, the procedures for establishing MACs and GWACs have been relocated from FAR 17.502-2(d) to 17.502-1(c) and hyperlinked to the Office of Federal Procurement Policy (OFPP) Business Case guidance.

#### B. Analysis of Public Comments

Respondents submitted comments covering the following seven categories:

- Best procurement approach determination.
- "Direct acquisition" definition.
- Written agreement for direct acquisition.
- Citing correct statutory authority for an interagency agreement.
- Content of determination and findings.
- Federal Supply Schedule orders and open market procurements.
- Business-case analysis.

#### 1. Best Procurement Approach Determination

*Comment:* One respondent asked if a class/commodity determination could be used for those products/services that might be ordered repeatedly from the FSS. Otherwise, according to the respondent, a determination for each procurement will be necessary.

*Response:* The best procurement approach determination, as described at FAR 17.502-1(a), is required by section 865 of the NDAA for Fiscal Year 2009 for any FSS order exceeding \$500,000. The law does not provide for class or commodity determinations.

*Comment:* Some respondents expressed concern that an additional

determination is required when agencies are using Schedules. The amended FAR 8.404(2) has added a requirement for FSS orders over \$500,000 to make a determination that use of FSS is the best procurement approach. However, FAR 8.002 establishes use of FSS as part of the "Priorities for Use of Government Supply Sources." It is not clear why an additional determination is required when agencies are using the Schedules as intended and as established by the FAR.

*Response:* The determination is required because it is mandated by section 865 of the NDAA for Fiscal Year 2009 and applies to FSS orders over \$500,000. Federal Supply Schedules are already priority sources, although not mandatory.

*Comment:* One respondent asked for additional guidance for lower prices when determining the best procurement approach at FAR 17.502-1(a)(2)(ii)(B). The reference to lower prices does not provide adequate guidance to contracting officers. Also, according to the respondent, an additional factor that should be listed under FAR 17.502-1(a)(2) is the cycle time to award.

*Response:* Lower price is one of the factors to be considered in determining the appropriate contract vehicle. Once this analysis is performed, other factors should be considered while following the ordering procedures as prescribed in FAR subparts 8.4 and 16.5. The determination criteria outlined at FAR 17.502-1(a)(2) is not an all inclusive list and does not preclude the use of other factors.

#### 2. "Direct Acquisition" Definition

*Comment:* One respondent suggested adding to the current definition of "direct acquisition" the following sentence: "A direct acquisition is also a type of interagency agreement where the servicing agency performs work using their own resources."

One respondent suggested adding the phrase "or through performance that uses the servicing agency's resources" in the text of FAR 17.501(a), after the phrase, "such as task and delivery-order contracts." Further, the respondent recommended, at FAR 17.502-1, adding a subsection (a)(3) to require that, prior to placing an order with another agency, the requesting agency shall make a determination that the servicing agency is able to provide the required supplies or services.

*Response:* A "direct acquisition," as defined in FAR 2.101(b)(2), is a type of interagency agreement, not a type of interagency agreement. An interagency agreement establishes general terms and

conditions governing the relationship between servicing agencies and requesting agencies as set forth in FAR 17.502-1(b)(1)(i). Interagency acquisitions may be a product of interagency agreements; the two are not the same. An interagency agreement whereby a servicing agency performs work using its own resources is not considered an interagency acquisition under the FAR.

The second respondent's comment relies on the addition of interagency agreements in the definition of direct acquisition, which the Councils did not adopt.

To provide additional clarity that the FAR only covers interagency transactions that result in a contract action, the rule was revised at FAR 17.500 and 17.502-2.

#### 3. Written Agreement for Direct Acquisition

*Comment:* One respondent stated that the current text at FAR 17.502-1(b)(2) should be deleted and replaced with the requirement for a written agreement because section 865 of the NDAA for Fiscal Year 2009 applies to all interagency agreements.

*Response:* The written agreement assigns responsibility for contract administration and management between the requesting agency and the servicing agency. The FAR does not require an additional written agreement for a direct acquisition because the basic contract outlines administration and management responsibilities; therefore, the requesting agency should follow ordering procedures/instructions per the contract vehicle.

#### 4. Citing Correct Statutory Authority for an Interagency Agreement

*Comment:* One respondent recommended that FAR 17.502-2(b) be revised by dividing into two parts and adding new text as follows: "(2) Agencies are responsible for determining whether statutory authority other than Economy Act applies to a particular interagency agreement." The respondent believed that because interagency agreements result in the transfer of funds from one agency to another, agencies must choose the correct authorizing statute for a particular interagency transaction.

*Response:* The statutory authority should be cited in the interagency agreement. Additional guidelines for preparing interagency agreements, including statutory authorities, are available at FAR 17.502-1(b).

#### 5. Content of Determination and Findings for Economy Act Acquisitions

*Comment:* One respondent suggested adding a new subsection at FAR 17.502–2(c), to read as follows: “(3) The D&F should provide factual information to support the determinations of (c)(2).” According to the respondent, without a requirement for factual information, the requesting agency’s determination can be added as a mere unsupported statement.

*Response:* Findings are statements of fact or rationale essential to support the determination and are already required in any determination and findings (D&F), as defined at FAR 1.701.

Note that the FAR does not require a formal D&F for determinations of best procurement approach. They are prepared in accordance with FAR 17.501–1(a).

#### 6. Federal Supply Schedule Orders and Open Market Procurements

*Comment:* One respondent expressed concern that the new rule requiring a best procurement approach determination for FSS orders exceeding \$500,000, combined with the lack of corresponding determination for open market commercial item procurements, creates a presumption of favoring duplicative, open market procurements. According to the respondent, the rule also creates an incentive to split FSS orders to avoid exceeding the \$500,000 threshold for a determination.

One respondent suggested that to provide clarity and ensure a level playing field in the acquisition planning process, the FAR should be amended to require a best procurement approach determination for open market procurements as well as FSS orders and other interagency transactions. Further, according to the respondent, FAR 7.105(b), Contents of written acquisition plans, should be amended to include the requirement for a best procurement approach determination for all transactions requiring an acquisition plan, including open market procurements.

*Response:* The best procurement approach determination is required for FSS orders greater than \$500,000 by section 865 of the NDAA for Fiscal Year 2009. This statute does not encourage the splitting of orders exceeding the \$500,000 threshold. FSS contracts are already priority sources, although not mandatory. The statute seeks to prevent abuse and implement controls for the interagency acquisitions process and is not intended to create barriers to the use of the FSS.

Per FAR 7.102, agencies are required to perform acquisition planning and

conduct market research for all acquisitions to ensure that the acquisition represents the best interests of the Government. If the result of acquisition planning is to use either a direct acquisition or an assisted acquisition, then the contracting officer is required to prepare a best procurement approach determination.

As for the comment of creating a presumption of favoring duplicative, open market procurements, FAR case 2009–024, *Prioritizing Sources of Supplies and Services for Use by the Government*, which was published as a proposed rule on June 14, 2011 (76 FR 34634), will address the priority and consideration of open market sources as part of acquisition planning. The recommendation for developing a best procurement approach determination for open market procurements is outside the scope of this case.

#### 7. Business-Case Analysis

*Comment:* One respondent suggested that FAR 17.502–2(d) should require that the business-case analysis address whether any other interagency contract vehicles, like the Multiple-Award Schedule program, meet the servicing agency’s needs.

*Response:* Business-case analysis is required by this statute for multi-agency contracts under the Economy Act. The requirement for the servicing agency to consider other existing contract vehicles is already covered under business-case analysis requirements for MACs and GWACs, which has been relocated to FAR 17.502–1(c).

#### C. Other Changes

During deliberations, the Councils determined that revisions to FAR 35.017–3 were necessary to clarify and streamline instructions for the placement of orders with FFRDCs. The FAR text at 35.017–3 has been revised to permit nonsponsoring agencies desiring to place orders against an FFRDC contract the option of incorporating the best procurement approach determination required by FAR 17.502–1(a) into the D&F required by FAR 17.502–2(c), subject to approval by the sponsoring agency.

#### III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, *Regulatory Planning and Review*, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any requirements on small entities.

#### V. Paperwork Reduction Act

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

#### List of Subjects in 48 CFR Parts 2, 4, 7, 8, 9, 17, 18, 35, and 41

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

#### Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 2, 4, 7, 8, 9, 17, 18, 35, and 41, which was published in the **Federal Register** at 75 FR 77733, December 13, 2010, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 17 and 35 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 17—SPECIAL CONTRACTING METHODS

■ 2. Amend section 17.500 by removing from paragraph (a) “paragraph (b)” and adding “paragraph (c)” in its place; revising paragraph (b); and adding paragraph (c) to read as follows:

#### 17.500 Scope of subpart.

\* \* \* \* \*

(b) This subpart applies to interagency acquisitions, see 2.101 for definition, when—

(1) An agency needing supplies or services obtains them using another agency's contract; or

(2) An agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order.

(c) This subpart does not apply to—

(1) Interagency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction; or

(2) Orders of \$500,000 or less issued against Federal Supply Schedules.

■ 3. Amend section 17.502-1 by revising the introductory text of paragraph (a)(2); removing from paragraph (a)(2)(ii)(A) "already"; and adding paragraph (c) to read as follows:

**17.502-1 General.**

(a) \* \* \*

(2) *Direct acquisitions.* Prior to placing an order against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach and shall obtain the concurrence of the requesting agency's responsible contracting office. At a minimum, the determination shall include an analysis, including factors such as:

\* \* \* \* \*

(c) *Business-case analysis requirements for multi-agency contracts and governmentwide acquisition contracts.* In order to establish a multi-agency or governmentwide acquisition contract, a business-case analysis must be prepared by the servicing agency and approved in accordance with the Office of Federal Procurement Policy (OFPP) business case guidance, available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/development-review-and-approval-of-business-cases-for-certain-interagency-and-agency-specific-acquisitions-memo.pdf>. The business-case analysis shall—

(1) Consider strategies for the effective participation of small businesses during acquisition planning (see 7.103(u));

(2) Detail the administration of such contract, including an analysis of all direct and indirect costs to the Government of awarding and administering such contract;

(3) Describe the impact such contract will have on the ability of the Government to leverage its purchasing power, e.g., will it have a negative effect because it dilutes other existing contracts;

(4) Include an analysis concluding that there is a need for establishing the multi-agency contract; and

(5) Document roles and responsibilities in the administration of the contract.

- 4. Amend section 17.502-2 by—
- a. Revising paragraphs (a) and (c);
- b. Removing paragraph (d);
- c. Redesignating paragraph (e) as paragraph (d); and
- d. Revising the newly redesignated paragraph (d)(4) to read as follows:

**17.502-2 The Economy Act.**

(a) The Economy Act (31 U.S.C. 1535) authorizes agencies to enter into agreements to obtain supplies or services from another agency. The FAR applies when one agency uses another agency's contract to obtain supplies or services. If the interagency business transaction does not result in a contract or an order, then the FAR does not apply. The Economy Act also provides authority for placement of orders between major organizational units within an agency; procedures for such intra-agency transactions are addressed in agency regulations.

\* \* \* \* \*

(c) *Requirements for determinations and findings.* (1) Each Economy Act order to obtain supplies or services by interagency acquisition shall be supported by a determination and findings (D&F). The D&F shall—

(i) State that use of an interagency acquisition is in the best interest of the Government;

(ii) State that the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source; and

(iii) Include a statement that at least one of the following circumstances applies:

(A) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services.

(B) The servicing agency has the capability or expertise to enter into a contract for such supplies or services that is not available within the requesting agency.

(C) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.

(2) The D&F shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head, except that, if the servicing

agency is not covered by the FAR, approval of the D&F may not be delegated below the senior procurement executive of the requesting agency.

(3) The requesting agency shall furnish a copy of the D&F to the servicing agency with the request for order.

(d) \* \* \*

(4) In no event shall the servicing agency require, or the requesting agency pay, any fee or charge in excess of the actual cost (or estimated cost if the actual cost is not known) of entering into and administering the contract or other agreement under which the order is filled.

**17.503 [Amended]**

■ 5. Amend section 17.503 by removing from paragraph (b)(4) "(see 17.502-2(e))" and adding "(see 17.502-2(d))" in its place.

**PART 35—RESEARCH AND DEVELOPMENT CONTRACTING**

■ 6. Amend section 35.017-3 by revising paragraph (b) to read as follows:

**35.017-3 Using an FFRDC.**

\* \* \* \* \*

(b) Where the use of the FFRDC by a nonsponsor is permitted by the sponsor, the sponsor shall be responsible for compliance with paragraph (a) of this subsection.

(1) The nonsponsoring agency shall prepare a determination in accordance with 17.502-1(a) and provide the documentation required by 17.503(e) to the sponsoring agency.

(2) When a D&F is required pursuant to 17.502-2(c), the nonsponsoring agency may incorporate the determination required by 17.502-1(a) into the D&F and provide the documentation required by 17.503(e) to the sponsoring agency.

(3) When permitted by the sponsor, a Federal agency may contract directly with the FFRDC, in which case that Federal agency is responsible for compliance with part 6.

[FR Doc. 2011-33409 Filed 12-30-11; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 2, 4, 7, 9, 13, 18, 25, 26,  
and 52**[FAC 2005–55; FAR Case 2011–021; Item  
II; Docket 2011–0021, Sequence 1]

RIN 9000–AM14

**Federal Acquisition Regulation;  
Transition to the System for Award  
Management (SAM)****AGENCIES:** Department of Defense (DoD),  
General Services Administration (GSA),  
and National Aeronautics and Space  
Administration (NASA).**ACTION:** Final rule.**SUMMARY:** DoD, GSA, and NASA are  
issuing a final rule amending the  
Federal Acquisition Regulation (FAR) to  
update certain definitions and clauses  
pertaining to three procurement systems  
included in the Integrated Acquisition  
Environment—the Central Contractor  
Registration database, the Excluded  
Parties List System, and the Online  
Representations and Certifications  
Application. These three Integrated  
Acquisition Environment systems and  
the Disaster Response Registry will now  
be accessed through a single Web site.**DATES:** *Effective Date:* February 2, 2012.**FOR FURTHER INFORMATION CONTACT:** Mr.  
Edward Loeb, Procurement Analyst, at  
(202) 501–0650, for clarification of  
content. For information pertaining to  
status or publication schedules, contact  
the Regulatory Secretariat at (202) 501–  
4755. Please cite FAC 2005–55, FAR  
Case 2011–021.**SUPPLEMENTARY INFORMATION:****I. Background**

The Integrated Acquisition Environment (IAE) is an electronic-Government initiative. The IAE is aggregating disparate Federal acquisition content, which is currently housed in numerous online systems, by providing one Web site for regulations, systems, resources, opportunities, and training. The Web site at <https://www.acquisition.gov> was designed to create an easily navigable resource that is both more efficient and transparent.

The transition of the IAE to the new System for Award Management (SAM) architecture has begun. This effort will transition the Central Contractor Registration (CCR) database, the Excluded Parties List System (EPLS),

and the Online Representations and Certifications Application (ORCA) to the new architecture. This case provides the first step in updating the FAR for these changes, and it updates the Web addresses present in the FAR for these systems as being accessible through <https://www.acquisition.gov>. This rule also amends the FAR to provide for accessing the Disaster Response Registry through <https://www.acquisition.gov>. As the transition to SAM progresses, future FAR cases are anticipated to change the current names of the systems to SAM, as well as to begin the transition of the remaining IAE systems.

**II. FAR Changes**

This case makes the following administrative changes to the FAR:

- Deletes the definition at 2.101 for “business partner network,” which is no longer necessary in the SAM architecture.
- Deletes reference to “business partner network” at 4.1100, Scope, which is no longer necessary in the SAM architecture.
- Revises the relevant database references shown throughout the FAR, to show the new Web site address at <https://www.acquisition.gov>. Databases include the CCR, EPLS, ORCA, and Disaster Response Registry.

**III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**IV. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 and does not require publication for public comment.

**V. Paperwork Reduction Act**

The final rule does not contain any information collection requirements that

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

**List of Subjects in 48 CFR Parts 2, 4, 7,  
9, 13, 18, 25, 26, and 52**

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,***Director, Office of Governmentwide  
Acquisition Policy, Office of Acquisition  
Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA  
amend 48 CFR parts 2, 4, 7, 9, 13, 18,  
25, 26, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 2, 4, 7, 9, 13, 18, 25, 26, and 52 continues to read as follows:

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

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

- 2. Amend section 2.101, in paragraph (b)(2) by removing the definition “Business Partner Network (BPN)” and revising the definitions “Disaster Response Registry” and “Online Representations and Certifications Application (ORCA)” to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

*Disaster Response Registry* means a voluntary registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities established in accordance with 6 U.S.C. 796, Registry of Disaster Response Contractors. The Registry contains information on contractors who are willing to perform disaster or emergency relief activities within the United States and its outlying areas. The Registry is accessed via <https://www.acquisition.gov> and alternately through the FEMA Web site at <http://www.fema.gov/business/index.shtm>. (See 26.205.)

\* \* \* \* \*

*Online Representations and Certifications Application (ORCA)* means the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government. Access ORCA via <https://www.acquisition.gov>.

\* \* \* \* \*

**PART 4—ADMINISTRATIVE MATTERS**

**4.1100 [Amended]**

■ 3. Amend section 4.1100 by removing from the introductory text “, a part of the Business Partner Network (BPN)”.

**4.1103 [Amended]**

4. Amend section 4.1103 by removing from paragraph (a)(2)(i) “<http://www.ccr.gov>” and adding “<https://www.acquisition.gov>” in its place.

**4.1104 [Amended]**

■ 5. Amend section 4.1104 by removing “at [www.ccr.gov](http://www.ccr.gov)” and adding “via <https://www.acquisition.gov>” in its place.

**4.1201 [Amended]**

■ 6. Amend section 4.1201 by removing from paragraph (a) “<http://orca.bpn.gov>” and adding “ORCA accessed via <https://www.acquisition.gov>” in its place.

**PART 7—ACQUISITION PLANNING**

**7.103 [Amended]**

■ 7. Amend section 7.103 by removing from paragraph (y) “at [www.ccr.gov](http://www.ccr.gov)” and adding “via <https://www.acquisition.gov>” in its place.

**PART 9—CONTRACTOR QUALIFICATIONS**

**9.404 [Amended]**

■ 8. Amend section 9.404 by removing from paragraph (d) “at <http://epls.gov>” and adding “via <https://www.acquisition.gov>” in its place.

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

**13.102 [Amended]**

■ 9. Amend section 13.102 by removing from paragraph (a) “at <http://www.ccr.gov>” and adding “via <https://www.acquisition.gov>” in its place.

**PART 18—EMERGENCY ACQUISITIONS**

■ 10. Revise section 18.102 to read as follows:

**18.102 Central contractor registration.**

Contractors are not required to be registered in the Central Contractor Registration (CCR) database for contracts awarded to support unusual and compelling needs or emergency acquisitions. (See 4.1102). However, contractors are required to register with CCR in order to gain access to the Disaster Response Registry. Contracting officers shall consult the Disaster

Response Registry via <https://www.acquisition.gov> to determine the availability of contractors for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas. (See 26.205).

**PART 25—FOREIGN ACQUISITION**

**25.703–3 [Amended]**

■ 11. Amend section 25.703–3 in paragraph (a) by removing “at <https://www.epls.gov>” and adding “via <https://www.acquisition.gov>” in its place.

**PART 26—OTHER SOCIOECONOMIC PROGRAMS**

**26.205 [Amended]**

■ 12. Amend section 26.205 by removing from paragraph (a) “at [www.ccr.gov](http://www.ccr.gov)” and adding “via <https://www.acquisition.gov>” in its place; and by removing from paragraph (b) “on the CCR Web page” and adding “, which can be accessed via <https://www.acquisition.gov>.” in its place.

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

■ 13. Amend section 52.204–7 by revising the date of the clause; and removing from paragraph (h) “the Internet at <http://www.ccr.gov>” and adding “CCR accessed through <https://www.acquisition.gov>” in its place. The revised text reads as follows:

**52.204–7 Central Contractor Registration.**

\* \* \* \* \*

**Central Contractor Registration (FEB 2012)**

\* \* \* \* \*

■ 14. Amend section 52.204–8 by revising the date of the provision; and removing from paragraph (d) “at <http://orca.bpn.gov>” and adding “accessed through <https://www.acquisition.gov>” in its place. The revised text reads as follows:

**52.204–8 Annual Representations and Certifications.**

\* \* \* \* \*

**Annual Representations and Certifications (FEB 2012)**

\* \* \* \* \*

■ 15. Amend section 52.204–10 by revising the date of the clause; and removing from paragraph (c)(2) “at <http://www.ccr.gov>” and adding “in the Central Contractor Registration (CCR) database via <https://www.acquisition.gov>” in its place. The revised text reads as follows:

**52.204–10 Reporting Executive Compensation and First-Tier Subcontract Awards.**

\* \* \* \* \*

**Reporting Executive Compensation and First-tier Subcontract Awards (FEB 2012)**

\* \* \* \* \*

■ 16. Amend section 52.209–7 by revising the date of the provision; and removing from paragraph (d) “at <http://www.ccr.gov>” and adding “via <https://www.acquisition.gov>”. The revised text reads as follows:

**52.209–7 Information Regarding Responsibility Matters.**

\* \* \* \* \*

**Information Regarding Responsibility Matters (FEB 2012)**

\* \* \* \* \*

■ 17. Amend section 52.209–9 by revising the date of the clause; and removing from paragraph (a) “at <http://www.ccr.gov>” and adding “via <https://www.acquisition.gov>” in its place. The revised text reads as follows:

**52.209–9 Updates of Publicly Available Information Regarding Responsibility Matters.**

\* \* \* \* \*

**Updates of Publicly Available Information Regarding Responsibility Matters (FEB 2012)**

\* \* \* \* \*

■ 18. Amend section 52.212–1 by revising the date of the provision; and removing from paragraph (k) “the Internet at <http://www.ccr.gov>” and adding “the CCR database accessed through <https://www.acquisition.gov>” in its place. The revised text reads as follows:

**52.212–1 Instructions to Offerors—Commercial Items.**

\* \* \* \* \*

**Instructions to Offerors—Commercial Items (FEB 2012)**

\* \* \* \* \*

■ 19. Amend section 52.212–3 by—  
■ a. Revising the date of the provision;  
■ b. Removing from the introductory paragraph “at <http://orca.bpn.gov>” and adding “via <https://www.acquisition.gov>” in its place; and  
■ c. Removing from paragraph (b)(2) “at <http://orca.bpn.gov>” and adding “accessed through <https://www.acquisition.gov>” in its place; and removing from the last paragraph the word “posted” and adding “posted electronically” in its place. The revised text reads as follows:

**52.212-3 Offeror Representations and Certifications—Commercial Items.**

\* \* \* \* \*

**Offeror Representations and Certifications—Commercial Items (FEB 2012)**

\* \* \* \* \*

■ 20. Amend section 52.212-4 by revising the date of the clause; and removing from paragraph (t)(4) “via the Internet at <http://www.ccr.gov>” and adding “via CCR accessed through <https://www.acquisition.gov>” in its place. The revised text reads as follows:

**52.212-4 Contract Terms and Conditions—Commercial Items.**

\* \* \* \* \*

**Contract Terms and Conditions—Commercial Items (FEB 2012)**

\* \* \* \* \*

[FR Doc. 2011-33414 Filed 12-30-11; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 5, 6, 8, 11, 13, 16, 18, and 36**

[FAC 2005-55; FAR Case 2005-037; Item III; Docket 2006-0020, Sequence 26]

RIN 9000-AK55

**Federal Acquisition Regulation; Brand-Name Specifications**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the Office of Management and Budget memoranda on brand-name specifications.

**DATES:** *Effective Date:* February 2, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Clark, Procurement Analyst, at (202) 219-1813, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-55, FAR Case 2005-037.

**SUPPLEMENTARY INFORMATION:****I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 71 FR 57357 on September 28, 2006, to implement Office of Management and Budget (OMB) memoranda and policies on the use of brand-name specifications. Eight respondents submitted 32 comments in response to the interim rule. The public comments were considered in development of this final rule.

Prior to the interim rule, on April 11, 2005, OMB issued a memorandum on the use of brand-name specifications that was designed to reinforce the need to maintain vendor- and technology-neutral contract specifications and provide for maximum competition by limiting the use of brand-name specifications. OMB encouraged agencies to mitigate brand-name usage and publicize the justification for using brand-names in solicitations. OMB issued a second memorandum on April 17, 2006, providing additional implementation guidance for publication of brand-name justifications.

Subsequent to the interim rule, OMB issued two additional memoranda addressing the use of brand-name specifications. One, entitled “Appropriate Use of Brand Name or Equal Purchase Descriptions,” dated November 28, 2007, reminded agencies of the need to comply with the requirements included in the interim rule and establish internal controls to monitor compliance. The last memorandum, published December 19, 2007, entitled “Reminder-Ensuring Competition When Acquiring Information Technology and Using Common Security Configurations,” summarized the FAR requirements on the use of brand-name purchase descriptions and again asked agencies to establish internal controls. All four of the OMB memoranda were considered in developing this final rule.

However, the need to stabilize the FAR baseline because of changes to be made by other pending FAR cases has delayed publication of this final rule. Publication in the **Federal Register** at 76 FR 14548 on March 16, 2011, of the interim rule for FAR Case 2007-012, Requirements for Acquisitions Pursuant to Multiple-Award Contracts, enabled the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) to move ahead with this final rule. Some of the changes made to the interim rule by this final rule are due solely to the revised baseline.

This final rule amends FAR subparts 6.3, 8.4, 13.1, 13.5, and 16.5 to clarify that when applicable, the documentation or justification and posting requirements for brand-name items only apply to the portion of the acquisition that requires the brand-name item. FAR subparts 8.4 and 16.5 are amended to require screening of the brand-name justifications for contractor proprietary data, and FAR subpart 16.5 is amended to require contracting officers to post the justification for an order peculiar to one manufacturer under indefinite-delivery contracts.

**II. Discussion and Analysis**

The Councils reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

**A. What To Post**

*Comments:* The interim rule specifically requested comments on whether agencies should be required to post brand-name justifications (a) For orders against indefinite-delivery contracts, including Governmentwide Acquisition Contracts (GWACs), (b) for orders against SmartBUY agreements and other strategic sourcing vehicles, and (c) to renew software-license agreements that are required to receive software updates. Several respondents addressed these questions as follows.

Most respondents expressed a strong belief that all Government procurements should be subject to the same brand-name-or-equal rules, at the basic-contract level and at the order level. One respondent stated that a single posting requirement will go a long way toward leveling the playing field. Other respondents believed that it would be unfair to allow agencies to avoid the brand-name justification rule by ordering against indefinite-delivery contracts.

One respondent distinguished between an agency-only indefinite-delivery contract and GWACs, which can be used by multiple agencies. The respondent did not think that an agency should be required to post brand-name justifications for orders under an internal indefinite-delivery contract, because all requirements should have been met at the time of posting the initial requirement for the basic indefinite-delivery contract, even if a competitive solicitation leads to a *de facto* brand-name indefinite-delivery contract. Further, this respondent read the FAR to contain a loophole that allows an ordering agency to avoid the posting requirements, as well as any

requirement to prepare a justification, when placing orders for brand-name products against a GWAC. Other respondents suggested that the FAR should incorporate a requirement for brand-name justification documentation and posting for GWACs only. Some respondents stated that orders issued against indefinite-delivery contracts should be included in the rule to the extent that the original indefinite-delivery action was not supported by a class justification and approval. The existence of the product on an indefinite-delivery contract does not, according to respondents, justify its acquisition if the facts supporting the product selection were not documented in the original indefinite-delivery procurement process.

Respondents were not in agreement as to whether orders under SmartBUY and other strategic-sourcing agreements should be subject to the posting requirement. One respondent believes that, because these are vehicles of choice, the determination to procure a brand-name product is made at the order level and should be supported by a posted justification for the order. Other respondents disagreed, stating that the posting requirement should be satisfied prior to the award of the basic agreement, not for individual orders.

Respondents did not consider that posting should be required for the renewal of software-licensing agreements because only the original equipment manufacturer has the software code to support the equipment and, therefore, there is no ability to compete. Respondents pointed out that FAR 13.106–1(b)(1) mentions license agreements separately from brand-name requirements, which respondents considered to strengthen the argument that software-license renewals should not be subject to the posting requirement.

*Response:* The justification for use of a brand-name specification and posting of the justification should take place when the requirement for the brand-name item is determined. This will result in different timing for multiple-award contracts from single-award contracts, e.g., requirements contracts. By definition, a requirements contract is with a single source. Therefore, the requirement for the source's brand-name item is determined prior to award of the basic contract, and the justification for purchasing a brand-name item should be completed prior to award of the requirements contract. On the other hand, a multiple-award contract offers buyers products from a variety of sources, some of which may offer particular brand-name products. The

existence of a brand-name item on a multiple-award contract does not imply that it is the only such item available for purchase. In this case, the requirement for a single manufacturer's brand-name item is determined at the time of the order, not at the time that the multiple-award contract is placed. Therefore, the justification for the brand-name item would be required when placing the order. For example, if an agency determined that it needed 50 Dell computers to be compatible with the agency's existing Dell capabilities, then it might place an order against a Federal Supply Schedule (FSS) contract for Dell brand-name computers. The agency placing the order would be responsible for justifying the brand-name purchase, because it is at the order level that it is determined that the requirement is for Dell computers, versus other brand-name computers that are also available on FSS contracts.

There is a benefit to posting a purchase description for an order peculiar to one manufacturer because it provides for greater transparency and accountability regarding the use of brand-name specifications. Agencies can no longer avoid the posting requirement for orders simply by placing an order against an indefinite-delivery contract, unless it is a requirements contract with a single source. Orders with a purchase description for an order peculiar to one manufacturer issued against a GWAC or multiple-agency contract now are also included in the posting requirement. Posting is required if a justification covering the requirements in the order had not previously been approved for the original contract in accordance with FAR 6.302–1(c). The posting requirement for orders under indefinite-delivery contracts, GWACs, and multiple-agency contracts is reflected in changes at FAR subpart 16.5.

The exception to the synopsis requirement for orders at FAR 16.505(a)(1) is revised by directing the contracting officer to follow the requirements of FAR 16.505(a)(4) for a proposed order peculiar to one manufacturer. FAR 16.505(a)(4) is added to require the contracting officer to document or prepare a justification when limiting competition for an item peculiar to one manufacturer, unless the justification covering the requirements in the order had been previously approved under the contract or unless the base contract is a single-award contract awarded under full and open competition. Under the final rule, agencies must post the solicitation, and any justification and supporting documentation on the agency Web site

used (if any) to solicit offers if the order is \$25,000 or more; or provide the justification and supporting documentation along with the solicitation to all awardees under the indefinite-delivery contract. The agency is required to keep a copy of the brand-name justification in the official contract file.

With regard to orders placed pursuant to the SmartBUY program, the Councils concluded that agencies utilizing SmartBUY will be required to comply with the procedures of the SmartBUY blanket purchase agreements (BPAs).

If an acquisition specifies a brand-name item, the justification or documentation shall be posted, as required, with the solicitation or request for quotation (RFQ) (see FAR 5.102(a)(6), 8.405–6 or 16.505). As such, if an acquisition for renewal of a software-license agreement requires a brand-name justification or documentation and a solicitation or RFQ, then the justification or documentation shall be posted, as required, with the solicitation or RFQ. Any exception to this requirement should cite the applicable FAR reference. For example, an order placed under an FSS contract for a software-license renewal that cites logical follow-on as the circumstance (see FAR 8.405–6(a)(1)(i)(C)) for placing the order would not require a brand-name justification. However, if the order exceeds the simplified acquisition threshold, the limited-source justification is required to be posted (see FAR 8.405–6(a)(2)). The parenthetical reference to exclusive licensing agreements at FAR 13.106–1(b)(1), as cited by the respondents, does not provide the applicable FAR reference for an exception to posting the brand-name justification or documentation required for an acquisition for renewal of software-license agreements.

#### *B. Where To Post Justifications*

*Comment:* One respondent stated that “agencies shall use GSA e-Buy to post RFQs, eliminating FedBid, thus assuring adequate notice and competition.” Another respondent stated that e-Buy should be used consistently for FSS purchases because “(u)se of FedBizOpps invites additional interest outside of the FSS community and creates confusion as to whether the acquisition is conducted under FAR parts 8, 13, 15, etc. procedures.”

*Response:* Agencies are required to post brand-name justifications or documentation to (1) the Governmentwide Point of Entry (GPE) system at [www.fedbizopps.gov](http://www.fedbizopps.gov) with the solicitation or (2) the e-Buy system at

<http://www.ebuy.gsa.gov> with the RFQ when using the GSA's FSS. The interim rule applied the posting requirement to acquisitions exceeding \$25,000 that use brand-name specifications, including simplified acquisitions, sole-source procurements, and multiple-award FSS orders. If an agency uses a third-party system such as FedBid for posting notices or soliciting offers for orders under the multiple-award FSS, the official posting location is still e-Buy. If publication of the justification or documentation with the solicitation is inappropriate because one of the exceptions in FAR 8.405-6(b)(3)(ii) or 16.505(a)(4)(iii)(C) applies, then agencies should retain a copy of the justification or documentation in the contract file.

#### C. Posting Increases Acquisition Lead Time

*Comment:* One respondent noted that requiring posting of a brand-name justification, as well as creating an e-Buy solicitation for orders over \$25,000, will add to lead time. The respondent stated that, in many cases, the posting of requirements could necessitate some type of legal or other review of the brand-name justification to ensure against unintentional disclosure of sensitive information. According to the respondent, "While classified information clearly falls within an exception to the posting rule, the primary concern is with the identification of sensitive information that does not carry a classification. It should not be the Contracting Officer's responsibility to determine the appropriateness of this information for release to the public." The respondent recommended that the posting requirement should only be imposed on orders over the simplified acquisition threshold, and then only if the requirements and technical personnel are required to certify that the information regarding the need for the brand-name is appropriate for public release.

*Response:* The Councils agree that posting of a brand-name justification, as well as creating an e-Buy solicitation for orders over \$25,000, may increase the procurement lead time and will have to be factored during acquisition planning. However, these actions foster competition, broaden industry participation and increase transparency of the acquisition process. The Councils note that the \$25,000 threshold for posting a brand-name justification was established in the memoranda issued by OMB. FAR 5.102(a)(6) assigns overall responsibility to the contracting officer, as a core member of the acquisition

team, for ensuring the brand-name justification, to be included with the solicitation, is properly screened and redacted, as necessary, prior to posting. Moreover, the contracting officer, when deemed necessary, may consult with the appropriate subject matter expert(s) when determining the appropriateness of information for public release.

#### D. What posting requirements are applicable to BPAs issued under FSS contracts and orders placed under the BPAs?

*Comment:* Some respondents believed the interim rule resulted in confusion as to the applicability of the requirements to the placement of orders under BPAs versus the placement of BPAs. Respondents stated that some contracting officers may apply the posting language to solicitations for BPAs, while other contracting officers may only apply the brand-name specification posting requirement to RFQs for orders and not to BPAs. Respondents believed that the intent should be clear.

*Response:* In this final rule, the Councils have clarified FAR subpart 8.4 to require that the documentation or justification for use of a brand-name specification must be completed and approved at the time the requirement for a brand-name item is determined. FAR 8.405-6 is revised to make it clear that the justification for a brand-name item is required at the order level when a justification for the brand item was not completed for the BPA or does not adequately cover the requirements in the order.

#### E. Interim Rule Prohibits Agency Use of Brand-Name Specifications When Placing Orders

*Comment:* A respondent stated that the requirement to post a brand-name justification should be applied only at the order level and never to the establishment of a BPA under an FSS contract.

*Response:* The Councils determined that it is appropriate to post the justification and documentation for brand-names at the time the requirement is established, *i.e.*, when a single-source contract is created or when an order is being placed against a multiple-award contract. Thus, the requirement to post a brand-name justification would not apply to the creation of a BPA unless it was a single-source BPA issued against an FSS contract. See also responses to comments in section II.A. and D.

#### F. Limiting Consideration to Brand-Names

*Comment:* A respondent was concerned that the interim rule goes beyond limiting consideration to brand-names and actually prohibits agencies from utilizing brand-name specifications when placing orders. To fix that, the respondent suggested that the FAR must be clearer in separating the initial-needs description from the actual ordering process because, without the ability to name products by brands, contracting officers will be unable to fill specific orders correctly. Also, respondents claimed that the requirement to post brand-name justifications for FSS orders in excess of \$25,000 reduces the ability to use streamlined acquisition procedures to place FSS orders.

*Response:* To implement the OMB memorandum, the interim rule restricted use of oral orders over \$25,000 against FSS when purchase descriptions contained brand-name specifications. The Councils recognize that the interim rule required that an RFQ be issued for a proposed order when the purchase description specifies a brand-name requirement. That requirement is consistent with the OMB memoranda and is retained in the final rule to reinforce the need to maintain vendor- and technology-neutral specifications to provide for maximum competition. However, additional clarification is needed, and the Councils have revised FAR 8.405-1(e) to specify that an RFQ is required when a purchase description specifies a brand-name for a proposed order issued under a FSS.

The interim rule does not prohibit the use of brand-name specifications when placing orders. However, the FAR could be clearer, and the Councils have made changes at FAR subparts 8.4 and 16.5, to reflect the documentation or justification and posting requirements that apply to the purchase description for proposed orders when placed against FSS contracts and indefinite-delivery contracts.

#### G. When a Brand-Name Product Is Included in the Agency's Enterprise Architecture, an Additional Justification Should Not Be Required

*Comment:* One respondent noted that a Government agency is now required to have an Enterprise Architecture for its information-technology (IT) systems. Once the Enterprise Architecture has been approved, the respondent believed that contracting officers should be able to purchase brand-name IT equipment described and identified within the

Enterprise Architecture without any justification, bypassing the posting requirement. The respondent proposed that, as a minimum, there should be provision for standardized maintenance agreements with a single company.

*Response:* If an agency's Enterprise Architecture includes brand-name IT equipment, this fact will be a critical element in the brand-name justification. It does not eliminate the requirement for the justification or posting the justification.

#### *H. Posting an RFQ Is Not Always Required When Using a Brand-Name Specification for Orders*

*Comment:* The interim rule, according to respondents, confused limiting consideration to brand-names with selecting a brand-name item. Respondents stated that the OMB memoranda were reasonably focused on the use of brand-name specifications at the requirements and solicitation stages, not at the ordering stage. Respondents believed that it is illogical to require an agency to post an RFQ or brand-name specification justification after a source selection, "including when the source selection necessarily results in the order of a brand-name good or service."

*Response:* The final rule incorporates appropriate language at FAR 16.505 and 8.405-6 to reflect that the justification and posting requirements apply at the time the requirement for the brand-name item is determined. Therefore, posting an RFQ with its associated brand-name justification will not be required at the order level for certain contracts or FSS BPAs (see also response to comments in section II.A.).

#### *I. Ties to Synopsis Exceptions for Open-Market Purchases*

*Comment:* Respondents stated that, for open-market purchases, the requirement to post the brand-name justification is tied to solicitations synopsized through GPE and, therefore, any solicitation not synopsized through GPE by virtue of the exceptions to the notice requirements at 5.202 technically will not need to be published.

*Response:* The respondents' analysis correctly reflects that, if a solicitation is not synopsized through the GPE based on one of the exceptions at FAR 5.202, the associated brand-name justification or documentation is not required to be published through the GPE.

#### *J. Clarify Thresholds, Cross-References, and Documentation Requirements*

*Comment:* One respondent recommended that FAR 5.102(a)(6) be revised to clarify whether the posting requirement applies when the

acquisition in total exceeds \$25,000 (regardless of the amount attributed to brand-name specifications) or only when the brand-name component of it exceeds \$25,000.

The respondent also recommended that FAR 5.102(a)(6) should have a reference to FAR 8.405-6(d) which requires documentation and justification for restricting competition when ordering under the FSS. The respondent stated that FAR 5.102(a)(6) requires the contracting officer to post the documentation required by FAR 13.106-1(b) when an acquisition contains brand-name specifications. However, there are no documentation requirements at FAR 13.106-1(b).

*Response:* No change is required at FAR 5.102(a)(6) to clarify the thresholds or to reference to FAR 8.405-6(d). The justification and posting requirements for orders containing brand-name specifications placed under FSS contracts are adequately covered under FAR 8.405-6(b).

The Councils have revised FAR 6.302-1(c), 13.106-1(b), 8.405-6(b)(4), and 13.501(a) to address requirements for documentation, justification, and approval for the portion of the acquisition which is brand-name.

There are adequate documentation requirements at FAR 13.106-1(b). For purchases not exceeding the simplified acquisition threshold, FAR 13.106-1(b) requires that the contracting officer document the circumstances (*e.g.*, brand-name) when it is determined that only one source is reasonably available. For sole-source (including brand-name) acquisitions of commercial items in excess of the simplified acquisition threshold, FAR 13.106-1(b) provides the cross reference to FAR 13.501(a) for the documentation.

*Comment:* One respondent indicated that FAR 8.405-1(c)(2) seems to contradict the \$25,000 posting threshold because the title of FAR 8.405-1(c) is "Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold." The respondent believed that the documentation or justification requirements for FSS orders containing brand-name specifications apply to any such order greater than \$3,000, when in fact, they apply only to orders exceeding \$25,000.

*Response:* FAR 8.405-1(c) was revised by FAR Case 2007-012. As a result of the case, FAR 8.405-1(c)(2) is now a separate paragraph at FAR 8.405-1(e), and the documentation or justification and posting requirements for FSS orders at the applicable thresholds are located at FAR 8.405-6(b). The documentation

requirement starts at \$3,000; the posting requirement starts at \$25,000.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses internal Federal agency procedures. The rule will benefit small business entities by providing the opportunity for review of brand-name justification and approval documents for contracts and orders awarded noncompetitively or with limited competition, thereby increasing the opportunity for competition for future awards.

### **V. Paperwork Reduction Act**

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

### **List of Subjects in 48 CFR Parts 5, 6, 8, 11, 13, 16, 18, and 36**

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

### **Interim Rule Adopted as Final With Changes**

Accordingly, the interim rule amending 48 CFR parts 5, 6, 8, 11, 13, 16, 18, and 36 which was published in the **Federal Register** at 71 FR 57357,

September 28, 2006, is adopted as final with the following changes:

- 1. The authority citation for 48 CFR parts 5, 6, 8, 11, 13, 16, 18, and 36 continues to read as follows:

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

**PART 5—PUBLICIZING CONTRACT ACTIONS**

- 2. Amend section 5.202 by revising paragraph (a)(6) to read as follows:

**5.202 Exceptions.**

\* \* \* \* \*

(a) \* \* \*

(6) The proposed contract action is an order placed under subpart 16.5. When the order contains brand-name specifications, see especially 16.505(a)(4);

\* \* \* \* \*

**PART 6—COMPETITION REQUIREMENTS**

- 3. Amend section 6.302–1 by revising paragraph (c) to read as follows:

**6.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.**

\* \* \* \* \*

(c) *Application for brand-name descriptions.* (1) An acquisition or portion of an acquisition that uses a brand-name description or other purchase description to specify a particular brand-name, product, or feature of a product, peculiar to one manufacturer—

(i) Does not provide for full and open competition, regardless of the number of sources solicited; and

(ii) Shall be justified and approved in accordance with 6.303 and 6.304.

(A) If only a portion of the acquisition is for a brand-name product or item peculiar to one manufacturer, the justification and approval is to cover only the portion of the acquisition which is brand-name or peculiar to one manufacturer. The justification should state it is covering only the portion of the acquisition which is brand-name or peculiar to one manufacturer, and the approval level requirements will then only apply to that portion;

(B) The justification should indicate that the use of such descriptions in the acquisition or portion of an acquisition is essential to the Government's requirements, thereby precluding consideration of a product manufactured by another company; and

(C) The justification shall be posted with the solicitation (see 5.102(a)(6)).

(2) Brand-name or equal descriptions, and other purchase descriptions that

permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use.

\* \* \* \* \*

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

- 4. Amend section 8.405–1 by revising paragraph (e) to read as follows:

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

\* \* \* \* \*

(e) When an order contains brand-name specifications, the contracting officer shall post the RFQ on e-Buy along with the justification or documentation, as required by 8.405–6. An RFQ is required when a purchase description specifies a brand-name.

\* \* \* \* \*

- 5. Amend section 8.405–6 by—
- a. Removing from paragraph (b)(2)(ii) “threshold see” and adding “threshold, see” in its place; and
- b. Adding paragraphs (b)(2)(iii), (b)(3)(i)(C), and (b)(4).

The added and revised text reads as follows:

**8.405–6 Limiting sources.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iii) The documentation or justification must be completed and approved at the time the requirement for a brand-name item is determined. In addition, the justification for a brand-name item is required at the order level when a justification for the brand-name item was not completed for the BPA or does not adequately cover the requirements in the order.

(3) \* \* \*

(i) \* \* \*

(C) The documentation in paragraph (b)(2)(i) and the justification in paragraph (c) of this subsection is subject to the screening requirement in paragraph (a)(2)(iii) of this section.

\* \* \* \* \*

(4) When applicable, the documentation and posting requirements in paragraphs (b)(2) and (3) of this subsection apply only to the portion of the order or BPA that requires a brand-name item. If the justification and approval is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

\* \* \* \* \*

**PART 11—DESCRIBING AGENCY NEEDS**

- 6. Amend section 11.105 by adding paragraph (c) to read as follows:

**11.105 Items peculiar to one manufacturer.**

\* \* \* \* \*

(c) For orders under indefinite-quantity contracts, see 16.505(a)(4).

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

- 7. Amend section 13.106–1 by revising paragraph (b) to read as follows:

**13.106–1 Soliciting competition.**

\* \* \* \* \*

(b) *Soliciting from a single source.* (1) *For purchases not exceeding the simplified acquisition threshold.* (i) Contracting officers may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available (e.g., urgency, exclusive licensing agreements, brand-name or industrial mobilization).

(ii) Where a single source is identified to provide a portion of a purchase because that portion of the purchase specifies a particular brand-name item, the documentation in paragraph (b)(1)(i) of this section only applies to the portion of the purchase requiring the brand-name item. The documentation should state it is covering only the portion of the acquisition which is brand-name.

(2) *For purchases exceeding the simplified acquisition threshold.* The requirements at 13.501(a) apply to sole-source (including brand-name) acquisitions of commercial items conducted pursuant to subpart 13.5.

(3) See 5.102(a)(6) for the requirement to post the brand-name justification or documentation.

\* \* \* \* \*

- 8. Amend section 13.501 by revising the introductory text of paragraph (a)(2) to read as follows:

**13.501 Special documentation requirements.**

(a) \* \* \*

(2) Justifications and approvals are required under this subpart for sole-source (including brand-name) acquisitions or portions of an acquisition requiring a brand-name. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

\* \* \* \* \*

**PART 16—TYPES OF CONTRACTS**

- 9. Amend section 16.505 by—
- a. Revising paragraph (a)(1);
- b. Redesignating paragraphs (a)(4) through (a)(10) as paragraphs (a)(5) through (a)(11), respectively; and
- c. Adding a new paragraph (a)(4).

The revised and added text reads as follows:

**16.505 Ordering.**

(a) \* \* \*

(1) In general, the contracting officer does not synopsise orders under indefinite-delivery contracts; except see 16.505(a)(4) and (11), and 16.505(b)(2)(ii)(D).

\* \* \* \* \*

(4) The following requirements apply when procuring items peculiar to one manufacturer:

(i) The contracting officer must justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications shall not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(ii) Requirements for use of items peculiar to one manufacturer shall be justified and approved using the format(s) and requirements from paragraphs (b)(2)(ii)(A), (B), and (C) of this section, modified to show the brand-name justification. A justification is required unless a justification covering the requirements in the order was previously approved for the contract in accordance with 6.302-1(c) or unless the base contract is a single-award contract awarded under full and open competition. Justifications for the use of brand-name specifications must be completed and approved at the time the requirement for a brand-name is determined.

(iii)(A) For an order in excess of \$25,000, the contracting officer shall—

- (1) Post the justification and supporting documentation on the agency Web site used (if any) to solicit offers for orders under the contract; or
- (2) Provide the justification and supporting documentation along with the solicitation to all contract awardees.

(B) The justifications for brand-name acquisitions may apply to the portion of

the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

(C) The requirements in paragraph (a)(4)(iii)(A) of this section do not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(D) The justification is subject to the screening requirement in paragraph (b)(2)(ii)(D)(4) of this section.

\* \* \* \* \*

**PART 18—EMERGENCY ACQUISITIONS****18.105 [Amended]**

- 10. Amend section 18.105 by removing “(see 16.505(a)(7))” and adding “(see 16.505(a)(8))” in its place.

**PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS****36.600 [Amended]**

- 11. Amend section 36.600 by removing “(see 16.505(a)(8))” and adding “(see 16.505(a)(9))” in its place.

[FR Doc. 2011-33417 Filed 12-30-11; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 8, 12, and 16**

**[FAC 2005-55; FAR Case 2009-043; Item IV; Docket 2010-0100, Sequence 1]**

**RIN 9000-AL74**

**Federal Acquisition Regulation; Time-and-Materials and Labor-Hour Contracts for Commercial Items**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Government Accountability Office (GAO) recommendations to: ensure that time-and-materials and labor-hour contracts are used to acquire commercial services only when no other contract type is suitable; and instill

discipline in the determination of contract type with a view toward managing the risk to the Government.

**DATES:** *Effective Date:* February 2, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-55, FAR Case 2009-043.

**SUPPLEMENTARY INFORMATION:****I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 75 FR 59195 on September 27, 2010. The due date for public comments was November 26, 2010.

Eleven comments were received from four respondents. The comments are separated into eight categories, addressed in the following sections.

**II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule.

**A. Summary of Significant Changes**

Changes were made to the proposed rule as a result of the public comments and the publication of FAR Case 2007-012 in the **Federal Register** at 76 FR 14548 on March 16, 2011. Specifically, all text in the proposed rule under FAR 8.405-2(e) has been relocated to FAR 8.404(h). FAR Case 2007-012 strengthened competition requirements for orders placed under the Federal Supply Schedules. As a result, FAR 8.405-2(e)(2)(ii) has been deleted and references to FAR part 12 at FAR subpart 8.4 have been removed.

Additional changes were made during deliberation of the final rule to require these same safeguards on the use of time-and-materials (T&M) and labor-hour (LH) orders for Blanket Purchase Agreements awarded under the Federal Supply Schedule Program.

**B. Analysis of Public Comments**

Respondents submitted comments covering the following seven categories: (1) Cross references; (2) Combine guidance from this case with FAR Case 2007-012; (3) Eliminate redundant material; (4) Clarify contract types; (5) Potential for rule to limit the use of T&M contracts; (6) Requirement for determination and findings at the order level; and (7) Address fixed-price level-of-effort (FP LOE) contracts.

## 1. Cross References

*Comment:* One respondent stated that there is a contradiction between FAR 12.207 and proposed FAR 16.201, which states that the contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items. The respondent recommended revising FAR 16.201 to reference FAR 12.207(b), which states the conditions for use of T&M or LH contracts to acquire commercial services, which are a subset of commercial items.

*Response:* A cross-reference to FAR 12.207(b) has been added at FAR 16.201, to reference the exception to the required use of fixed-price contracts for acquisition of commercial items.

*Comment:* A respondent noted that FAR 8.405–2(e)(2)(ii) would require the contracting officer to follow the competitive procedures at FAR 8.405–2(c), but, in contrast, FAR 12.207(b)(1)(i)(B) provides that procedures for other than full and open competition may be used if the agency receives at least two offers. The respondent believed that it would be consistent with the latter approach to give an agency the discretion to use other than the competitive procedures at FAR 8.405–2(c) if at least two quotes are received for the task order.

*Response:* FAR Case 2007–012, which was published in the **Federal Register** at 76 FR 14548 on March 16, 2011 (FAC 2005–50), provides an interim rule that sets forth the requirements for the use of limited sources and strengthens competition rules in FAR subpart 8.4. FAR 8.405–2(c) does not preclude the acquisition of commercial services under T&M and LH contracts on other than a competitive basis under 8.405–2(c)(3)(i), provided the procedures outlined in FAR 8.405–6 are followed. The references to FAR part 12 in the proposed rule will be deleted.

*Comment:* One respondent stated that, with regard to orders placed under the Federal Supply Schedule program and indefinite-delivery contracts, FAR 12.207(c)(2) references both FAR subparts 8.4 and 16.5, while FAR 12.207(c)(3) references only FAR subpart 16.5. The respondent recommended that, for the sake of clarity, either (a) only FAR 12.207 should include all guidance regarding T&M or LH orders or (b) guidance should be included in both FAR subparts 8.4 and 16.5.

*Response:* It is not necessary to cross-reference to FAR subpart 8.4 at FAR 12.207(c)(3) because the requirement for a determination and findings does not apply to individual orders when the

basic contract allows only for T&M or LH orders, which is not the case for Federal Supply Schedule contracts.

## 2. Combine Guidance From This Case With FAR Case 2007–012

*Comment:* A respondent noted that DoD, GSA, and NASA will be issuing guidance implementing section 863 of the National Defense Authorization Act for FY 2009 and recommended that any guidance regarding the use of T&M or LH orders be included in that rule, not in this case, FAR Case 2009–043. Such an approach, according to the respondent, would provide for clarity in the process and allow for a comprehensive review by all the stakeholders.

*Response:* FAR Case 2007–012 implements a statutory requirement. The basis for FAR Case 2009–043 is not statutory; rather, the case was opened in response to a June 2009 GAO report entitled: “Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program” (GAO–09–579, June 2009). Given the different purposes of the two cases, combining them would not be practical.

## 3. Eliminate Redundant Material

*Comment:* One respondent recommended deletion of the proposed language at FAR 8.405–2(e)(2)(i), which states that a T&M or LH order may only be used when it is not possible to accurately estimate the extent or duration of the work or anticipated costs with any degree of confidence. The respondent stated that the proposed language at FAR 8.405–2(e)(2)(i) is redundant to the proposed language at FAR 8.405–2(e)(4)(ii), which describes the content requirements of a determination and findings that, among other things, it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate the costs with any reasonable degree of certainty.

*Response:* The proposed language at FAR 8.405–2(e)(2)(i) (which has been relocated to FAR 8.404(h)(3)(i)) is not redundant with language at FAR 8.405–2(e)(4)(ii) (which has been relocated to 8.404(h)(3)(iii)(B)).

- The proposed language at FAR 8.405–2(e)(2)(i) (relocated to FAR 8.404(h)(3)(i)) describes one of the policy conditions that must be met before a T&M order may be placed.

- The proposed language at FAR 8.405–2(e)(4)(ii) (relocated to FAR 8.404(h)(3)(iii)(B)) describes the circumstances under which the T&M or LH order may be placed, and FAR

8.405–2(e)(3)(i) (relocated to FAR 8.404(h)(3)(ii)(A)) describes an element of the documentation that must be prepared by the contracting officer to support the decision.

Although the two sections share the same idea and similar words, their separate citations serve two distinct purposes.

## 4. Clarify Contract Types

*Comment:* Two respondents expressed concern that the proposed language at FAR 16.600, which states that T&M and LH contracts are not fixed-price contracts, may create confusion or be taken out of context because it does not state that T&M and LH contracts are not cost-reimbursement contracts. The respondents believe that this could blur the lines between T&M and LH contracts and cost-reimbursement contracts, creating confusion on how to administer T&M and LH contracts and orders. The respondents recommended revising the FAR to clarify the nature of the T&M and LH contracts as a hybrid contract type that is neither fixed-price nor cost-reimbursement but does include elements of each; or to describe the attributes and cross-reference to the applicable FAR subparts.

*Response:* T&M and LH contracts are neither fixed-price contracts nor cost-reimbursement contract types. T&M and LH contracts comprise unique contract types and are described in a separate FAR subpart, 16.6.

This rule addresses the use of T&M and LH contracts for the acquisition of commercial services. The revisions made in this rule are intended to clarify the requirement to use fixed-price contract types for the acquisition of commercial items, unless specific requirements and conditions are documented to support the decision to use the T&M and LH contracts to acquire commercial services, a subset of commercial items.

## 5. Potential for Rule To Limit the Use of T&M Contracts

*Comment:* One respondent expressed concern that the proposed rule could curtail the use of T&M and LH contracts in circumstances where those contract types would be the most advantageous to the Government.

*Response:* There are circumstances warranting the use of T&M and LH contracts and orders. This rule is intended to clarify and appropriately limit their use to those circumstances.

#### 6. Requirement for Determination and Findings at the Order Level

*Comments:* The respondents strongly recommended that the Government reconsider requiring agencies to execute a new determination and findings prior to issuing each T&M or LH order placed under the Federal Supply Schedules program. The respondent noted that Congress has not legislated such an approach. The respondent pointed out that the Federal Acquisition Streamlining Act, as amended, requires issuance of a determination and findings at the contract level, not at the order level.

*Response:* The Federal Acquisition Streamlining Act does require the issuance of a determination and findings at the contract level, but note that a requirement for a determination and findings at the order level is not precluded by that statute. In situations where the basic contract allows for the issuance of individual orders using more than one contract type, the over-reliance on T&M and LH pricing has resulted in increased risk to the Government (see GAO Report 09–579, June 2009). The GAO has recommended this change to FAR subpart 8.4 explicitly to require the same safeguards for the acquisition of commercial services acquired on a T&M or LH basis as required by FAR 12.207 and FAR 16.601(d) (*i.e.*, require a detailed determination and findings stating that no other contract type is suitable). Further, Federal Supply Schedules generally are long-term contracts, and a determination and findings generated at the initiation of a schedule contract may no longer reflect current market conditions. The intent is to ensure that this contract type is used only when no other contract type is suitable and to instill discipline in the determination of contract type with a view toward managing the risk to the Government.

#### 7. Address Fixed-Price Level-of-Effort Contracts

*Comment:* One respondent expressed concern that the proposed language at FAR 16.600 stating T&M and LH contracts are not fixed-price contracts does not clarify the issue or address the fact that what is actually happening is the contracting officer is using a FP LOE contract without the appropriate approval. The respondent recommended adding a definition to FAR part 16 that clearly defines a LOE contract and identifies that a LOE contract type is considered to be either T&M/LH, FP LOE, or a cost-plus term. Otherwise, the respondent thinks contracting officers are likely to read the proposed change

to FAR part 16 as something they already knew and continue calling LOE contracts firm-fixed price.

*Response:* T&M and LH contracts are neither fixed-price contracts nor cost-reimbursement contract types. It is for this reason that the FAR addresses T&M and LH contracts in a separate subpart, FAR subpart 16.6. This rule addresses the use of T&M and LH contracts for commercial items; therefore, the respondent's request to define LOE contracts is outside the scope of this case.

#### C. Other Changes

The Councils have also amended the language proposed for FAR part 8 (now set forth at FAR 8.404(h)(3)(iv)) addressing increases in the ceiling price of T&M contracts to more closely track the language set forth in FAR 12.207(b)(1)(ii)(C). Section 1423 of the Services Acquisition Reform Act of 2003 provides that any change in the ceiling price of a T&M or LH contract is authorized only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change such ceiling price.

The Councils have opened FAR Case 2011–025 for the purpose of considering additional guidance addressing the actions required when raising the ceiling price or otherwise changing the scope of work for a T&M or LH contract or order. The case will consider appropriate guidance to address this issue for the respective parts of the FAR addressing T&M or LH contracts or orders, such as FAR 8.404, FAR 12.207, and FAR 16.601.

#### III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### IV. Regulatory Flexibility Act

The 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 requirements on small entities. An Initial Regulatory Flexibility Analysis was not conducted. No comments were received from small entities in response to the proposed rule.

#### V. Paperwork Reduction Act

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

#### List of Subjects in 48 CFR Parts 8, 12, and 16

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 12, and 16 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 12, and 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).

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

■ 2. Amend section 8.404 by adding paragraph (h) to read as follows:

##### 8.404 Use of Federal Supply Schedules.

\* \* \* \* \*

(h) *Type-of-order preference for services.* (1) The ordering activity shall specify the order type (*i.e.*, firm-fixed price, time-and-materials, or labor-hour) for the services offered on the schedule priced at hourly rates.

(2) Agencies shall use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.

(3)(i) A time-and-materials or labor-hour order may be used for the acquisition of commercial services only when it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.

(ii) Prior to the issuance of a time-and-materials or labor-hour order, the contracting officer shall—

(A) Execute a determination and findings (D&F) for the order, in

accordance with paragraph (h)(3)(iii) of this section that a fixed-price order is not suitable;

(B) Include a ceiling price in the order that the contractor exceeds at its own risk; and

(C) When the total performance period, including options, is more than three years, the D&F prepared in accordance with this paragraph shall be signed by the contracting officer and approved by the head of the contracting activity prior to the execution of the base period.

(iii) The D&F required by paragraph (h)(3)(ii)(A) of this section shall contain sufficient facts and rationale to justify that a fixed-price order is not suitable. At a minimum, the D&F shall—

(A) Include a description of the market research conducted (see 8.404(c) and 10.002(e));

(B) Establish that it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate costs with any reasonable degree of confidence;

(C) Establish that the current requirement has been structured to maximize the use of fixed-price orders (e.g., by limiting the value or length of the time-and-materials/labor-hour order; or, establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and

(D) Describe actions to maximize the use of fixed-price orders on future acquisitions for the same requirements.

(iv) The contracting officer shall authorize any subsequent change in the order ceiling price only upon a determination, documented in the order file, that it is in the best interest of the ordering activity to change the ceiling price.

■ 3. Amend section 8.405–2 by redesignating paragraph (e) as paragraph (f); and adding a new paragraph (e) to read as follows:

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

\* \* \* \* \*

(e) *Use of time-and-materials and labor-hour orders for services.* When placing a time-and-materials or labor-hour order for services, see 8.404(h).

\* \* \* \* \*

■ 4. Amend section 8.405–3 by revising paragraphs (b)(2)(ii) and (c)(3) to read as follows:

**8.405–3 Blanket purchase agreements (BPAs).**

\* \* \* \* \*

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

(ii) *Type-of-order preference.* The ordering activity shall specify the order type (i.e., firm-fixed price, time-and-materials, or labor-hour) for the services identified in the statement of work. The contracting officer should establish firm-fixed priced orders to the maximum extent practicable. For time-and-materials and labor-hour orders, the contracting officer shall follow the procedures at 8.404(h).

\* \* \* \* \*

(c) \* \* \*

(3) *BPAs for hourly-rate services.* If the BPA is for hourly-rate services, the ordering activity shall develop a statement of work for each order covered by the BPA. Ordering activities should place these orders on a firm-fixed price basis to the maximum extent practicable. For time-and-materials and labor-hour orders, the contracting officer shall follow the procedures at 8.404(h). All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

\* \* \* \* \*

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

■ 5. Amend section 12.207 by removing from paragraph (b)(2)(ii) “degree of certainty” and adding “degree of confidence” in its place; and adding paragraph (b)(4) to read as follows:

**12.207 Contract type.**

\* \* \* \* \*

(b) \* \* \*

(4) See 8.404(h) for the requirement for determination and findings when using Federal Supply Schedules.

\* \* \* \* \*

**PART 16—TYPES OF CONTRACTS**

■ 6. Revise section 16.201 to read as follows:

**16.201 General.**

(a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances. The contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items, except as provided in 12.207(b).

(b) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

■ 7. Add section 16.600 to read as follows:

**16.600 Scope.**

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

[FR Doc. 2011–33418 Filed 12–30–11; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 9, 12, 42, and 52**

[FAC 2005–55; FAR Case 2010–016; Item V; Docket 2010–0016, Sequence 1]

RIN 9000–AL94

**Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Supplemental Appropriations Act, 2010. This section requires that the information in the Federal Awardee Performance and Integrity Information System (FAPIS), excluding past performance reviews, shall be made publicly available. The interim rule notified contractors of this new statutory requirement for public access to FAPIS.

**DATES:** *Effective Date:* January 3, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–55, FAR Case 2010–016.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 4188 on January 24, 2011, to

implement section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212).

## II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

### A. General Comments

*Comments:* Several respondents made positive comments about the rule granting public access to the FAPIIS. One respondent stated that this is a most welcome process. One respondent stated that making public the data in FAPIIS will benefit contractors with records of business integrity and performance excellence. Another respondent commented that by making this information public, construction subcontractors will soon be able to evaluate the business ethics and quality of potential contractor clients. According to this respondent, this can reduce risk and save taxpayers millions of dollars.

*Response:* Noted.

*Comments:* On the other hand, some of the respondents are concerned about possible risk associated with making FAPIIS data available to the public.

- One respondent noted that the new proposed rule is over-reaching the purpose for which FAPIIS was initiated. According to the respondent, FAPIIS was designed to do one thing and was approved with comments to the effect that Government contractor sensitive information would not be publicized. The Government is now essentially rescinding this, with the exception of not making “past performance information” available. Further, the respondent feared that it is only a matter of time before the Government also allows the public access to Government contractor “past performance information” and expands FAPIIS in other ways.

- Another respondent pointed out that contractors face a number of risks associated with release of information subject to the Freedom of Information Act (FOIA). In particular, this respondent was concerned that by making FAPIIS public, there is an increased likelihood that contractors could be subject to a False Claims Act litigation on the basis of the certification at FAR 52.209–7(c) (that the information entered into FAPIIS is current, accurate, and complete).

*Response:* This change in FAPIIS was mandated by section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212), enacted by Congress.

With regard to possible litigation under the False Claims Act, as with any FAR contract provision or clause, it is the responsibility of the contractor to ensure that the information being certified is current, accurate, and complete.

The Councils recognize the risk to contractors if the data is made public prior to offering the contractor a chance to review. The rule has been revised to provide to contractors a 7-calendar-day review period to identify information posted in FAPIIS that is covered by a disclosure exemption under the FOIA. The information entered into FAPIIS by the contracting officer or suspension and debarment official will be made publicly available within an additional 7-calendar-day period, unless the contractor asserts to the Government official, who posted the item, that it is protected by a disclosure exemption under FOIA. In such case, the information will be removed by the Government official and the issue resolved in accordance with agency FOIA procedures. If the Government official does not remove the item, it will be automatically released to the public site within 14 calendar days after the review period began.

### B. Make More Data Public

#### 1. Narrow definition of “past performance review”.

*Comment:* One respondent noted that Congress did not define “past performance review” and requested that the Councils define the term very narrowly, in a way that allows all “past performance information” to be made public, except that which proposes a legitimate threat to commercial proprietary or personal privacy interests.

The respondent stated that the Government releases a broad array of past performance information in bid protest decisions, and should do the same with FAPIIS, because this will strengthen efforts to exclude non-responsible contractors.

*Response:* This FAR case uses the definition of “past performance” in FAR part 2 and the discussion of contractor performance information in FAR subpart 42.15, including “past performance evaluations” and “past performance reports” that are entered into the Past Performance Information Retrieval System (PPIRS) as a result of past performance evaluations. This coverage of past performance was in the FAR when Congress passed Public Law

111–212 and section 3010 specifically excludes “past performance reviews.”

The FAR Council published a proposed rule, FAR Case 2009–042, Documenting Contractor Performance, in the **Federal Register** at 76 FR 37704 on June 28, 2011, with public comments due on September 29, 2011, that clarified “past performance information”—see <http://edocket.access.gpo.gov/2011/pdf/2011-16169.pdf>. The language in FAR Case 2009–042 has been updated to reference the part of FAR subpart 42.15 related to “past performance.”

The Councils also note that the Government Accountability Office allows a party to request redaction of “past performance information” prior to the release of a bid protest decision.

#### 2. Release data entered prior to April 15, 2011.

*Comments:* One respondent opposed the new regulation regarding information entered into FAPIIS before April 15, 2011. Specifically, FAR 52.209–9 provides that information posted in FAPIIS prior to April 15, 2011, will not be publicly disclosed, except by request submitted under FOIA. Due to the respondent’s concern about the shortcomings of the FOIA process, the respondent requested that all data posted prior to April 15, 2011, be made available to the public without requiring requests through FOIA.

*Response:* The data posted in FAPIIS prior to April 15, 2011, cannot be made publicly available because the final rule, FAR Case 2008–027, published in the **Federal Register** at 75 FR 14059, effective April 22, 2010, included a statement in paragraph (b)(3) of FAR 52.209–8, Updates of Information Regarding Responsibility Matters, that “(w)ith the exception of the Contractor, only Government personnel and authorized users performing business on behalf of the Government will be able to view the Contractor’s record in the system.” The paragraph continued with the statement that public requests for system information would be handled under the FOIA procedures. After section 3010 was enacted, the Government began to plan the transition to making the data in FAPIIS available to the public. The Councils concluded that it was not appropriate to make information publicly available that the Government contractually committed that it would only release in accordance with the procedures of FOIA.

The Councils took every feasible action to make the maximum amount of data publicly available, without violating the contractual commitments made by the Government in contracts containing FAR 52.209–8.

### C. Protection of Data That Should Not Be Released

#### 1. Include in the FAR specific prohibition against entry of inappropriate data in FAPIIS.

*Comment:* Several respondents were concerned about lack of sufficient guidance in the interim rule on the scope of information to be withheld. Several respondents recommended that the rule should explicitly prohibit the contracting officer from posting information in FAPIIS that is protected by a disclosure exemption under FOIA. According to one respondent, the rule should list the FOIA exemptions, specifically instruct contracting officers to redact information protected by FOIA, and further instruct contracting officers to consult a FOIA expert to resolve questions regarding the applicability of an exemption.

Another respondent requested that the FAR should expressly state that additional information not identified in FAR 9.104–6 cannot be posted in the publicly available iteration of FAPIIS.

*Response:* The Councils have revised the final rule, at FAR 9.105–2(b)(2)(iv) and 52.209–9(c)(1), to prohibit contracting officers from posting information in FAPIIS that is protected by a disclosure exemption under FOIA. To alleviate errors or oversights, the FAR text points to the FOIA exemptions and allows the agencies' FOIA officers to determine the applicable exemption relevant to their situation. It is not customary practice to list all the FOIA exemptions in the FAR, as they are readily available in the Department of Justice Guide to the Freedom of Information Act (2009 Edition) at [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm) or at agencies' FOIA Office Web sites.

#### 2. Allow contractors to review before making public.

*Comment:* Several respondents recommended that the interim rule should be revised to allow contractors to review information that will be posted to FAPIIS for public review prior to its release.

Several respondents stated that privacy rights could be irreparably impaired, and proprietary information could be irreparably lost as a result of release to the public through FAPIIS, even if the data is later removed.

One respondent stated that contractors should be allowed to determine if any of the information might be protected from release under FOIA, thus allowing contractors to request redaction of properly FOIA-protected information.

Another respondent requested time to review the data both to ensure accuracy

and completeness, as well as to ensure that it does not violate the requirement to protect proprietary information. This respondent stated that publicly posting proprietary information or inaccurate or incomplete information is not quantifiable and there is no remedy that can adequately address the contractor's losses.

Another respondent noted that the Councils have recognized the importance of allowing contractors the opportunity to respond to information in FAPIIS before the Government acts on that information. FAR 9.104–6 entitles an offeror to present additional information to demonstrate responsibility after a contracting officer identified "relevant information" in FAPIIS.

Several respondents requested periods varying from 30 days to 60 days to review the information before it is made public, although the respondent that requested 60 days noted that the FAR currently allows the contractor only 30 days to respond to past performance information in PPIRS.

Another respondent believed that this approach should not require major changes to the system. The respondent suggested that when the information is first entered into FAPIIS, it could be quarantined in the "non-public" iteration of FAPIIS, similar to past performance information.

*Response:* The Councils have revised the final rule, at FAR 9.105–2(b)(2) and 52.209(c), to allow contractors 7 calendar days to review information posted to FAPIIS before that information is made available to the public. A notice is sent to the contractor whenever information is entered into the system about that contractor. If contractors assert to the Government, within 7 calendar days, that information has been posted that is covered by a disclosure exemption under FOIA, the information will be removed while the agency resolves the issue in accordance with agency FOIA procedures.

#### 3. Allow submission of two versions—redacted for public and unredacted for Government.

*Comment:* One respondent recommended that two versions of the information should be submitted—a complete version for the Government, and a redacted version for the public.

*Response:* The statute requires that all information in FAPIIS, other than information on "past performance reviews," must be made available to the public. Therefore, submission of two different versions would not meet the statutory requirement.

#### 4. Include systems protections so that past performance data is not inadvertently made public.

*Comment:* One respondent recommended that the FAR Council should coordinate with the FAPIIS Program Manager to take all the appropriate steps from a system architecture/controls standpoint to preclude the public disclosure (advertent or inadvertent) of "past performance information." According to the respondent, this should include systemic protections that make it impossible to post "past performance information" to the publicly-available iteration of FAPIIS.

*Response:* The structure of FAPIIS ensures that "past performance reviews" (as described in FAR subpart 42.15) will not be inadvertently released. Past performance information is stored in a completely separate module from the other information in FAPIIS. There is no connection between the past performance module and the public Web site for FAPIIS. This assurance was provided by the Contractor Performance Assessment Reporting System/PPIRS Program Manager and the FAPIIS Program Manager.

### D. Ensure That Data Is Timely and Accurate

#### 1. Timeliness.

*Comment:* One respondent recommended that the FAR should assign responsibility to a particular Government official to timely remove stale information from FAPIIS.

*Response:* All information in FAPIIS is marked with the date of the occurrence. In response to search requests, FAPIIS only provides access to information that is dated within five years of the date of the request.

#### 2. Accuracy.

*Comment:* One respondent stated that the FAR should require contracting officers and suspension and debarment officials (SDOs) to validate the accuracy of information before inputting into FAPIIS.

*Response:* The procedures at FAR 9.406–3(f) and 9.407–3(e) already require that the SDOs are responsible for the accuracy of the documentation entered into FAPIIS regarding an administrative agreement to resolve a debarment or suspension proceeding. The Councils have revised the rule at FAR 9.105–2(b)(2)(ii) and 42.1503(f)(1) to make the contracting officer/agency responsible for the accuracy of agency data entered into FAPIIS.

### E. Technical Recommendations

#### 1. Include FAR 52.209–9 in the list at FAR 52.212–5.

*Comment:* Two respondents suggested that FAR 52.209–9, Updates to Publicly Available Information Regarding Responsibility Matters, should be added to the list of clauses incorporated as part of FAR 52.212–5 (at paragraph (b)) for FAR part 12 commercial item acquisitions. Another respondent noted that, if the clause is not included in FAR 52.212–5, it may be inadvertently omitted.

*Response:* The change has been made in the final rule by listing FAR 52.209–9 under FAR 52.212–5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

#### 2. Allow incorporation of clause by reference.

*Comment:* A respondent noted that the FAR matrix now requires that both FAR 52.209–9 and its Alternate be incorporated in full text. The respondent commented that both the clause and its alternate should be available for incorporation into contracts by reference.

*Response:* The change has been incorporated into the FAR provision and clause matrix under FAR subpart 52.3, Provision and Clause Matrix, available for review at [https://www.acquisition.gov/far/current/html/52\\_300.html#wp1077611](https://www.acquisition.gov/far/current/html/52_300.html#wp1077611).

#### 3. Designate contractor point of contact to receive notification of entry into FAPIIS.

*Comment:* One respondent stated that FAR 52.209–9(b)(1) does not specify who in the contractor's organization will be notified when new information is posted. The respondent recommended that the FAR should designate the contractor's Central Contractor Registration (CCR) point of contact as the person who will receive all notification related to the Government posting new information on the contractor's record.

*Response:* If the contractor specifies a past performance point of contact in its CCR record, then the notification goes to the specified point of contact. At the contractor's discretion, this past performance point of contact's email address can be a single individual or a common email address that multiple individuals in the company can access. If the contractor does not specify a past performance point of contact, then the notification is sent to the contractor's Government business point of contact, which is a mandatory field in CCR.

#### 4. Allow larger field in FAPIIS for contractor comments.

*Comment:* One respondent requested a larger field to enter contractor comments.

*Response:* The field currently allows 1000 characters per entry. As a result of the public comments, the FAPIIS Program Manager doubled the available characters to 2000 and this change is effective now.

### F. Requests for Further Rulemaking (Outside the Scope of This Rule)

#### 1. Make training and guidance subject to rulemaking.

*Comment:* Two respondents were concerned about the statements in the preamble to the final FAPIIS rule under FAR Case 2008–027 that policies and guidance would be developed to ensure the timely and accurate input of information into the FAPIIS database. Further, the Councils would work with the FAPIIS Program Manager, the Federal Acquisition Institute, and the Defense Acquisition University to develop guidance for contracting officials and suspension and debarment officials. The respondent was concerned that training, policies, and guidance to contracting officers and SDOs will, in effect, provide further direction regarding what constitutes proper input, accuracy, and timeliness. The respondent believed that this guidance will supplement and clarify FAPIIS data requirements. Therefore, according to the respondent, it should be published in the **Federal Register** so that all impacted parties may provide input.

Another respondent was also concerned that the clear direction to the contracting officer should be included in the FAR, rather than in subsequent training and informal guidance. This respondent stated that the final FAPIIS rule did not go far enough, and recommended additional changes to the FAR to clarify what information is relevant to responsibility determinations and past performance evaluations. The respondent also wanted the FAR to make clear that not all information in FAPIIS will be relevant to a contractor's past performance.

*Response:* The FAR includes direction to the contracting officer about the FAPIIS requirement and relevancy of that information. The FAPIIS training will not include new policies, but rather procedures on how to comply with existing FAR policies and guidance. The current FAPIIS training overview is available at <http://www.fai.gov/FAPIIS/trailer/module.htm> for the public to view. Follow-on training will also be publicly available later this year.

#### 2. Provide more regulation on contractor reporting obligations.

*Comment:* One respondent had comments that relate to clear definition of "reportable outcomes." This respondent provided a list of items that should be excluded from the database and a list of items that should be reportable.

Another respondent contended that the reporting obligations of the FAPIIS regulations are unclear, addressing the need for guidance relating to clarifying "the Offeror, and/or any of its principals," "within the last five years," "in connection with a Federal contract or grant," "administrative proceeding," and "consent or compromise."

*Response:* This FAR case was established to implement section 3010, which required information in FAPIIS, excluding "past performance reviews," to be publicly available.

Any further definition of reportable outcomes or guidance on reporting requirements would require publication of a new rulemaking for public comment.

#### 3. Get public comments before adding any new data elements to FAPIIS or change databases that feed into FAPIIS.

*Comment:* One respondent wanted to ensure that the Councils will get public comments before adding any new data elements to FAPIIS or changing databases that feed into FAPIIS.

*Response:* Addition of new data elements to FAPIIS would require further rulemaking for public comment.

#### 4. Update to FAPIIS.

*Comment:* One respondent stated that the Councils should clarify the requirement to update FAPIIS information on a semi-annual basis.

*Response:* Additional clarification is not necessary. FAR clause 52.209–9, Updates of Publicly Available Information Regarding Responsibility Matters, tells contractors that they are required to update the information in the FAPIIS on a semi-annual basis, throughout the life of the contract.

### G. Deadline

#### 1. Display pilot run before deadline.

*Comment:* One respondent requested to see a pilot run of the FAPIIS format and the program before it is officially "rolled out."

*Response:* The statute did not provide for a delay in implementation; therefore, FAPIIS is now available to the public at <https://fapiis.ppirs.gov>.

#### 2. Postpone deadline until all issues resolved.

*Comment:* Two respondents requested that the deadline of April 15, 2011, be postponed until certain issues can be resolved (see issues identified in section II.F. of this preamble). Both respondents pointed out that Congress did not

mandate that FAPIIS be made available to the public on a particular date. One respondent concluded that it is implicit that Congress intended for the Councils to take the time necessary to “get it right.”

*Response:* The statute did not provide for any delay in implementation. In the interest of transparency in Government contracting, the Councils implemented the FAR changes and system changes to provide direction to Government and contractor personnel in a timely manner to align with the statute.

### III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### IV. Regulatory Flexibility Act

The 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 this rule just notifies the contractors that the public will have access to the database. The rule does not impose any additional burdens on small entities. The interim rule made editorial changes to FAR 52.209–7 and transferred the information collection requirement from FAR 52.209–8 to a new clause at FAR 52.209–9.

In response to public comments, the final rule allows a 14-calendar-day delay before making the data available to the public. Contractors have 7 calendar days within those 14 calendar days to assert a disclosure exemption under the Freedom of Information Act. In addition, the FAPIIS system has been modified to allow more space for contractor comments. The rule does not impose any new requirements on small businesses.

Therefore, a Final Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA did not receive any comments relating to impact on small entities.

### V. Paperwork Reduction Act

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

### List of Subjects in 48 CFR Parts 1, 9, 12, 42, and 52

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

### Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 1, 9, 12, 42, and 52, which was published in the **Federal Register** at 76 FR 4188 on January 24, 2011, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 1, 9, 12, 42, and 52 continues to read as follows:

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

### PART 9—CONTRACTOR QUALIFICATIONS

■ 2. Amend section 9.104–7 by adding paragraph (c) to read as follows:

#### 9.104–7 Solicitation provisions and contract clauses.

\* \* \* \* \*

(c) The contracting officer shall insert the clause at 52.209–9, Updates of Publicly Available Information Regarding Responsibility Matters—

(1) In solicitations where the resultant contract value is expected to exceed \$500,000; and

(2) In contracts in which the offeror checked “has” in paragraph (b) of the provision at 52.209–7.

\* \* \* \* \*

■ 3. Amend section 9.105–2 by revising paragraph (b)(2)(ii); and adding paragraphs (b)(2)(iii) and (b)(2)(iv) to read as follows:

#### 9.105–2 Determinations and documentation.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) The contracting officer is responsible for the timely submission,

within 3 working days, and sufficiency, and accuracy of the documentation regarding the nonresponsibility determination.

(iii) As required by section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212), all information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available. FAPIIS consists of two segments—

(A) The non-public segment, into which Government officials and contractors post information, which can only be viewed by—

(1) Government personnel and authorized users performing business on behalf of the Government; or

(2) An offeror or contractor, when viewing data on itself; and

(B) The publicly-available segment, to which all data in the non-public segment of FAPIIS is automatically transferred after a waiting period of 14 calendar days, except for—

(1) Past performance reviews required by subpart 42.15;

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with paragraph (b)(2)(iv) of this section.

(iv) The contracting officer, or any other Government official, shall not post any information in the non-public segment of FAPIIS that is covered by a disclosure exemption under the Freedom of Information Act. If the contractor asserts within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of FAPIIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must within 7 calendar days remove the posting from FAPIIS and resolve the issue in accordance with agency Freedom of Information Act procedures, prior to reposting the releasable information.

■ 4. Amend section 9.406–3 by adding paragraph (f)(3) to read as follows:

#### 9.406–3 Procedures.

\* \* \* \* \*

(f) \* \* \*

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the debarring official shall follow the procedures at 9.105–2(b)(2)(iv).

■ 5. Amend section 9.407–3 by adding paragraph (e)(3) to read as follows:

9.407-3 Procedures.

\* \* \* \* \*

(e) \* \* \*

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending official shall follow the procedures at 9.105-2(b)(2)(iv).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.301 [Amended]

■ 6. Amend section 12.301 by removing paragraph (d)(4).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 7. Amend section 42.1503 by revising the introductory text of paragraph (f)(1); and adding paragraph (f)(3) to read as follows:

42.1503 Procedures.

\* \* \* \* \*

(f) \* \* \*

(1) Agencies shall ensure information is accurately reported in the FAPIIS module of PPIRS within 3 calendar days after a contracting officer—

\* \* \* \* \*

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the contracting officer shall follow the procedures at 9.105-2(b)(2)(iv).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.209-9 by revising the date of the clause and paragraph (b); and adding paragraphs (c) and (d) to read as follows:

52.209-9 Updates of Publicly Available Information Regarding Responsibility Matters.

\* \* \* \* \*

Updates of Publicly Available Information Regarding Responsibility Matters (JAN 2012)

\* \* \* \* \*

(b) As required by section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212), all information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available. FAPIIS consists of two segments—

(1) The non-public segment, into which Government officials and the Contractor post information, which can only be viewed by—

(i) Government personnel and authorized users performing business on behalf of the Government; or

(ii) The Contractor, when viewing data on itself; and

(2) The publicly-available segment, to which all data in the non-public segment of FAPIIS is automatically transferred after a waiting period of 14 calendar days, except for—

(i) Past performance reviews required by subpart 42.15;

(ii) Information that was entered prior to April 15, 2011; or

(iii) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with paragraph (c)(1) of this clause.

(c) The Contractor will receive notification when the Government posts new information to the Contractor's record.

(1) If the Contractor asserts in writing within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of FAPIIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must within 7 calendar days remove the posting from FAPIIS and resolve the issue in accordance with agency Freedom of Information procedures, prior to reposting the releasable information. The contractor must cite 52.209-9 and request removal within 7 calendar days of the posting to FAPIIS.

(2) The Contractor will also have an opportunity to post comments regarding information that has been posted by the Government. The comments will be retained as long as the associated information is retained, i.e., for a total period of 6 years. Contractor comments will remain a part of the record unless the Contractor revises them.

(3) As required by section 3010 of Pub. L. 111-212, all information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available.

(d) Public requests for system information posted prior to April 15, 2011, will be handled under Freedom of Information Act procedures, including, where appropriate, procedures promulgated under E.O. 12600.

(End of clause)

■ 9. Amend section 52.212-5 by revising the date of the clause; and redesignating paragraphs (b)(7) through (b)(50) as (b)(8) through (b)(51), respectively; and adding new (b)(7) to read as follows:

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

\* \* \* \* \*

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2012)

\* \* \* \* \*

(b) \* \* \*

(7) 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters (JAN 2012) (41 U.S.C. 2313).

\* \* \* \* \*

[FR Doc. 2011-33420 Filed 12-30-11; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 52

[FAC 2005-55; FAR Case 2010-005; Item VI; Docket 2010-0005, Sequence 1]

RIN 9000-AM00

Federal Acquisition Regulation; Updated Financial Accounting Standards Board Accounting References

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to update references to authoritative accounting standards owing to the Financial Accounting Standards Board's Accounting Standards Codification of Generally Accepted Accounting Principles.

DATES: Effective Date: February 2, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-55, FAR Case 2010-005.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 76 FR 8989 on February 16, 2011, to update the references based upon the Financial Accounting Standards Board's (FASB) Statement Number 168 which stated that the FASB Accounting Standards Codification (ASC) would become the source of authoritative U.S. Generally Accepted Accounting Principles (GAAP) recognized by the FASB to be applied to nongovernmental entities. The revisions are intended to have no effect other than to simply replace the superseded references with

updated references. The Regulatory Secretariat received one response to the proposed rule.

**II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council reviewed the public comment in the development of the final rule. A discussion of the comment follows:

*Executive Compensation Reporting*

*Comment:* The respondent inquired if the executive compensation reporting language applied to private companies that through the normal course of business have no interest in disclosing this information to the public/Government.

*Response:* This comment is outside the scope of this case, which was limited to simply replacing superseded FAR references with updated references. FAR 4.1403 delineates which Government contracts require the reporting of executive compensation (FAR clause 52.204–10).

**III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**IV. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule makes administrative changes only by merely updating references to authoritative accounting standards owing to the Financial Accounting Standard Board’s Accounting Standards Codification of Generally Accepted Accounting Principles.

**V. Paperwork Reduction Act**

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

**List of Subjects in 48 CFR Parts 31 and 52**

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 31 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 31 and 52 continues to read as follows:

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

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

■ 2. Amend section 31.205–11 by revising the introductory text of paragraph (h) to read as follows:

**31.205–11 Depreciation.**

\* \* \* \* \*

(h) A “capital lease,” as defined in Financial Accounting Standards Board’s Accounting Standards Codification (FASB ASC) 840, Leases, is subject to the requirements of this cost principle. (See 31.205–36 for Operating Leases.) FASB ASC 840 requires that capital leases be treated as purchased assets, *i.e.*, be capitalized, and the capitalized value of such assets be distributed over their useful lives as depreciation charges or over the leased life as amortization charges, as appropriate, except that—

\* \* \* \* \*

■ 3. Amend section 31.205–36 by revising paragraph (a) to read as follows:

**31.205–36 Rental costs.**

(a) This subsection is applicable to the cost of renting or leasing real or personal property acquired under “operating leases” as defined in Financial Accounting Standards Board’s Accounting Standards Codification (FASB ASC) 840, Leases. (See 31.205–11 for Capital Leases.)

\* \* \* \* \*

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

■ 4. Amend section 52.204–10 by revising the date of the clause, and in

paragraph (a), in the definition “Total compensation”, revising paragraph (2) to read as follows:

**52.204–10 Reporting Executive Compensation and First-Tier Subcontract Awards.**

\* \* \* \* \*

**Reporting Executive Compensation and First-Tier Subcontract Awards (FEB 2012)**

\* \* \* \* \*

*Total compensation* \* \* \*

(2) *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Financial Accounting Standards Board’s Accounting Standards Codification (FASB ASC) 718, Compensation-Stock Compensation.

\* \* \* \* \*

■ 5. Amend section 52.212–5 by revising the date of the clause and paragraph (b)(4) to read as follows:

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

\* \* \* \* \*

**Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (FEB 2012)**

\* \* \* \* \*

(b) \* \* \*

(4) 52.204–10, Reporting Executive Compensation and First-Tier Subcontract Awards (Feb 2012) (Pub. L. 109–282) (31 U.S.C. 6101 note).

\* \* \* \* \*

■ 6. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(i) to read as follows:

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

\* \* \* \* \*

**Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (FEB 2012)**

(a) \* \* \*

(2) \* \* \*

(i) 52.204–10, Reporting Executive Compensation and First-Tier Subcontract Awards (FEB 2012) (Pub. L. 109–282) (31 U.S.C. 6101 note).

\* \* \* \* \*

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Parts 4, 8, 15, 19, 22, 23, 28,  
42, and 52**

[FAC 2005–55; Item VII; Docket 2011–0078;  
Sequence 4]

**Federal Acquisition Regulation;  
Technical Amendments**

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

**ACTION:** Final rule.

**SUMMARY:** This document makes  
amendments to the Federal Acquisition  
Regulation (FAR) in order to make  
editorial changes.

**DATES:** *Effective Date:* January 3, 2012.

**FOR FURTHER INFORMATION CONTACT:** The  
Regulatory Secretariat, 1275 First Street  
NE., 7th Floor, Washington, DC 20417,  
(202) 501–4755, for information  
pertaining to status or publication  
schedules. Please cite FAC 2005–55,  
Technical Amendments.

**SUPPLEMENTARY INFORMATION:** In order to  
update certain elements in 48 CFR parts  
4, 8, 15, 19, 22, 23, 28, 42, and 52, this  
document makes editorial changes to  
the FAR.

**List of Subjects in 48 CFR Parts 4, 8, 15,  
19, 22, 23, 28, 42, and 52**

Government procurement.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide  
Acquisition Policy, Office of Acquisition  
Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA  
amend 48 CFR parts 4, 8, 15, 19, 22, 23,  
28, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR  
parts 4, 8, 15, 19, 22, 23, 28, 42, and 52  
continues to read as follows:

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

**PART 4—ADMINISTRATIVE MATTERS****4.603 [Amended]**

■ 2. Amend section 4.603 by removing  
from paragraph (c) “[http://csrc.nist.gov/  
publications/nistpubs/800-87/sp800-87-  
Final.pdf](http://csrc.nist.gov/publications/nistpubs/800-87/sp800-87-Final.pdf)” and adding “[http://  
www.nist.gov/publication-portal.cfm](http://www.nist.gov/publication-portal.cfm)” in  
its place.

**PART 8—REQUIRED SOURCES OF  
SUPPLIES AND SERVICES****8.402 [Amended]**

■ 3. Amend section 8.402 by—  
■ a. Removing from paragraph (c)(1)  
“<http://www.gsa.gov/fss>” and adding  
“<http://www.gsa.gov/fas>” in its place;  
and  
■ b. Removing from paragraph (e)  
“<http://www.fsstraining.gsa.gov>” and  
adding “<http://www.gsa.gov/training>” in  
its place.

**8.405–5 [Amended]**

■ 4. Amend section 8.405–5 by  
removing from paragraph (c) “[http://  
www.gsa.gov/fss](http://www.gsa.gov/fss)” and adding “[http://  
www.gsa.gov/fas](http://www.gsa.gov/fas)” in its place.

**8.703 [Amended]**

■ 5. Amend section 8.703 by removing  
“<http://abilityone.gov/index.html>” and  
adding “[http://www.abilityone.gov.](http://www.abilityone.gov)” in  
its place.

**PART 15—CONTRACTING BY  
NEGOTIATION****15.402 [Amended]**

■ 6. Amend section 15.402 by removing  
from paragraph (a)(2) “15.403–4,  
obtain” and adding “15.403–4, shall  
obtain” in its place.

■ 7. Amend section 15.403–1 by  
revising paragraph (c)(1)(ii)(B) to read as  
follows:

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

\* \* \* \* \*  
(c) \* \* \*  
(1) \* \* \*  
(ii) \* \* \*

(B) The determination that the  
proposed price is based on adequate  
price competition and is reasonable has  
been approved at a level above the  
contracting officer; or  
\* \* \* \* \*

**PART 19—SMALL BUSINESS  
PROGRAMS****19.102 [Amended]**

■ 8. Amend section 19.102 by removing  
from paragraph (f)(4) “[http://  
www.sba.gov/gc](http://www.sba.gov/gc)” and adding “[http://  
www.sba.gov/content/class-waivers](http://www.sba.gov/content/class-waivers)” in its  
place.

**19.402 [Amended]**

■ 9. Amend section 19.402 by removing  
from paragraph (a)(2) “[http://  
www.sba.gov/GC/PCR.html](http://www.sba.gov/GC/PCR.html)” and adding  
“[http://www.sba.gov/content/  
procurement-center-representatives](http://www.sba.gov/content/procurement-center-representatives)” in  
its place.

**PART 22—APPLICATION OF LABOR  
LAWS TO GOVERNMENT  
ACQUISITIONS****22.404–1 [Amended]**

■ 10. Amend section 22.404–1 by  
removing from paragraph (a)(2) “[http://  
www.dol.gov/esa](http://www.dol.gov/esa)” and adding “[http://  
www.wdol.gov](http://www.wdol.gov)” in its place.

**22.1304 [Amended]**

■ 11. Amend section 22.1304 by  
removing from paragraph (a) “[http://  
www.vets100.com/login.aspx](http://www.vets100.com/login.aspx)” and  
adding “[https://webapps.dol.gov/  
vets100](https://webapps.dol.gov/vets100)” in its place.

**22.1306 [Amended]**

■ 12. Amend section 22.1306 by  
removing from paragraph (b) “[http://  
vets100.vets.dol.gov](http://vets100.vets.dol.gov)” and adding  
“<https://webapps.dol.gov/vets100>” in its  
place.

**PART 23—ENVIRONMENT, ENERGY  
AND WATER EFFICIENCY,  
RENEWABLE ENERGY  
TECHNOLOGIES, OCCUPATIONAL  
SAFETY, AND DRUG-FREE  
WORKPLACE****23.205 [Amended]**

■ 13. Amend section 23.205 by  
removing from paragraph (c)(1) “[http://  
www.eren.doe.gov/femp/resources/  
legislation.html](http://www.eren.doe.gov/femp/resources/legislation.html)” and adding “[http://  
www1.eere.energy.gov/femp/financing/  
espcs\\_regulations.html](http://www1.eere.energy.gov/femp/financing/espcs_regulations.html)” in its place.

**23.401 [Amended]**

■ 14. Amend section 23.401 by  
removing from paragraph (a)(2) “[http://  
www.epa.gov/epaoswer/non-hw/  
procure/backgrnd.htm](http://www.epa.gov/epaoswer/non-hw/procure/backgrnd.htm)” and adding  
“[http://www.epa.gov/epawaste/  
conserves/tools/cpg/index.htm](http://www.epa.gov/epawaste/conserves/tools/cpg/index.htm)” in its  
place.

**PART 28—BONDS AND INSURANCE****28.203–3 [Amended]**

■ 15. Amend section 28.203–3 by  
removing from paragraph (a)(1) “[http://  
www.usdoj.gov/enrd/  
2001\\_Title\\_Standards.html](http://www.usdoj.gov/enrd/2001_Title_Standards.html)” and adding  
“[http://www.justice.gov/enrd/  
ENRD\\_Assets/  
Title\\_Standards\\_2001.pdf](http://www.justice.gov/enrd/ENRD_Assets/Title_Standards_2001.pdf)” in its place.

**PART 42—CONTRACT  
ADMINISTRATION AND AUDIT  
SERVICES**

■ 16. Amend section 42.203 by revising  
the last sentence to read as follows:

**42.203 Contract administration services  
directory.**

\* \* \* For additional information  
contact—Defense Contract Management

Agency, 3901 A Avenue, Building 10500, Ft. Lee, VA 23801-1809.

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

**52.202-1 [Amended]**

■ 17. Amend section 52.202-1 by revising the date of the clause to read (Jan 2012); and by removing from paragraph (b) “<http://www.acqnet.gov>” and adding “<http://www.acquisition.gov/far>” in its place.

**52.212-3 [Amended]**

■ 18. Amend section 52.212-3 by removing from Alternate II “(Apr 2011)” and adding “(Jan 2012)” in its place; and by removing from paragraph (iii) “<http://www.arnet.gov/References/sdbadjustments.htm>” and adding “<http://www.acquisition.gov/References/sdbadjustments.htm>” in its place.

**52.219-22 [Amended]**

■ 19. Amend section 52.219-22 by removing from Alternate I “(Apr 2011)” and adding “(Jan 2012)” in its place; and by removing from paragraph (3) “<http://www.arnet.gov/References/sdbadjustments.htm>” and adding “<http://www.acquisition.gov/>”

*References/sdbadjustments.htm*” in its place.

**52.228-11 [Amended]**

■ 20. Amend section 52.228-11 by revising the date of the clause to read (Jan 2012); and by removing from paragraph (b)(2)(i) “[http://www.usdoj.gov/enrd/2001\\_Title\\_Standards.html](http://www.usdoj.gov/enrd/2001_Title_Standards.html)” and adding “[http://www.justice.gov/enrd/ENRD\\_Assets/Title\\_Standards\\_2001.pdf](http://www.justice.gov/enrd/ENRD_Assets/Title_Standards_2001.pdf)” in its place.

[FR Doc. 2011-33424 Filed 12-30-11; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2011-0077, Sequence 7]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-55; Small Entity Compliance Guide**

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

and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2005-55, which amends the Federal Acquisition Regulation (FAR).

Interested parties may obtain further information regarding this rule by referring to FAC 2005-55, which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**DATES:** January 3, 2012.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005-55 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

**LIST OF RULES IN FAC 2005-55**

Item	Subject	FAR case	Analyst
I	Preventing Abuse of Interagency Contracts	2008-032	Sakalos.
II	Transition to the System for Award Management (SAM)	2011-021	Loeb.
III	Brand-Name Specifications	2005-037	Clark.
IV	Time-and-Materials and Labor-Hour Contracts for Commercial Items	2009-043	Sakalos.
V	Public Access to the Federal Awardee Performance and Integrity Information System	2010-016	Loeb.
VI	Updated Financial Accounting Standards Board Accounting References	2010-005	Chambers.
VII	Technical Amendments.		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item numbers and subject set forth in the documents following these item summaries. FAC 2005-55 amends the FAR as specified below:

**Item I—Preventing Abuse of Interagency Contracts (FAR Case 2008-032)**

This rule adopts as final, with changes, an interim rule that implemented section 865, Preventing Abuse of Interagency Contracts, of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). This final rule further amends FAR subpart 17.5 to make it clear that this rule only applies to

interagency acquisitions when an agency needing supplies or services obtains them using another agency’s contract; or when an agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order. A business case analysis must be developed for the establishment and renewal of governmentwide acquisition contracts as well as for multi-agency contracts. Additionally, FAR 35.017 clarifies determination requirements when using a Federally Funded Research and Development Center. This rule does not impose any information collection requirements on small businesses. There is no significant impact on small businesses because this rule is only applicable to internal

operating procedures of the Government.

**Item II—Transition to the System for Award Management (SAM) (FAR Case 2011-021)**

The Integrated Acquisition Environment (IAE) systems are being transitioned to a new System for Award Management (SAM) architecture. This effort will transition the Central Contractor Registration (CCR) database, the Excluded Parties Listing System (EPLS), and the Online Representations and Certifications Application (ORCA) to SAM. The FAR change will indicate that these IAE systems and the Disaster Response Registry will now be accessed through <http://www.acquisition.gov>. This rule will not significantly affect small business, as the only impact on the public will be the Web site address

that offerors/contractors will need to use.

**Item III—Brand-Name Specifications (FAR Case 2005–037)**

This final rule adopts, with changes, the interim rule that amended the FAR to fully implement Office of Management and Budget memoranda and policies on the use of brand-name specifications. The final rule clarifies that when applicable, the documentation or justification and posting requirements for brand name items only apply to the portion of the acquisition that requires the brand name item. The final rule also adds a requirement to screen the brand name documentation or justification for contractor proprietary data. Further, the final rule requires the contracting officer to post the justifications for an order peculiar to one manufacturer under indefinite-delivery contracts. The rule will benefit small business entities by providing the opportunity for review of brand-name justification and approval documents for contracts and orders awarded noncompetitively, thereby increasing the opportunity for competition for future awards.

**Item IV—Time-and-Materials and Labor-Hour Contracts for Commercial Items (FAR Case 2009–043)**

This final rule amends the FAR to implement recommendations from the Government Accountability Office to: (1) Ensure that time-and-materials (T&M) and labor-hour (LH) contracts are used to acquire commercial services only when no other contract type is

suitable, and (2) instill discipline in the determination of contract type with a view toward managing the risk to the Government. The requirement for a determination and findings when no other contract type is suitable is added to FAR 8.404, Use of Federal Supply Schedules. FAR 8.404 has also been amended to address increases in the order ceiling price of T&M and LH contracts, to more closely conform to the language at FAR 12.207. In addition, FAR 16.201 is modified and FAR 16.600 is added to clarify that T&M and LH contracts are not types of fixed-price contracts. This rule will not have a significant economic impact on a substantial number of small entities.

**Item V—Public Access to the Federal Awardee Performance and Integrity Information System (FAR Case 2010–016)**

This rule adopts as final, with changes, an interim rule. The interim rule implemented section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212), enacted July 29, 2010. Section 3010 requires that the information in the Federal Awardee Performance and Integrity Information System (FAPIS), excluding past performance reviews, shall be made publicly available. The interim rule notified contractors of this new statutory requirement for public access to FAPIS.

In response to public comments, the final rule allows a 14-calendar-day delay before making the data available to the public. Contractors have 7

calendar days within those 14 calendar days to assert a disclosure exemption under the Freedom of Information Act. In addition, the FAPIS system has been modified to allow more space for contractor comments. The rule does not impose any new requirements on small businesses.

**Item VI—Updated Financial Accounting Standards Board Accounting References (FAR Case 2010–005)**

This final rule amends the FAR sections 31.205–11, 31.205–36, 52.204–10, 52.212–5, and 52.213–4 to update references to authoritative accounting standards owing to the Financial Accounting Standards Board's Accounting Standards Codification of Generally Accepted Accounting Principles ("Codification of GAAP"). These revisions have no effect other than to simply replace the superseded references with updated references.

**Item VII—Technical Amendments**

Editorial changes are made at FAR 4.603, 8.402, 8.405–5, 8.703, 15.402, 15.403–1, 19.102, 19.402, 22.404–1, 22.1304, 22.1306, 23.205, 23.401, 28.203–3, 42.203, 52.202–1, 52.212–3, 52.219–2, and 52.228–11.

Dated: December 21, 2011.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

[FR Doc. 2011–33425 Filed 12–30–11; 8:45 am]

**BILLING CODE 6820–EP–P**

## 47 CFR Part 54

Communications common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

**Marlene H. Dortch,**  
Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 20 and 54 as follows:

### PART 20—COMMERCIAL MOBILE RADIO SERVICES

■ 1. The authority citation for part 20 continues to read as follows:

**Authority:** 47 U.S.C. 154, 160, 201, 251–254, 301, 303, 316, and 332 unless otherwise noted. Section 20.12 is also issued under 47 U.S.C. 1302.

■ 2. Section 20.11 is amended by revising paragraph (e) to read as follows:

#### § 20.11 Interconnection to facilities of local exchange carriers.

\* \* \* \* \*

(e) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission.

\* \* \* \* \*

### PART 54—UNIVERSAL SERVICE

■ 3. The authority citation for part 54 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 201, 205, 214, 219, 220, 254, 303(r), 403, and 1302 unless otherwise noted.

#### Subpart B—Services Designated for Support

■ 4. Section 54.101 is amended by revising paragraph (a) to read as follows:

#### § 54.101 Supported services for rural, insular and high cost areas.

(a) *Services designated for support.* Voice telephony services shall be supported by federal universal service support mechanisms. Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911

and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation for qualifying low-income consumers (as described in subpart E of this part).

\* \* \* \* \*

[FR Doc. 2012–349 Filed 1–10–12; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 1, 9, 12, 42, and 52

[Correction; FAC 2005–55; FAR Case 2010–016; Item V; Docket 2010–0016, Sequence 1]

RIN 9000–AL94

#### Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System; Correction

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

**ACTION:** Correction.

**SUMMARY:** This document contains a correction to the final rule that was published in the **Federal Register** at 77 FR 197 on January 3, 2012. An applicability date to the rule was inadvertently omitted.

**DATES:** The effective date for the rule published at 77 FR 197 remains January 3, 2012.

**Applicability Date:** The clause prescription of this rule applies to solicitations issued on or after January 17, 2012, and resultant contracts.

With regard to information entered by the Government into FAPIIS on and after January 17, 2012—

(1) There will be a 14-calendar-day delay in the posting to the publicly available segment of FAPIIS; and

(2) The notification generated when the Government posts new information to the contractor's record will inform the contractor of the 14-calendar-day delay and the contractor's right to request withdrawal of the posted information if the contractor asserts that the information is covered by a disclosure exemption under the Freedom of Information Act, as set forth in FAR 9.105–2(b)(2)(iv).

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–55, FAR Case 2010–016; Correction.

**SUPPLEMENTARY INFORMATION:** This document contains a correction to the final rule that was published in the **Federal Register** at 77 FR 197 on January 3, 2012, by adding an applicability date to the rule that was inadvertently omitted.

DoD, GSA, and NASA adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 3010 of the Supplemental Appropriations Act, 2010. Section 3010 requires that the information in the Federal Awardee Performance and Integrity Information System (FAPIIS), excluding past performance reviews, shall be made publicly available. The interim rule notified contractors of this new statutory requirement for public access to FAPIIS.

The delayed application of the final rule will allow time for the Government to complete necessary system changes to support the 14-day wait period. The current system was designed to automatically transfer to the publicly available segment of FAPIIS all information posted by the Government (other than past performance information). As a result, until the change is implemented, there will not be an opportunity for a contractor to request withholding of the information before it is posted to the publicly available segment of FAPIIS. Any information entered into FAPIIS by the Government on or after January 17, 2012 (other than past performance information, which will not transfer to the publicly available segment of FAPIIS), will be subject to a 14-calendar-day delay before it is transferred to the publicly available segment of FAPIIS, regardless of whether the contract includes the January 2012 version or the January 2011 version of FAR 52.209–9, Updates of Publicly Available Information Regarding Responsibility Matters. This will allow all contractors opportunity to assert for the Government's consideration, within 7 calendar days of being posted, that the information is covered by a disclosure exemption under the Freedom of Information Act.

Dated: January 5, 2012.

**Laura Auletta,**

*Director, Office of Governmentwide  
Acquisition Policy, Office of Acquisition  
Policy, Office of Governmentwide Policy.*

[FR Doc. 2012-291 Filed 1-10-12; 8:45 am]

**BILLING CODE 6820-EP-P**