**December 23, 2002 (12:45 PM)**

# OFFICE OF PROCUREMENT AND ASSISTANCE POLICY
## CY 2002 INDEX OF POLICY FLASHES

| POLICY FLASH # | TITLE OF FLASH | DATE | ACTION OFFICER (Order) |
|---|---|---|---|
| 2002-01 | New and Revised **Acquisition Guide Chapters** | 01/03/02 | D. Tilly |
| 2002-02 | FY 2002 **Energy and Water Act** and **Interior Act Requirements** | 01/08/02 | T. Wood<br>D. Wright |
| 2002-03 | **Partnership Agreement** between the Department of Energy (**DOE**) and the Small Business Administration (**SBA**) | 01/09/02 | R. Webb |
| 2002-04 | Federal Acquisition Circulars (**FACs**) **2001-02** and **2001-03** | 01/14/02 | D. Wright |
| 2002-05 | Revisions to **Acquisition Letter 2002-02** and **Overview of the National Defense Authorization Act for Fiscal year 2002 (Pub. L. 107-107)** | 01/22/02 | D. Wright |
| 2002-06 | **FedBizOpps** Implementation Guidance | 01/28/02 | D. Baptist |
| 2002-07 | Federal Acquisition Circulars **(FAC) 2001-02 Correction** | 01/31/02 | D. Wright |
| 2002-08 | 1. Treatment of **Commercially Valuable Information (CVI)** Under Department of Energy (DOE) Management and Operating (M&O) Contracts<br>2. Suspension of **Project Labor Agreement Implementation**<br>3. **Acquisition Letter 2002-01** and **Financial Assistance Letter 2002-01** | 02/12/02 | B. Webb<br>T. Wood |
| 2002-09 | **Federal Acquisition Circulars** (FAC) 2001-04 and **Notice of Proposed Rulemaking: Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency** | 02/20/02 | D. Wright |
| 2002-10 | **Federal Acquisition Conference** and **Exhibitor Fair 2002** | 02/26/02 | D. Wright |
| 2002-11 | **Correction** of Flash 2002-08! | 03/01/02 | R. Webb |

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| 2002-12 | 1. Additions to the Office of Procurement and Assistance Management's **Professionals Page**<br>2. Availability of Updates to the **Government Purchase Card Section of Chapter 13 of the DOE Acquisition Guide** | 03/12/02 | P. Coombs<br>R. Langston |
| 2002-13 | Federal Acquisition Circular **(FAC) 2001-05** | 03/13/02 | D. Wright |
| 2002-14 | 1. Acquisition Letter **(AL) 2002-03**, Public Relations Requirements<br>2. Final Plan and Guidance to **Implement Executive Order 13148 Requirements to Achieve Ozone-Depleting Substance Reductions** | 03/14/02 | R. Webb<br>R. Langston |
| 2002-15 | **Federal Acquisition Circular (FAC) 2001-06** and **Notice of Proposed Rulemakings:** 1) Miscellaneous Cost Principles 2) Contract Terms and Conditions Required to Implement Statute or Executive Orders-Commercial Items; and 3) Prohibited Sources | 03/27/02 | D. Wright |
| 2002-16 | 1. Interim Final Rule - **National Industrial Security Program**<br>2. Final Rule - **Administrative Amendment of the Department of Energy Acquisition Regulation** | 03/29/02 | R. Langston<br>D. Wright |
| 2002-17 | Federal Acquisition Circular **(FAC) 2001-07** | 05/03/02 | D. Wright |
| 2002-18 | Office of Federal Procurement Policy (OFPP) **Determination of Executive Compensation Benchmark Amount** | 05/14/02 | T. Sheppard |
| 2002-19 | **NAICS Appeal of SCI Consulting, Inc.** in re Solicitation No. DE-RQ01-02NA00019, Department of Energy, Office of Procurement Operations, Washington, D.C., No. NAICS-2002-05-06-17, June 12, 2002 | 07/09/02 | R. Webb |
| 2002-20 | **Acquisition Letter** (AL) **2002-04, Processing Requests for Indemnification or Other Extraordinary Contractual Relief Under Pub. L. 85-804** | 07/09/02 | R. Webb |
| 2002-21 | **Acquisition Letter** (AL) **2002-05, Greening the Government Requirements in Contracting** | 07/10/02 | R. Langston |
| 2002-22 | **Federal Acquisition Circular (FAC) 2001-08 and Advanced Notice of Proposed Rulemaking**: Section 508 Contract Clause (FAR Case 2001-033) | 07/11/02 | D. Wright |

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| 2002-23 | **Replacement System** for **PADS Pre-Award Functions** | 07/23/02 | D. Hoexter |
| 2002-24 | **Final Rule** - Revisions of **Patent Regulations** Relating to the **Department of Energy (DOE) Management and Operating (M&O) Contracts** | 07/26/02 | R. Webb |
| 2002-25 | Updates of the **DOE Acquisition Guide** | 08/08/02 | R. Langston<br>R. Leotta |
| | | | |
| 2002-26 | **Acquisition Letter** (AL) **2002-06, Domestic and Foreign Procurement Preference Rules** | 08/14/02 | R. Webb |
| 2002-27 | Guidelines for **Physician Panel Determinations** | 08/20/02 | G. Cowan |
| 2002-28 | Electronic **DEAR** Update | 08/27/02 | R. Langston |
| 2002-29 | **Acquisition Letter** (AL) **2000-10R** | 09/09/02 | M. Fischetti |
| 2002-30 | **Federal Acquisition Circular** (FAC) **2001-09** | 09/10/02 | D. Wright |
| 2002-31 | Use of **FedBizOpps** by DOE Contractors | 09/24/02 | D. Baptist |
| 2002-32 | **Acquisition Letter** (AL) **2002-07, Review of Management Contractor Purchasing Systems - Purchase Card Considerations** | 10/02/02 | R. Langston |
| 2002-33 | Applicability of **FDP IV General Terms and Conditions** and **DOE Agency Specific Requirements** | 10/02/02 | T. Wood |
| 2002-34 | Updates of the **FAR** and **DEAR clause matrix** | 10/07/02 | S. Zvolensky |
| 2002-35 | Revisions to Department of Energy (DOE) Acquisition Guide **Chapter 71, Part 2, "Performance-Based Incentives and Related Approvals"** | 11/08/02 | J. Tower |
| 2002-36 | **Updates** of the Department of Energy **(DOE) Acquisition Guide** | 11/19/02 | C. Yee<br>R. Leotta |
| 2002-37 | **General Services Administration** (GSA's) **New** Federal Acquisition Regulation **(FAR) Deviation** | 11/25/02 | S. Zvolensky |
| 2002-38 | (1) **Project Labor Agreements**<br>(2) New Acquisition Letter, **AL 2002-08**, dated December 02, 2002<br>(3) Reactivation of Financial Assistance Letter **(FAL) 2001-02**, dated July 30, 2001 | 12/02/02 | R. Webb<br>T. Wood |

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| 2002-39 | Financial Assistance Letter **(FAL) 2002-03**, Implementation of DOE's Industry Interactive Procurement System **(IIPS)** | 12/10/02 | T. Wood |
| 2002-40 | **Extension** of **Price-Anderson Act**:<br><br>(1) Awarded Contracts<br>(2) Proposed Awards<br>(3) Reinstatement of AL 2002-04 | 12/11/02 | R. Webb |
| 2002-41 | **Revisions** and **Additions** to the Department of Energy **(DOE) Acquisition Guide** —<br><br>**Chapter 7 - Acquisition Planning**<br>**Chapter 71 - Headquarters Review of Contract and Financial Assistance Actions** | 12/20/02 | T. Brown<br>D. Leotta |
| 2002-42 | Federal Acquisition Circular **(FAC) 2001-10** | 12/20/02 | D. Wright |

Ernise's "Index of Policy Flashes 2001" disk - filename::2001-Index of Flashes.wpd

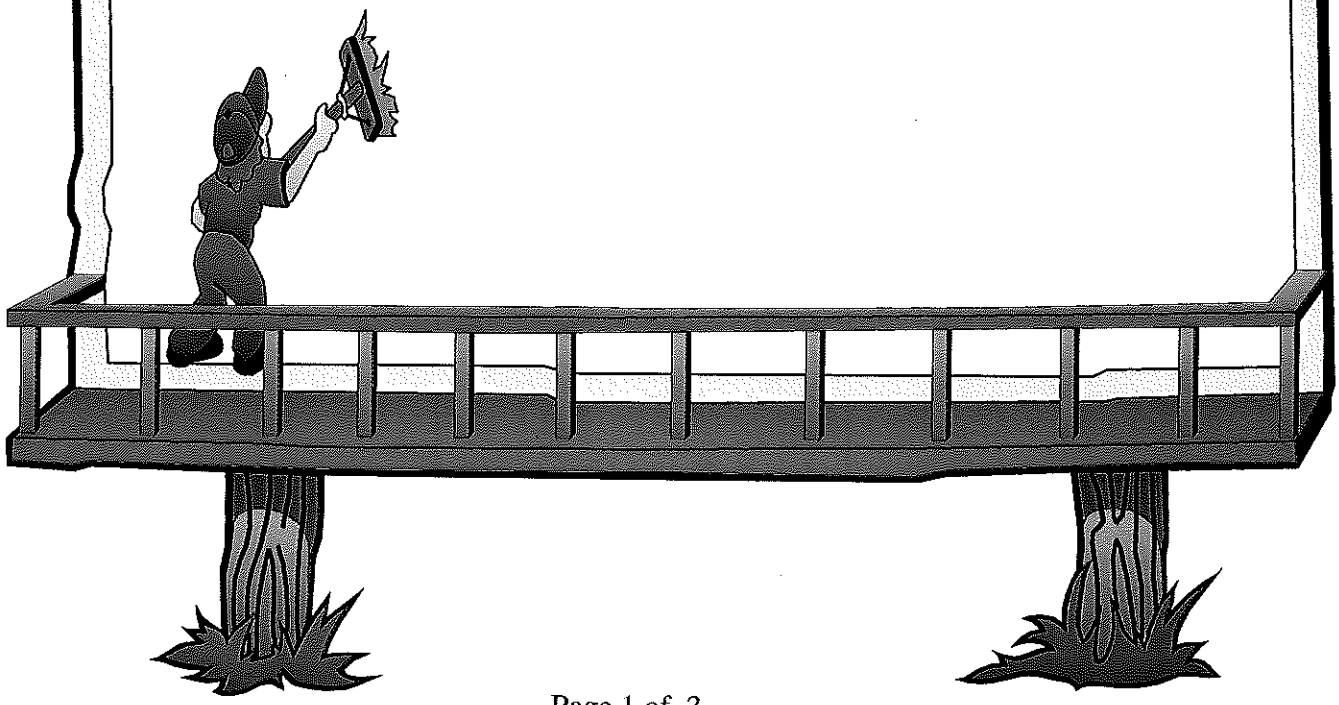
# Headquarters Policy Flash

**FLASH 2002-01**

DATE: January 3, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **New and Revised Acquisition Guide Chapters**

SUMMARY: Acquisition Guide Chapters 1, 13, 37, and 70 were revised and two new subjects were added in Chapters 1 and 42 as follows:



**FLASH 2002-01**
**January 3, 2002**

- **Chapter 1 - Acquisition Regulations System (Revised)**

  The main section of Chapter 1 was revised to update references, provide additional Contracting Officer Representative (COR) guidance in accordance with DOE O 541.1A, add guidance with respect to the Uniform Contract Format (UCF) which was formerly included in AL 99-05, and include references for NNSA review and coordination where appropriate.

- **Chapter 1 - Balanced Scorecard Performance Assessment Program (New)**

  This new section incorporates guidance previously included in Acquisition Letter 98-10 and provides instruction to contracting personnel regarding the implementation and administration of the Balanced Scorecard procurement performance assessment programs used by the Department's federal procurement offices and major site and facility management contractors.

- **Chapter 13 - Government Purchase Cards (Revised)**

  This section has been revised to update 3 internet home page addresses.

- **Chapter 37 - Support Service Contracting (Revised)**

  This chapter was revised to add FAR reference 11.106 and language to the Support Services Contracting Guide, drafting of the Statement of Work pursuant to the FAR reference and to reference the performance incentive guidance provided in Chapter 70.

- **Chapter 42 - Contract Close Out (New)**

  This new section provides general guidance for the close out of contracts and interagency agreements pursuant to FAR Subpart 4.8 and DEAR Subpart 904.8. Four templates and specific guidance are provided to close out contracts for simplified acquisitions, firm-fixed-price contracts, contracts requiring settlement of indirect costs rates and all other contracts.

- **Chapter 70 - Make or Buy Plans (Revised)**

  This section was revised to update the FAR and DEAR references.

**FLASH 2002-01**
**January 3, 2002**

In addition to the revisions and new chapters, a "note" has been added to the beginning of the electronic table of contents to clarify that the term Procurement Executive as used in the Acquisition Guide applies to either the DOE Procurement Executive or the NNSA Procurement Executive, whichever is applicable for the contracting activity.

The revisions/additions to the DOE Acquisition Guide are now available under Procurement, Regulations and Guidance, on the ME-60 Professionals Homepage at http://professionals.pr.doe.gov. These changes have been coordinated with NNSA.

If you have questions pertaining to this flash, please contact Daphne Tilly at (202) 586-8246 or via e-mail at daphne.tilly@pr.doe.gov.

Gwendolyn S. Cowan, Director

cc: PPAG Members

# Headquarters Policy Flash

**FLASH 2002-02**

DATE: January 8, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: FY 2002 Energy and Water Act and Interior Act Requirements

SUMMARY: This Flash transmits a summary of a new Acquisition Letter and Financial Assistance Letter that provides implementing guidance on FY 2002 appropriation requirements. The Flash, Acquisition Letter, and Financial Assistance Letter are posted online at http://professionals.pr.doe.gov

# FLASH 2002-02
# January 8, 2002

## I. Acquisition Letter 2002-02 on FY 2002 Legislative Provisions (dated January 8, 2002)

**Energy and Water Act**

AL 2002-02 provides guidance regarding the implementation of Section 301, 304, 501, 502, and Legislative Direction provided in the House and Conference Reports (Augmenting Federal Staff, Limitation on Multi-Year Funding Agreements for Environmental and Other Defense Related Activities, and Contractor Travel) of the FY 2002 Energy and Water Development Appropriations Act Pub. L. 107-66. Provisions related to the use of competitive procedures, RFP's for unfunded programs, lobbying restrictions, and purchase of American made products are carried over from the FY 2001 Energy and Water Development Appropriations Act Pub. L 106-377. The Travel restrictions, included in previous Energy and Water Acts, placing a monetary limit on the reimbursement of travel costs for management and operating contracts has not been included in this year's provisions. However, the Department is directed to maintain a tracking system that will allow for periodic reviews of contractor travel costs and destinations.

It is important to note that a new Section 307 has been included in this year's act concerning user facilities. The Department is in the process of evaluating the new requirement and will provide implementation guidance as soon as possible. However, in the interim, you should be aware of the new provision: *When the Department makes a user facility available to universities and other potential users, or seeks input from universities and other potential users regarding significant characteristics or equipment in a user facility or a proposed user facility, the Department shall ensure broad public notice of such availability or such need for input to universities and other potential users. When the Department considers the participation of a university or other potential user as a formal partner in the establishment or operation of a user facility, the Department shall employ full and open competition in selecting such a partner.*

Also, included in this AL is a new section entitled Legislative Direction. Legislative direction is language that is contained in the House, Senate and/or Conference Reports accompanying the Energy and Water Act or any Act associated with the Department of Energy Appropriations.

**FLASH 2002-02**
**January 8, 2002**

**Interior Act**

FY 2002 Department of Interior and Related Agencies Appropriations Act (Pub. L. 107-63) contains three provisions relative to DOE procurement programs. Section 301 addresses public availability of information, section 302 lobbying restrictions, and an unnumbered provision that prohibits the use of funds to prepare, issue, or process procurement documents where funds have yet to be appropriated. Guidance implementing these provision is contained in the attached AL.

**Defense Act**

The National Defense Authorization Act for FY 2002, Pub. L. 107-107, has only recently been signed into law. Information regarding any procurement requirements that effect DOE will be provided at a later date.

For questions related to this Acquisition Letter, contact Denise P. Wright on (202) 586-6217 or via e-mail at Denise.Wright@hq.doe.gov

**II. Financial Assistance Letter (FAL) 2002-02 of FY 2002 Legislative Provisions (dated January 8, 2002)**

The guidance in the FAL is the same as the guidance provided in FAL 2000-02, implementation of FY 2001 legislative provisions.

For questions related to this FAL, contact Trudy Wood on (202) 586-5625 or via e-mail at Trudy.Wood@hq.doe.gov

Gwendolyn S. Cowan, Director

Attachment

cc:
PPAG Members

# Headquarters Policy Flash

## FLASH 2002-03

DATE: January 9, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Partnership Agreement between the Department of Energy (DOE) and the Small Business Administration (SBA)**

SUMMARY: Recently, the Secretary and the Administrator of the SBA executed a Partnership Agreement which delegates to DOE contracting officers the authority to execute on behalf of SBA contracts/subcontracts awarded pursuant to SBA's 8(a) Program. The Partnership Agreement is intended to expedite the award of such contracts. It will remain effective through June 30, 2003.

**FLASH 2002-03**
**January 9, 2002**

Delegation of SBA's contracting officer authority occurred previously and was communicated by Acquisition Letter 98-09, dated June 26, 1998 (extensions of the delegation were later communicated by Flash 99-16, Flash 2000-04, and Flash 2000-17). The AL included a class deviation signed by the Procurement Executive. It also included a DOE modification to Part 19 of the Federal Acquisition Regulation (FAR) to implement the class deviation. AL 98-09 is rescinded by this Flash.

Since the class deviation was signed, the FAR has been modified at 19.801(f) to authorize agencies to promulgate regulations or other guidance to implement SBA's delegation of it's contracting officer authority in the award of 8(a) contracts/subcontracts.

This Flash transmits a guide section which provides guidance implementing the Partnership Agreement in the award of contracts/subcontracts pursuant to SBA's 8(a) Program. A copy of the Partnership Agreement is attached to that guide section.

For questions related to this Flash, contact Robert Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov

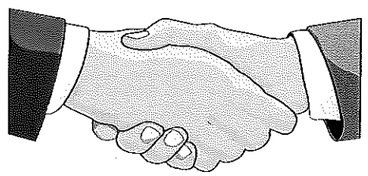
Gwendolyn S. Cowan

Gwendolyn S. Cowan, Director

Attachment

cc: PPAG Members

## Delegation of SBA Contracting Officer Authority in the Award of Contracts and Subcontracts Pursuant to SBA's 8(a) Program



[Reference: FAR 19.8]

### Overview

Recently, the Secretary and the Administrator of the Small Business Administration (SBA) executed a Partnership Agreement to expedite the award of requirements pursuant to section 8(a) of the Small Business Act. It will remain in effect through June 30, 2003. A copy is attached. This section discusses the effects of that Partnership Agreement on the way Department of Energy (DOE) contracting officers process awards under the 8(a) Program.

*Guiding Principle*

✓ Exercising SBA contracting officer authority in the award of 8(a) contracts/subcontracts in accordance with the DOE-SBA Partnership Agreement will speed the award process.

### Background

Section 8(a) of the Small Business Act provides for the award of contracts to the SBA and the award of a subcontract to a small disadvantaged businesses accepted into the SBA's 8(a) Business Development Program. Depending on the values and other factors, awards made under this authority may be sole source or the result of competition limited to such firms.

The Federal Acquisition Regulation (FAR) at Subpart 19.8 regulates the award of contracts/subcontracts under the 8(a) program. Generally, that regulation requires the agency which is to receive performance to offer the procurement to the SBA. Depending upon the circumstances, the agency may identify an 8(a) firm which is to perform the work. Upon SBA's acceptance, the agency awards the prime contract to the SBA. The award document is to contain prescribed clauses for 8(a) awards and allow for its use as both the prime contract with the SBA and the subcontract with the selected 8(a) firm. The agency contracting officer then executes the contract/subcontract on behalf of the requiring agency and forwards it to the SBA where an SBA contracting officer executes the prime contract/subcontract and acquires the authorized execution by an official of the selected 8(a) firm. The result is a prime contract between the agency and the SBA and a subcontract between SBA and the selected 8(a) firm. However, absent termination or other special issues, the contract/subcontract is administered by the requiring agency.

The process of acquiring the signature of the SBA contracting officer takes time and

delays award. The Partnership Agreement has been designed to speed that process by the SBA's delegating its contracting officer authority, involved in the execution of the contract/subcontract, to the requiring agency.

**Guidance**

The Partnership Agreement and the delegation of contracting officer authority for the execution of 8(a) contracts/subcontracts is effective for contracts and purchase orders and for competitive and noncompetitive awards. The effect of the Partnership Agreement is to delegate only contracting officer authority in the execution of the contract/subcontract. The Partnership Agreement does not affect the parties or their roles, i.e., SBA is the prime contractor and the 8(a) firm is a subcontractor to the SBA.

DOE must still supply SBA with offering letters for contracts/subcontracts in excess of the simplified acquisition threshold. The SBA may still reject a proposed 8(a) firm.

For sole source 8(a) awards in excess of the simplified acquisition threshold, SBA is allowed 5 working days after receipt of an offering letter to accept or reject the proposed award or 8(a) firm. However, under the terms of the Partnership Agreement, DOE may assume acceptance on the sixth working day.

For competitive 8(a) awards in excess of the simplified acquisition threshold, SBA is allowed 5 working days from receipt of an offering letter to accept or reject the procurement. DOE may assume acceptance on the sixth working day. Once the 8(a) firm is selected or a competitive range is established, where no discussion are to be conducted, SBA has 2 working days to issue an eligibility determination for the selected firm or those firms in the competitive range.

In the case of procurements subject to simplified acquisition threshold procedures, DOE is not required to provide an offering letter. Instead, DOE is to provide SBA with a signed purchase order. SBA then has two working days after receipt to make a negative eligibility determination. If no such determination is made within those two working days, the 8(a) firm is authorized to begin performance.

The awarding office is required, within 15 calendar days of the date of award, to supply the SBA a copy of each 8(a) contract/subcontract where the award has been made exercising the delegation of SBA's contracting officer authority. Quarterly, SBA is to inform DOE's Office of Small Disadvantaged Business Utilization of any 8(a) requirements that the SBA accepted but for which SBA has not been furnished a copy of the award document.

Awarding offices are responsible for issuing procurement instrument identification numbers. The SBA will not issue subcontract numbers.

Awarding offices are obligated to ensure that all proposed joint ventures involving 8(a) firms are approved by SBA before a contract is awarded to the joint venture. Each of the other special situations requiring notification or special contract

language discussed in the Partnership Agreement (i.e., SBA's approval of novation agreements, advance notice of any final termination of the contract, and identification of SBA as the prime contractor) are satisfied by the special 8(a) contract clauses at FAR 52.219-11 and -12.

**PARTNERSHIP AGREEMENT**
**Between**
**The U.S. Small Business Administration**
**And**
**Department of Energy**

## I. PURPOSE

The purpose of this Partnership Agreement (PA) between the U.S. Small Business Administration (SBA) and the Department of Energy (DoE) is to establish basic procedures for expediting the award of requirements pursuant to section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)) (the Act), and the SBA's regulations. This PA replaces all terms and conditions of any previously executed Memorandum of Understanding (MOU).

## II. OBJECTIVES

a. To delineate the responsibilities regarding 8(a) contracts among the SBA and DoE;
b. To establish the procedures for offer and acceptance between the SBA and DoE;
c. To reduce the interval between the time DoE contracting offices send an offering letter to the SBA and receive an SBA decision on the offering to a maximum of 5 workdays;
d. To emphasize that the SBA only delegates the authority to sign contracts on their behalf. The SBA remains the prime contractor on all 8(a) contracts;
e. To eliminate SBA review of contracts and purchase orders executed under the authority of this PA; and
f. To establish uniform policy and procedures regarding application of purchase orders to the 8(a) contracting process, when applicable.

## III. SCOPE

This PA provides for the award of both contracts and purchase orders under the provisions of section 8(a) of the Act as implemented by the Federal Acquisition Regulation (FAR) (48 C.F.R.) and the SBA's 8(a) Business Development Program regulations.

This PA encompasses all competitive and non-competitive acquisitions of requirements offered by DoE contracting offices and accepted by the SBA into the 8(a) program.

This PA applies to all SBA offices and all DoE offices deemed appropriate by the head of the agency (as defined in FAR 2.101, Definitions) for DoE.

## IV. RESPONSIBILITIES

a. The SBA:

1. delegates to the head of the agency, or designee, for redelegation to warranted DoE contracting officers, its authority under section 8(a)(1)(A) of the Act to enter into 8(a) prime contracts, and its authority under section 8(a)(1)(B) of the Act to arrange for the performance of such procurement contracts by eligible 8(a) Program Participants. In accordance with 13 C.F.R. 124.501(a), the SBA delegates only the contract execution function. The SBA remains the prime contractor on all 8(a) contracts, and the 8(a) Participant remains the SBA's subcontractor;

2. will implement its responsibilities under this PA through uniform procedures for use by all SBA offices;

3. shall review DoE's offering letters, issue acceptance or rejection letters, and make eligibility determinations:

   (a) Sole source procurements. The SBA will issue an acceptance letter or notification of rejection within 5 working days of receipt of an offering letter. Absent a notification of rejection within 5 working days of receipt of the offer, acceptance may be assumed on the 6th working day. Acceptance shall include a size verification and determinations with respect to all elements of eligibility (e.g., determinations of adverse impact, North American Industry Classification System (NAICS) code appropriateness and program eligibility);

   (b) Competitive acquisitions: The SBA will issue an acceptance letter or notification of rejection within 5 working days of receipt of an offering letter. Absent a notification of rejection within 5 working days of receipt of the offer, acceptance may be assumed on the 6th working day. Following receipt of bids, and within 2 working days after a request from the contracting officer, the SBA shall issue an eligibility determination for the firm with the lowest bid. In the case of a negotiated procurement following receipt of initial offers including price, and within 2 working days after a request from the contracting officer, the SBA shall issue an eligibility determination for all firms in the competitive range, if discussions are to be conducted.

   The SBA will issue an eligibility determination for all firms with a realistic chance of award within 2 working days after a

request from the contracting officer, if no discussions are to be conducted;

(c) Requirements under the simplified acquisition threshold (FAR 2.101). The SBA will review the eligibility of the 8(a) Participant within 2 working days after receipt of a copy of the signed purchase order document. The purchase order document may be delivered by any means acceptable to the SBA district office. The SBA shall provide a copy of any negative eligibility determination to the contracting activity and the 8(a) Participant. Absent receipt of a negative eligibility determination from the SBA within 2 working days, the 8(a) contractor will be authorized to begin performance. No offering or acceptance letter is required for requirements processed under the simplified acquisition procedures threshold;

4. shall provide 8(a) Participants with assistance in contract negotiations when requested by either the 8(a) firm or the DoE contracting officer;

5. shall retain its appeal authority in accordance with FAR 19.810;

6. shall retain the right to perform on-site contract surveillance reviews;

7. shall retain the responsibility for compliance with all applicable provisions of 13 C.F.R. Part 124, including determining eligibility;

8. shall select an appropriate 8(a) Participant when DoE submits an open offering letter for a sole source requirement; and

9. will issue a letter to the DoE Office of Small and Disadvantaged Business Utilization, with a copy to the senior procurement executive (FAR 2.101), on a quarterly basis identifying accepted requirements for which award documents have not been received by the SBA district office.

b. The Federal agency:

1. shall submit to the SBA, not later than March 31, 2002, copies of any procedures developed to comply with this PA that are in addition to guidance provided by the Civilian Agency Acquisition Council (CAAC);

2. shall determine which requirements are suitable for offering to the 8(a) program in accordance with FAR Subpart 19.8, and, where appropriate, identify, in conjunction with the appropriate SBA servicing offices, 8(a) Participants capable of performing these requirements;

3. shall submit the offering letter for sole source requirements to the SBA's district office responsible for servicing the selected 8(a) Participant, when an 8(a) firm has been identified;

4. shall submit an open offering letter for sole source requirements to the SBA district office that services the geographical area where the DoE contracting activity is located, when DoE has not identified a specific 8(a) Participant for a requirement;

5. shall submit the offering letter for competitive 8(a) procurements to the SBA district office that services the geographical area where the Federal agency's contracting activity is located, except that offering letters for construction work will be sent to the SBA district office located in the geographical area where the work will be performed, or, in the case of such contracts to be performed overseas, to the SBA Headquarters;

6. shall retain responsibility for compliance with all applicable provisions of the FAR and other applicable acquisition regulations, unless a FAR deviation is obtained;

7. shall provide a copy of any contract, as defined in FAR 2.101, including basic contracts, orders, modifications, and purchase orders, to the SBA servicing district office within 15 calendar days of the date of award. Systemic failure to timely provide the required documents to the SBA may result in suspension or rescission of this PA;

8. shall retain the option to use tripartite procedures to award 8(a) contracts and purchase orders to 8(a) Participants as specified in FAR Part 19;

9. shall ensure that all contracts awarded pursuant to this PA contain provisions that:

   (a) require the SBA's approval of novation agreements submitted by the 8(a) Participant; and

(b) require advance notice to the SBA (as the prime contractor) prior to issuance of a final notice terminating the contract in whole or in part;

10. shall ensure that all North American Industry Classification System codes for all 8(a) Business Development contracts comply with FAR 19.102;

11. shall ensure that all contracts comply with the work performance requirements, in accordance with FAR 19.508(e);

12. shall add language to every contract stating that, even though the SBA may not be identified in section A of the contract, it is still the prime contractor on the contract; and

13. shall ensure that all proposed joint ventures involving 8(a) Participants are approved by SBA before contracts are awarded.

## V. CONTRACT EXECUTION

The cognizant DoE contracting officer may make direct award of a contract to the 8(a) Participant, but only after the requirement has been offered to and accepted by the SBA. Acquisitions that employ the simplified acquisition procedures authorized by FAR Part 13, limited to the simplified acquisition threshold (FAR 2.101), require no offer or acceptance. Contract execution shall be on the appropriate form specified in the FAR or the DoE's acquisition regulations. The "Issued by" block shall identify the awarding DoE office. The cognizant SBA district office for the 8(a) Program Participant shall be identified in the award document. The 8(a) Participant's name and address shall be listed as the contractor. The DoE's contracting activities are responsible for issuing procurement instrument identification numbers; the SBA will not issue subcontract numbers.

## VI. TERM

This PA will take effect as soon as both the SBA Administrator and the head of DoE have signed it. It will remain in effect until June 30, 2003.

## VII. AMENDMENT

This PA may be amended, in writing, at any time by mutual agreement of the SBA's Associate Administrator for 8(a) Business Development (AA/8(a) BD) and DoE's senior procurement executive.

## VIII. TERMINATION

This PA may be terminated by either SBA or DoE upon 30 days advance, written notice to the other party.

## IX. PENALTIES

a. Contracts that have not been offered to and accepted by the SBA into the 8(a) Business Development program cannot be used for DoE's 8(a) negotiated goals.

b. The SBA reserves the option to suspend or rescind the authority of this PA if DoE fails to submit copies to the SBA of award documents within 15 working days of award.

## X. ADMINISTRATION

Department of Energy:

Head of the agency, or delegee.

For the SBA:

Associate Administrator for
8(a) Business Development
409 3rd Street, SW
Washington, DC 20416
(202) 205-7340

Deputy Associate Administrator for
8(a) Business Development
409 3rd Street, SW
Washington, DC 20416
(202) 205-6471

# Headquarters Policy Flash

**FLASH 2002-04**

DATE: January 14, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circulars (FACs) 2001-02 and 2001-03**

SUMMARY: This Policy Flash summarizes the items in FACs 2001-02 and 2001-03, which were published in the Federal Register on December 18, 2001, at 66 FR 65348 and December 27, 2001, at 66 FR 66984, respectively. Contracting personnel should review the details of each item in the full text of the FACs.

**FLASH 2002-04**
**(January 14, 2002)**

## A. Federal Acquisition Circular (FAC) 2001-02

The following nine items are in FAC 2001-02, which was published in the Federal Register on December 18, 2001, at 66 FR 65348. Items 1-6 are effective February 19, 2002, and items 7-9 are effective December 18, 2001. The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

*Effective Date: February 19, 2002(Items 1-6)*
*Applicability: The FAR coverage, as amended by this rule, is applicable to solicitations issued on or after February 19, 2002.*

### 1. Definitions of "Component" and "End Product" (FAR Case 2000-015)

This final rule amends FAR Part 2, Definitions, Part 25, Foreign Acquisition, and Part 52, Solicitation Provisions and Contract Clauses. The rule restores unique Part 25 definitions of "component" and "end product" for acquisition of supplies. Also, makes minor revisions to the definitions of "component" and "cost of components" for the acquisition of construction.

### 2. Energy Efficiency of Supplies and Services (FAR Case 1999-011)

The final rule amends FAR Part 2, Definitions, Part 11, Describing Agency Needs, Part 15, Contracting By Negotiation, Part 23, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug Free Workplace. The rule implements in FAR Executive Order 13123, Greening the Government through Efficient Energy Management. This final rule-

- ❑ Directs the contracting officer to acquire energy efficient products if life-cycle cost-effective and available;
- ❑ Requires that the contracting officer use Internet sources for more detailed information on ENERGY STAR and other energy-efficient products;
- ❑ Provides guidance on energy-savings performance contracts (ESPCs) including an explanation of what they are and when they should be used; and procedures for the solicitation and award of ESPCs, and the evaluation of unsolicited proposals; and

- ❑ Impacts only those contracting officers that acquire energy-using products or services, contract for design, construction, renovation, or maintenance of public buildings that will include energy-using products, or use energy-savings performance contracts to reduce energy use and cost in an agency's facilities or operations.

**3. Prompt Payment and the Recovery of Overpayment (FAR Case 1999-023)**

The final rule amends FAR Part 32, Contract Financing, and Part 52, Solicitation Provisions and Contract Clauses. The rule-

- ❑ Revises prompt payment policies simplifying and clarifying prompt payment coverage that currently exist in the FAR;
- ❑ Revises the information that must be on an invoice in order to be considered a proper invoice;
- ❑ Establishes the requirement in the prompt payment clauses for contractors to notify the contracting officer if the contractor becomes aware of an overpayment of an invoice; and
- ❑ Applies to all Government contracts (including contracts at or below the simplified acquisition threshold) except contracts with payment terms and late payment penalties established by other governmental authority.

**4. Javits-Wagner-O'Day Act (JWOD) Subcontract Preference under Service Contracts (FAR Case 1999-017)**

This final rule amends the FAR to add a new preference for award of subcontracts under service contracts to non-profit workshops designated by JWOD. The rule-

- ❑ Requires that all contractors providing services to the Government use and subcontract services giving preference in awarding subcontracts to nonprofit workshops, if the services are on the Committee for Purchase From People Who Are Blind or Severely Disabled procurement list;

- Directs contracting officers to consider the preference for subcontracting with non-profit workshops when reviewing a subcontract for services that is subject to the procedures at FAR Subpart 44.2, Consent to Subcontracts; and

- Informs offerors and contractors that certain services provided to the Government are required by law to be obtained from the Committee for Purchase From People Who Are Blind or Severely Disabled as well as amends FAR 52.208-9, Contractor Use of Mandatory Sources of Supply.

**5. Discussion Requirements (FAR Case 1999-022)**

The rule amends FAR 15.306(d) to clarify that the existing policy providing for discussions beyond the minimum elements, as stated in FAR, are a matter of contracting officer judgement. The rule-

- Provides that the contracting officer is not required to discuss every area where the proposal could be improved; and

- Expresses that the contracting officer must discuss deficiencies, significant weaknesses, and adverse past performance information, to which the offeror has not yet had an opportunity to respond, and other aspects of the offeror's proposal.

**6. Definition of Subcontract in FAR Subpart 15.4 (FAR Case 2000-017)**

This final rule excludes FAR 15.407-2, Make-or-buy programs, from the application of the expanded definition of "subcontract" at FAR 15.401. The application of the expanded definition creates a conflict with the definitions of "buy item" and "make item" in FAR 15.407-2. This rule is a clarification and does not change any policy.

*Effective Date: December 18, 2001(Items 7, 8, and 9)*
*Applicability: The FAR coverage, as amended by this rule, is applicable to solicitations issued on or after December 18, 2001.*

7. **North American Industry Classification System (FAR Case 2000-604)**

   This rule finalizes the interim rule, with minor changes, which amends the FAR to convert size standards and other programs that were based on the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS).

8. **Iceland Newly Designated Country under Trade Agreements Act (FAR Case 2001-025)**

   The final rule adds Iceland as a designated country under the Trade Agreements Act (TAA). The definition of "Designated Country" at FAR 25.003 and the clause at 52.225-11, Buy American Act-Balance of Payments Program-Construction Materials under Trade Agreements is amended. The rule-

   - ❑ Provides that contracting officers many now consider offers of end products or construction materials from Iceland in acquisitions subject to the TAA. Currently, the TAA threshold for the acquisition of supplies is $177,000 and construction is $6,806,000.

   - ❑ Requires that if TAA applies, Executive Order 13126 of June 12, 1999, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor does not apply to contracts for the acquisition of products from foreign countries that are party to the Agreement on Government Procurement. As a consequence, this rule adds Iceland to the list of excepted countries of origin at 22.1503(b)(4) and the clause at 52.222-19, Child Labor-Cooperation with Authorities and Remedies.

9. **Contractor Personnel in the Procurement of Information Technology Services (FAR Case 2000-609)**

   The final rule adopts, without change, the interim rule published in the Federal Register on May 1, 2001. The FAR is amended at subpart 39.1 to address the use, in the procurement of information technology services, of requirements regarding the experience and education of contractor personnel.

**B. Federal Acquisition Circular (FAC) 2001-03.**

The following two items are in FAC 2001-03, which was published in the Federal Register on December 27, 2001, at 66 FR 66984. The FAC is available via the Internet at http://www.arnet.gov/far/facsframe.html

*Effective Date: December 27, 2001 (Items 1-2)*
*Applicability Date: The FAR coverage, as amended by this rule, is applicable to solicitations issued on or after December 27, 2001.*

❑ **Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (FAR Case 1999-010 (Stay))**

This final rule terminates the stay issued as an interim rule published in the Federal Register at 66 FR 17754, April 3, 2001. The interim rule stayed a final rule published in the Federal Register at 65 FR 80255 addressing contractor responsibility and cost incurred in legal and other proceedings.

❑ **Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings-Revocation (FAR Case 2001-014)**

This final rule revokes the final rule published in the Federal Register at 65 FR 80255, December 20, 2000, addressing responsibility and cost incurred in legal and other proceedings.

**What is the impact of these changes?**

The final result is that policies regarding Contractor Responsibility that had been published on December 20, 2000, have been revoked. Policies which had been in effect prior to the December 20, 2000, final rule were restored. In addition, AL 2001-02 "FAR Class Deviation Addressing Contractor Responsibility" dated February 15, 2001, is cancelled. The following background chronology is provided to assist in understanding the changes:

☞ A final rule was published at 65 FR 80255, December 20, 2000, addressing contractor responsibility, labor relations costs, and costs incurred in legal and other proceedings. The rule was to be effective January 19, 2001. One of the more controversial provisions of the final rule was an amendment to FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed

Debarment, and Other Responsibility Matters", to require offerors to certify to additional violations (violations of tax, labor and employment, environmental, antitrust or consumer protection laws) adjudicated within the last three years.

- As a result of the issuance of the final rule, legal action was taken by several business associations seeking to overturn the final rule.

- The Civilian Agency Acquisition Council advised agencies that they may issue a class deviation to the new FAR requirements in the final rule. The AL 2001-02 dated February 15, 2001, was issued to forward a FAR class deviation. This action resulted in the FAR effectivity being delayed until July 19, 2001 or until issuance of an appropriate FAR change, whichever occurs first.

- Additional actions were also taken in response to the legal action. An interim rule was published at 66 FR 17754, April 3, 2001, which "stayed" the December 20, 2000, rule resulting in a further delay of the FAR effective date until December 29, 2001. A separate proposed rulemaking was also issued concurrently at 66 FR 17758, April 3, 2001, to propose revoking the final rule issued December 20, 2000.

- Both the interim rule and the proposed rule were finalized in FAC 2001-02.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-05**

DATE: January 22, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Revision to Acquisition Letter 2002-02 and Overview of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107)**

SUMMARY: This Policy Flash summarizes procurement related items included in the National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107 and provides an administrative correction to Acquisition Letter 2002-02 Implementation of Fiscal Year (FY) 2002 Legislative Provisions.

**FLASH 2002-05**
**(JANUARY 22, 2002)**

A. **Revision of Acquisition Letter 2002-02**

Acquisition Letter (AL) 2002-02 implements FY 2002 legislative provisions for the Energy and Water Act and the Department of Interior and Related Agencies. Page 8, clause number two, Lobbying Restriction (Department of Interior and Related Agencies Appropriations Act, 2002) is amended to read as follows:

*"The contractor agrees that none of the funds obligated on this award shall be made available for any activity* ***or*** *the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete. This restriction is in addition to those prescribed elsewhere in statute and regulation."*

The change to the clause is highlighted in bold. The administrative change to the AL is available via the Internet at http://professionals.pr.doe.gov/ma5/ma-5web.nsf/?Open

B. **Overview of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107)**

The following two provisions are contained in the National Defense Authorization Act for Fiscal Year 2002, which is Public Law 107-107, signed into law December 28, 2001. Both sections will require either FAR or OMB implementation. Guidance will be communicated once action has been taken.

1. **Section 823 - One-Year Extension of Program Applying Simplified Procedures to Certain Commercial Items.**

The test pilot program discussed in FAR 13.5 is extended until January 1, 2003. The original test pilot program expired on January 1, 2002. As stated in FAR 13.5, contracting officers may use this authority to award contracts after the expiration date for solicitations issued before January 1, 2002. Pending formal amendment to the FAR, the Civilian Agency Acquisition Council has recommended that a class deviation be processed. Authorization of the Class Deviation providing for the extension of the test pilot program is transmitted along with this Flash.

**FLASH 2002-05**
**(JANUARY 22, 2002)**

2. **Section 831 - Identification of Errors Made By Executive Agencies In Payments To Contractors And Recovery Of Amounts Erroneously Paid**

   Requires that the head of each executive agency that enters into contracts with a total value in excess of $500,000,000 in a fiscal year shall carry out a cost-effective program for identifying any errors made in paying the contractors and for recovering any amounts erroneously paid to the contractors. An established program shall include recovery audits and recovery activities . The head of the executive agency shall determine, in accordance with guidance provided by OMB, the classes of contracts to which recovery audits and recovery activities are applied.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# CLASS DEVIATION FROM FEDERAL ACQUISITION REGULATION (FAR) 13.5, Test Program for Certain Commercial Items

**Action:** Section 4202 of the Clinger-Cohen of 1996 (Pub. L. 104-106) establishes a test program for certain commercial items. Among other things, Pub. L. 104-106 allows for all acquisitions of commercial items to be conducted using simplified procedures. The test program authorizes the use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding $5,000,000, including options. The test program expired on January 1, 2002. Section 823 of the National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107, extends the test program to January 1, 2003.

Contracting officers are directed to make award of contracts that were solicited under this authority prior to the expiration.

FAR 13.500(d) is affected by this deviation.

**Rationale:** This class deviation extends the test program period as discussed in FAR 13.5. The purpose of the test program is to entrust contracting officers with added procedural discretion and flexibility, in order to solicit, offer, evaluate, and award commercial item acquisitions in an uncomplicated manner that maximizes efficiency and economy and minimizes burden and administrative cost for the Government and Industry.

The Civilian Agency Acquisition Council has issued a letter 2002-01 providing for consultation for a Class Deviation to extend the test program. An expedited FAR case is being processed to change the date of expiration for the program in FAR 13.500(d). Pending issuance of an interim rule effecting that change, it is recommended that a class deviation remain in effect until January 1, 2003 or until issuance of the appropriate FAR change, whichever occurs first.

**Consultation:** In accordance with FAR 1.404 consultation with the Civilian Agency Acquisition Council Chairman before approving this class deviation to the FAR has been accomplished. The appropriate consultation and approval have been completed under the authority granted to the civilian agencies under Civilian Agency Acquisition Letter 2002-01.

APPROVAL: _____ DATE JAN 17 2002
Director of Office of Procurement and
Assistance Management
Department of Energy

APPROVAL: _____ DATE JAN 17 2002
Director of Office Procurement and
Assistance Management
National Nuclear Security Administration

# Headquarters Policy Flash

**FLASH 2002-06**

DATE: January 28, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **FedBizOpps Implementation Guidance**

SUMMARY: Federal Acquisition Circular (FAC) 97-26 implemented the interim rule that designated the Federal Business Opportunities ("FedBizOpps") web site as the Governmentwide Point of Entry (GPE). Mandatory use of the GPE for publishing acquisition information as described in Federal Acquisition Regulation (FAR) 5.2, "Synopsis of Proposed Contract Actions " was effective October 1, 2001. This Policy Flash provides answers to some frequently asked questions regarding the implementation of FedBizOpps requirements.

**FLASH 2002-06**
**January 28, 2002**

The Department uses a single, automated interface with FedBizOpps. The Industry Interactive Procurement System (IIPS) was enhanced to accomodate the collection and transmission of the required information for various synopses. As a result, Contracting Officers (CO) and Contract Specialist (CS) will need to become familiar with the FedBizOpps features functionality within IIPS. However, due to the underlying interface between IIPS and FedBizOpps, there is no requirement for CO's and/or CS's to register with FedBizOpps or to learn how to create, edit, and update synopses on the FedBizOpps web site. A FedBizOpps Administrator, Douglas Baptist in the Office of Management Systems and Services (ME-65), has been designated and is responsible for managing the Department's FedBizOpps account.

Complete procedures are provided in the IIPS Internal User Guide, which may be found under the Help button at http://e-center.doe.gov. Please note that only registered, internal IIPS users can "see" the guide. You must log in to IIPS prior to clicking on the Help button. Some of the most Frequently Asked Questions regarding the implementation are provided below:

☞ **Q. How does this requirement to use IIPS for sending information to FedBizOpps relate to the overall requirement to use IIPS as provided for in the April 3, 2001, memorandum on Implementing Electronic Commerce Intiatives?**

*The dollar threshold at which the information must be made publicly available through the GPE is $ 25,000. Additionally FAR 5.101(a)(2) indicates that any action over $10,000 must be displayed in a public place which may include an electronic medium such as the GPE. The April memorandum required the implementation and use of IIPS for certain acquisitions above the simplified acquisition threshold. Due to the new regulatory requirements, the use of IIPS was revised to require its use for any action that must be synopsized. For actions between $10,000 and $25,000, each office may elect to synopsize and conduct the action on IIPS or follow local procedures for displaying the synopsis and conducting the action. In the event the action is over $25,000 and is being processed within DOE/C-Web, only the synopsis, solicitation, and revisions to either document must be completed on IIPS. The remainder of the process is completed in DOE/C-Web. Instructions for this scenario are provided in the DOE/C-Web and IIPS user guide.*

☞ **Q. As the CO, what must I do to submit a synopsis or solicitation to FedBizOpps?**

*FedBizOpps requires that every initial submission take the form of a synopsis.*

*As a result the CO or CS must initiate all actions in IIPS as a synopsis regardless of the action's ultimate purpose. For example, the CO wishes to issue a notice that a draft Performance Work Statement is available for comment. While IIPS provides a status specifically for this purpose ("Draft Documents Published"), the CO must use the "Synopsis Issued" status initially to ensure the submission reaches FedBizOpps. Once this has been accomplished, the IIPS page can be updated to reflect the more appropriate status of "Draft Documents Published."*

☞ **Q. How do I know that my submission was sent to FedBizOpps?**

*An e-mail is sent to the CO and CS listed on the IIPS page stating that the notice was sent to FedBizOpps. During the period of October 1, 2001, to December 31, 2001, a separate notice was sent to the CBD concurrently. The submission should be viewable on the FedBizOpps web site shortly after its submission.*

☞ **Q. Will the notices continue to go to the CBD after January 1, 2002?**

*No. Any office desiring to publish a notice after January 1, 2002 will need to provide the information separately. However, the last publication date for the CBD printed version will be January 4, 2002. Further, the CBDNet online database will be eliminated during the month of January 2002. The Office of Management Systems and Services has assumed responsibility for the costs for publication in the CBD prior to that date. After January 1, 2002, each individual office will be responsible for the payment.*

☞ **Q. How long does it take for the notice to show up on FedBizOpps?**

*Approximately 20 minutes or less. Contact the IIPS Help Desk if your notice does not appear in a timely manner.*

☞ **Q. Is there any place to practice this prior to submitting an actual notice?**

*The IIPS practice area can be used to become familiar with this new feature. The IIPS practice area sends the information to the FedBizOpps practice area, so users can see how the 2 systems function together.*

**FLASH 2002-06**
**January 28, 2002**

☞ **Q. Who do I call if I have problems or questions?**

*Assistance can be obtained from your local IIPS Point of Contact, the IIPS Help Desk, or the IIPS Project Manager. The IIPS Help Desk can assist users with systems questions and problems. They can be reached at 800.683.0751 or at IIPS_HelpDesk@e-center.doe.gov DOE/C-Web users can obtain assistance by contacting the DOE/ C-Web Help Desk at (301) 758-1832. Policy and acquisition and/or financial assistance procedural questions should be referred to Douglas Baptist at 202-586-0813 or at douglas.baptist@pr.doe.gov*

For Questions related this Flash contact Douglas Baptist at (202) 586-0813, or via e-mail at douglas.baptist@pr.doe.gov

Gwendolyn S. Cowan, Director

cc:
PPAG Members

Keep this behind flash in file

**Gwendolyn Cowan**
01/24/2002 08:08 AM

To: Ed T Lovett/HQ-EXCH/US,
cc:
cc:
Subject: Re: CBD document

Dave and Doug have asked me to issue a flash with Q&As on FEDBIZOPS and CBD. Doug said he sent it to you but did not hear back....before i publish i want to make sure you have no objections....can you take a quick look? thanks

----- Forwarded by Gwendolyn Cowan/HR5/DOE on 01/24/2002 08:12 AM -----

**Douglas Baptist**
01/17/2002 04:27 PM

To: Gwendolyn Cowan/HR5/DOE@HR5DOE
cc: David Hoexter/HR5/DOE@hr5doe
Subject: Re: CBD document

I've just been advised it can go forward. The information is still timely and may help eliminate some confusion. Attached is the file with the notice as written. I know this doesn't conform with the ones on the web exactly. Does some one in the office format them? Let me know how I can help.

Doug

Headquarters Policy Flash 2002.c

Ed Lovett reviewed & gave verbal OK to publish. Said some dates were past.

**Gwendolyn Cowan**
01/24/2002 07:53 AM

To: Douglas Baptist/HR5/DOE@HQLNC
cc: David Hoexter/HR5/DOE,
cc: Gwendolyn Cowan/HR5/DOE@HR5DOE
Subject: Re: CBD document

thanks...i'll run it by him again...they are extremely sensitive about policy pronouncements going out without their OK and i don't want to rely on a "non-response" .
Douglas Baptist@HQLNC

**Douglas Baptist@HQLNC**
01/23/2002 06:00 PM

To: Gwendolyn Cowan/HR5/DOE@HR5DOE
cc:
Subject: Re: CBD document

I sent a copy of the flash and asked for his input. No response was received.

Doug

---
Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

----- Original Message -----
From:Gwendolyn Cowan/HR5/DOE
To:Douglas Baptist/HR5/DOE@HR5DOE,
David Hoexter/HR5/DOE@HR5DOE
Cc:Jan Chavez/HR5/DOE@HR5DOE
Date: 01/23/2002 04:52:05 PM
Subject: Re: CBD document

David/Doug: Have you folks run this by NNSA (Lovett)...they are extememly sensitive to us putting out interpretations without their review....

Douglas Baptist
01/17/2002 04:27 PM

To: Gwendolyn Cowan/HR5/DOE@HR5DOE
cc: David Hoexter/HR5/DOE@hr5doe
Subject: Re: CBD document

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Doug

Gwendolyn Cowan

# Headquarters Policy Flash

**FLASH 2002-07**

DATE: January 31, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circulars (FAC) 2001-01 Correction**

SUMMARY: This Policy Flash summarizes the correction to FAC 2001-01, published in the Federal Register on January 14, 2002, at 67 FR 1858. Contracting personnel should review the details of the FAC in full text.

**FLASH 2002-07**
**(JANUARY 31, 2002)**

**Federal Acquisition Circular (FAC) 2001-01 (Correction)**

The following item is a correcting amendment to **FAC 2001-01**, which was published in the Federal Register on October 22, 2001, at 66 FR 53492. This FAC is available via the Internet at http://www.arnet.gov/far.

*Effective Date: January 14, 2002*

The correcting rule making amends the Veterans Entrepreneurship and Small Business Development Act of 1999 as published in the Federal Register on October 22, 2001, at 66 FR 53492. The interim rule, FAC 2001-01 item V - Veterans Entrepreneurship and Small Business Development Act of 1999, did not remove existing language intended for deletion. A previous rule (FAC 97-20) combined the goal for service-disabled veteran-owned small business concerns with veteran-owned small business concerns. The correcting rule, FAC 2001-01 (Correction), properly establishes a goal for service-disabled veteran-owned small business concerns separate from the goal for veteran-owned small business concerns.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov.

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-08**

DATE: February 12, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT:
1. Treatment of Commercially Valuable Information (CVI) Under Department of Energy (DOE) Management and Operating (M&O) Contracts Memorandum
2. Suspension of Project Labor Agreement Implementation
3. Acquisition Letter 2002-01 and Financial Assistance Letter 2002-01

SUMMARY: **1. Treatment of Commercially Valuable Information (CVI) Under Department of Energy (DOE) Management and Operating (M&O) Contracts**

**FLASH 2002-08**
**February 12, 2002**

On February 4, 2002, the attached memorandum titled "Treatment of Commercially Valuable Information (CVI) Under Department of Energy (DOE) Management and Operating (M&O) Contracts" was distributed to all Heads of Contracting Activities. This memorandum provides guidance on the Department's position regarding application of the Freedom of Information Act to "commercially valuable information" first produced in perform ance of an M&O contract.

For questions related to this subject matter, please contact Bob Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov

2. **Suspension of Project Labor Agreement Implementation**

Executive Order (EO) 13202 was issued 2/17/01 to require that agencies and their construction managers remain neutral towards the use of project labor agreements (PLA) for all new construction projects. A subsequent EO was also issued 4/6/01 which authorized the agency head to exempt a particular construction project awarded after the date of the original EO where a PLA for that project was in effect before that date. The EOs applied to both contracts and financial assistance awards.

These orders have been the subject of litigation in the federal courts, and an appeal is currently pending. Based upon guidance received from White House Counsel and from the Department of Justice, the Office of Management and Budget has advised agencies to immediately cease implementation of EO's requirements pending resolution of the appeal.

The FAR Council is in the process of issuing an interim rule to suspend federal contract implementation at FAR 36.202(d). We will advise you as soon as the interim rule is published.

In light of the suspension of the EOs, this Flash is suspending FAL 2001-02, dated 7/30/01. This FAL provided a special provision to be incorporated in new or renewal grants or cooperative agreements, if the objective of the award is to construct, rehabilitate, alter, convert, extend, or repair buildings, highways, or make other improvements to real property.

This special provision should not be included in prospective awards until further notice. Awards made since the issuance of FAL 2001-02 that include the special provision, should be modified to delete the special provision.

For questions related to the Procurement Actions, contact Bob Webb at (202) 586-8264 or at Robert.Webb@pr.doe.gov

For questions related to the Financial Assistance Actions, contact Trudy Wood at (202) 586-5625 or at trudy.wood@pr.doe.gov

3. **Acquisition Letter 2002-01 and Financial Assistance Letter 2002-01**

Acquisition Letter 2002-01, " Acquisition Letters Remaining in Effect," and Financial Assistance Letters 2002-01, "Financial Assistance Letters Remaining in Effect," were issued on February 11, 2002 and are available online at www.professionals.pr.doe.gov

Gwendolyn S. Cowan, Director

Attachment

cc: PPAG Members

ATTACHMENT

**Department of Energy**
Washington, DC 20585
FEB 04 2002

MEMORANDUM FOR HEADS OF CONTRACTING ACTIVITIES

FROM: RICHARD H. HOPF, DIRECTOR
OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT
DEPARTMENT OF ENERGY

ROBERT C. BRADEN, DIRECTOR
OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT
NATIONAL NUCLEAR SECURITY
ADMINISTRATION

SUBJECT: TREATMENT OF COMMERCIALLY VALUABLE INFORMATION (CVI) UNDER DEPARTMENT OF ENERGY (DOE) MANAGEMENT AND OPERATING (M&O) CONTRACTS

The purpose of this memorandum is to inform you of the Department's position regarding application of the Freedom of Information Act to "commercially valuable information" first produced in performance of an M&O contract.

The Department has become aware that a question has arisen as to whether DOE M&O contractors may license "commercially valuable information" first produced in the performance of an M&O contract. The premise offered to justify such licensing is that DOE's Freedom of Information Act (FOIA) regulations at 10 CFR §1004(e)(2) provide for release under the FOIA of "information or technical data having commercial value" only where they are in DOE's possession and are not otherwise exempt under FOIA.

Attached to this memorandum is a legal analysis setting forth the Department's position on the proper interpretation of the FOIA regulation at 10 CFR §1004(e), the rights in data clause, and all surrounding considerations. This analysis and position of the Department should be provided to M&O contractors under your cognizance and should be followed in the handling of any Freedom of Information request for "commercially valuable information" first produced in the performance of an M&O contract.

Printed with soy ink on recycled paper

This memorandum addresses an issue that has arisen regarding whether the DOE regulations, 10 C.F.R. Part 1004, implementing the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), provide a basis for management and operating (M&O) contractors to license certain information and technical data owned by the Government under an M&O contract. Specifically, confusion has arisen with regard to whether 10 C.F.R. § 1004.3(e),[1] as applied to technical data and computer software first produced by the M&O contractor in the performance of the M&O contract, creates a licensable property right, in and of itself, in such technical data and computer software. As the analysis set out below indicates, our conclusion is that the DOE FOIA regulation does not create such a licensable property right.

**Background**

The FOIA regulation at 10 C.F.R. § 1004.3(e)(1) states that when a contract provides that DOE owns any records acquired or generated by the contractor, DOE generally will make such records that are in the possession of the Government or the contractor available to the public unless the records are exempt under FOIA. Subsection § 1004.3(e)(2) continues by providing that technical data or information having commercial value (hereinafter "commercially valuable information"or "CVI") owned by the Government for which the contractor claims CVI status will be made available for release under the FOIA only if it is in the possession of the Government and is not otherwise exempt under FOIA.

The contracts executed by M&O contractors and DOE govern all rights and responsibilities between the parties. The Department of Energy Acquisition Regulation (DEAR) requires that all M&O contracts contain a "Rights in Data" clause providing, *inter alia,* that the Government has ownership of all technical data and computer software first produced by the M&O contractor in

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[1] 10 C.F.R. § 1004.3 provides:
(e) Contractor Records. (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)(2).
(2) Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in § 1004.3(e)(4) or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).
(3) The policies stated in this paragraph:
(i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and
(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.
(4) For purposes of § 1004.3(e)(2), "technical data and information having commercial value" means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data. 10 C.F.R. § 1004.3 (2001) (amended 1994).

the performance of the M&O contract.[2] The clause continues to provide that the Government has "unlimited rights"[3] in technical data and computer software specifically used in the performance of the contract

> except as provided herein regarding copyright, limited rights data[4], or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information, ...or other data specifically protected by statute ...or, where approved by DOE, appropriate instances of the DOE Work for Others Program (emphasis added).

Technical data and computer software generated or acquired by the M&O contractor in the performance of the M&O contract whose disclosure the M&O contractor certifies to DOE would cause competitive harm to the commercial value or use of the information would fall within the definition of "technical data and information having commercial value" provided in 10 C.F.R. § 1004.3(e)(4).

The issue that arose is whether technical data or computer software owned by the Government but that is not in the possession of the Government and is claimed by the contractor to be CVI may properly be the subject of a license agreement between the M&O contractor and a third party, whereby the M&O contractor grants to the licensee a right (to the exclusion of others not licensed) to make, use, or sell the CVI. Implicit in such a license would be an assurance to the licensee that DOE would not request delivery of the licensed CVI to DOE and that the basis for the license is that the data is CVI and not that the data is patented or copyrighted. This issue also leads to the question of whether DOE may agree in advance that DOE will not in the future request delivery of a specific item of CVI from the contractor and whether DOE may create a licensable right on behalf of the M&O contractor in that specific item of CVI.

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[2] For the current versions of the "Rights in Data" clauses, *see* 48 C.F.R. 970.5227-1and 48 C.F.R. 970.5227-2. These clauses define "technical data" as: "recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base." *See* 48 C.F.R. 970.5227-2(a)(6).

[3] "Unlimited rights" is defined as "the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, ... and perform publicly and display publicly, in any manner, ..., and for any purpose whatsoever, and to have or permit others to do so." *See* 48 C.F.R. 970.5227-2(a)(7).

[4] "Limited rights data" is defined as "data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential privileged." *See* 48 C.F.R. 970.5227-2(a)(4).

**Analysis**

As stated at 10 C.F.R. § 1004.1, Part 1004 contains DOE's regulations that implement the FOIA and provide information concerning the procedures by which records may be requested by members of the public from DOE offices. The regulation is not directed to, and does purport to cover, the creation of contractor rights to license CVI. Section § 1004.3(e) addresses, *inter alia*, application of the FOIA to contractor records that are the property of the Government but are not in possession of the Government. Specifically, 10 C.F.R. § 1004.3(e) states: "DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under FOIA (emphasis added)," and 10 C.F.R. §1004.3(e)(2) states that, notwithstanding §1004.3 (e)(1), CVI will "shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b)(2)." The regulation continues, however, by confirming DOE's contractual rights to obtain contractor generated records and to determine their disposition:

> (3) The policies stated in this paragraph:
> (i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and
> (ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

10 C.F.R. § 1004.3(e)(3) (emphasis added).

The "Rights in Data" clause included in all M&O contracts (*see* 48 C.F.R. 970.5227-1 and 48 C.F.R. 970.5227-2) provides at paragraph (b)(1)(i) that the Government has ownership of all technical data and computer software first produced in the performance of the M&O contract, and in (b)(1)(ii) the Government has "unlimited rights" in technical data and computer software specifically used in the performance of the contract except as otherwise provided in the contract. Section 970.5227-2 (b)(iv) provides that the Government has the right to have such first produced data delivered to the Government at any time during the term of the M&O contract. Further, the "Access to and Ownership of Records" clause (*see* 48 C.F.R. 970.5204-3) provides in paragraph (a) that, unless exempted in (b), all records acquired or generated by the M&O contractor in the performance of the contract are the property of the Government and shall be delivered to the Government at any time during the term of the M&O contract. In paragraph (b), technical data and computer software first produced under the M&O contract are not exempted from Government ownership, the only relevant exceptions being protected CRADA information (in (b)(5)(ii)) and patent, copyright, mask work, and trademark application files and related contractor invention disclosures and documents (in (b)(5)(iii)).

Therefore, under the terms and conditions of the M&O contracts, Government-owned records falling under § 1004.3(e)(2), which include those containing information or technical data having commercial value as defined in § 1004.3(e)(4), must be provided to DOE upon DOE's request, whereupon DOE has the right to determine their disposition, including public dissemination. This conclusion is confirmed by § 1004.3(e)(3) which specifies that the policies expressed in the regulation, including the contractor's ability to claim a privilege under state or Federal law for a record containing commercially valuable information, do not alter the contractor's obligation to provide DOE upon request any DOE-owned record or DOE's rights to obtain contractor records "and to determine their disposition, including public dissemination." Thus, rather than providing contractors a basis to license Government-owned data, DOE's FOIA regulations expressly address DOE's right to make available to the public records the Government owns under an M&O contract, and a license executed by an M&O contractor that restricts the dissemination of records of this type is, without the express consent of DOE, inimical to DOE's authorities.

Beyond our interpretation of the DOE FOIA regulation, any determination by DOE to withhold CVI must consider DOE's statutory duty to disseminate technical data first produced in the performance of DOE-funded research activities. In fact, DOE's right to determine whether CVI will be publically released under § 1004.3(e)(2) underscores its mission to disseminate technical data generated under its research programs as mandated by its enabling acts. The Atomic Energy Act of 1954, as amended, provides for broad dissemination of DOE-owned data, with few exceptions.[5] The Act contains restrictions on the dissemination of data for national defense and security and for pending patent applications, but, other than those notable exceptions, the Atomic Energy Act established as a mandate as well as a policy that data should be disseminated for the progress of science and industry, public understanding, and to enlarge the fund of technical information.

[5] Relevant provisions of the Atomic Energy Act of 1954 include 42 U.S.C.S. § 2051(d) (1999)("No such arrangement shall contain any provisions or conditions which prevent the dissemination of scientific or technical information, except to the extent such dissemination is prohibited by law"), and 42 U.S.C.S. § 2161(b) (1999)("The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information").

The Energy Reorganization Act of 1974, as amended, uses almost the same language as the Atomic Energy Act in setting forth Congress' position on broad dissemination of information.[6] The Federal Nonnuclear Energy Research and Development Act of 1974, as amended, echoes that position.[7] The Department of Energy Organization Act of 1977 establishing the Department of Energy restated Congress's position that information be freely disseminated, and extended the scope of the subject matter from atomic energy to all energy sources.[8]

Given that DOE's FOIA regulations do not create a licensable property right in CVI, and that DOE's enabling statutes strongly favor the dissemination of data generated under its contracts, a question arises as to when it would be appropriate for DOE to agree that CVI will not be delivered to DOE and thereby not be released in response to a FOIA request. In the past, DOE has determined that it may protect first produced data from public release under FOIA by not asking for delivery for reasonable, fixed periods of time when withholding the data is complementary to and consistent with the technology transfer provisions of the M&O Contract. For example, if, after receipt by DOE of an FOIA request, an M&O contractor requests that DOE withhold copyrightable data from the public while the M&O contractor determines whether permission to assert copyright from DOE should be obtained, DOE may, in its sole discretion,

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[6] "Subject to the provisions of Chapter 12 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2161-2166), and other applicable law, the Administrator shall disseminate scientific, technical, and practical information acquired pursuant to this title through information programs and other appropriate means, and shall encourage the dissemination of scientific, technical, and practical information relating to energy so as to enlarge the fund of such information and to provide that free interchange of ideas and criticism which is essential to scientific (2001). "The responsibilities of the Administrator shall include, but not be limited to ...(6) developing, collecting, distributing, and making available for distribution, scientific and technical information concerning the manufacture or development of energy and its efficient extraction, conversion, transmission, and utilization; (7) creating and encouraging the development of general information to the public on all energy conservation technologies and energy sources as they become available for general use, and the Administrator, in conjunction with the Administrator of the Federal Energy Administration shall, to the extent practicable, disseminate such information through the use of mass communications...." 42 U.S.C. § 5813 (2001) (amended 1977 and 1992).

[7] The Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C.S. § 5916 (2001), provides: "The Secretary shall promptly establish, develop, acquire, and maintain a central source of information on all energy resources and technology in furtherance of the Secretary's research, development, and demonstration mission . . . . The information maintained by the Secretary shall be made available to the public, subject to the provisions of section 552 of title 5 and section 1905 of title 18, and to other Government agencies in a manner that will facilitate its dissemination . . . ."

[8] "The Congress therefore declares that the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs. It is the purpose of this chapter: ... (5) To carry out the planning, coordination, support, and management of a balanced and comprehensive energy research and development program, including - ... D) disseminating information resulting from such programs, including disseminating information on the commercial feasibility and use of energy from fossil, nuclear, solar, geothermal, and other energy technologies." 42 U.S.C. § 7112.

permit the data to be withheld from delivery to DOE and likely release under FOIA under §1004.3(e)(1) by not requesting delivery to DOE. However, such data would be licensable only after approval to copyright is granted, and then only in accordance with the M&O contract. Thus, the procedures in §1004.3(e)(2) can be used to temporarily withhold from release by DOE in response to an FOIA request, a recognized form of intellectual property that may be ultimately licensable by the M&O contractor. However, any data temporarily withheld would not be licensable, and the decision to withhold and the period of temporary withholding are entirely within DOE discretion.

If and when DOE should determine that an additional form of licensable intellectual property protection should be made available for use by its M&O contractors, DOE would circumscribe the parameters of such a right within the M&O contracts at issue. Memorializing any potentially licensable data rights within the M&O contract would protect all parties, including any potential licensees. The M&O contractor's failure to obtain DOE's approval to license such data could leave the licensee holding a worthless license. Furthermore, a question could arise as to whether the contractor was in breach of its M&O contract for making representations regarding the licensability of the data.

**Summary**

DOE's FOIA regulations, in and of themselves, do not create a property right in CVI that would permit CVI to be licensed. Under the M&O Contracts' "Rights in Data Clause, M&O contractors have no right to license CVI unless they first seek and receive DOE approval before licensing the data. DOE's long-standing interpretation of various statutes requiring DOE to disseminate information is that the licensing of technical data first produced by a contractor that is not covered under extant forms of intellectual property protection is prohibited. Any attempt by a contractor to utilize DOE's FOIA regulations as a basis to license technical data, except as provided by contract, is not authorized by DOE.

Mary H. Egger
Deputy General Counsel
Technology Transfer and Procurement

12/10/01
Date

Paul A. Gottlieb, Assistant General Counsel
Technology Transfer and Intellectual Property

12-7-01
Date

David S. Jonas
Deputy General Counsel
National Nuclear Security Administration

1/23/02
Date

# Headquarters Policy Flash

**FLASH 2002-09**

DATE: February 20, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circulars (FAC) 2001-04 and Notice of Proposed Rulemaking: Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency**

SUMMARY: This Policy Flash summarizes the items in FAC 2001-04 and a proposed rule, which were published in the Federal Register on February 8, 2002, at 67 FR 6112 and February 15, 2002, at 67 FR 7256, respectively. Contracting personnel should review the details of each item in full text of the FAC and the notice of proposed rulemaking.

**FLASH 2002-09**
**(February 20, 2002)**

## A. Federal Acquisition Circular (FAC) 2001-04

The following seven items are in FAC 2001-04, which was published in the Federal Register on February 8, 2002, at 67 FR 6112. Items 1-6 are effective February 20, 2002, and item 7 was effective February 8, 2001. The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

*Effective Date: February 20, 2002(Items 1-6)*

### 1. Definitions for Classified Acquisitions (FAR Case 2000-404)

This final rule amends FAR Part 2, Definitions, Part 4, Administrative Matters, Part 14, Sealed Bidding, and Part 32 Contract Financing. The rule amends the FAR to address inconsistencies in definitions that are used for classified acquisitions. The final rule-

- ☞ Moves the definition of "classified acquisition," "classified contract," and "classified information" from FAR 4.401 to FAR 2.101 because these definitions apply to more than one FAR part.
- ☞ Amends definition of classified information to reflect classification of privately generated restricted data in accordance with DOE regulations; and
- ☞ Clarifies the policy regarding bid openings for classified acquisitions at FAR 14.402-2.

### 2. Special Simplified Procedures for Purchases of Commercial Items in Excess of the Simplified Acquisition Threshold (FAR Case 2002-002)

*Applicability Date: FAR Subpart 13.5, as amended by this rule, is applicable to solicitations issued on or after January 1, 2002.*

This rule amends FAR Subpart 13.5 to extend, through January 1, 2003 the expiration of the test of special simplified procedures for purchases of commercial items greater than the simplified acquisition threshold, but not exceeding $5,000,000.

*Note: This rule supersedes the Class Deviation from Federal Acquisition Regulation (FAR 13.5), Test Program for Certain Commercial Items issued as an attachment to Flash 2002-05.*

3. **Notification of Noncompliance With Cost Accounting Standards (FAR Case 2001-013)**

   The final rule amends FAR Subpart 15.4, Contract Pricing, Table 15-2 Instruction for Submitting Cost/Price Proposals When Cost or Pricing Data are Required. The rule -

   - ☞ Affects cost accounting standard covered contracts where cost or pricing data are required; and
   - ☞ Removes the requirement for a contractor to notify the contracting officer when there is a noncompliance that has an immaterial cost impact.

4. **Executive Order 13204, Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts (FAR Case 2001-017)**

   This final rule converts an interim rule published in the Federal Register at 66 FR 27416, May 16 2001, without change. This rule-

   - ☞ Finalizes the implementation of Executive Order (E.O.) 13204, Revocation of E.O. on Nondisplacement of Qualified Workers Under Certain Contracts, signed by the President on February 17, 2001. Requiring that any rule implementing E.O. 12933, Nondisplacement of Qualified Workers Under Certain Contracts be promptly rescinded.
   - ☞ Removes FAR Subpart 22.12 and the clause at 52.222-50.
   - ☞ Amends FAR clause 52.212-5 by revising the date and removing paragraph (c)(6).
   - ☞ Directs the Contracting Officer not to take any action on any complaint filed under former FAR Subpart 22.12.

**5. Caribbean Basin Country End Products (FAR Case 2000-306)**

This is an interim rule, with request for comments, amends FAR 25.003, Definitions, 25.400, Scope of Subpart 25.404, Caribbean Basin Trade Initiative, and the clause at 52.225-5, Trade Agreements, to implement the determination of the United States Trade Representative to renew the treatment of Caribbean Basin country end products as eligible products under the Trade Agreements Act (TAA), except those end products from the Dominican Republic, Honduras, and Panama. The rule-

- ☞ Applies only if an acquisition is subject to the TAA (see FAR 25.403);
- ☞ Removes Panama from the definition of Caribbean Basin;
- ☞ Provides that offers of end products from Dominican Republic, Honduras, and Panama are no longer acceptable under acquisitions subject to TAA;
- ☞ Provides that unless the contracting officer receives an offer of U.S. made end products or eligible products (designated, Caribbean Basin, or NAFTA country end products) end products from Dominican Republic, Honduras and Panama are acceptable;
- ☞ Amends the definition of "Caribbean Basin country end product" identifying which countries qualify for the enhanced trade benefits under the Act; and
- ☞ Determines that the definition of "Caribbean Basin country end product" excludes products that do not qualify for duty-free treatment.

**6. Final Contract Voucher Submission (FAR Case 1999-026)**

This final rule amends FAR 42.705, Final indirect cost rates, and FAR 52.216-7, Allowable Cost and Payment. The rule-

- ☞ Directs the contracting officer to unilaterally determine the final contract payment amount when the contractor does not submit a final invoice or voucher for payment within time frame specified in the contract; and
- ☞ Applies to contracting officer that administer contract closeout procedures.

*Effective Date: February 8,* 2002

**7. Technical Amendments**

This final rule amends certain sections of FAR by updating and making editorial changes.

**B. <u>Notice of Proposed Rulemaking: Electronic Listing of Acquisition Vehicles Available for Use By More Than One Agency</u>.**

The following item was published in the Federal Register on February 15, 2002, at 67 FR 7256. The FAC is available via the Internet at http://www.arnet.gov/far/facsframe.html

The proposed rule would amend the FAR to require contracting activities to input information online for 1) Government-wide acquisition contracts (GWAC), 2) multi-agency contracts, 3) GSA Federal Supply Schedule (FSS) contracts, 4) blanket purchase agreements (BPAs) under FSS contracts, and 5) other procurement instruments intended for multiple agency use. The proposed rule-

- ☞ Adds a new FAR subpart to provide contracting officers and program managers an online source of information on contracts intended for multiple agency use;
- ☞ Adds a new FAR subpart to publicize multi-agency use contracts that-
  - ✓ Provides the internet address to access the database;
  - ✓ Requires contracting activities to enter information into the database within ten days of contract award; and
  - ✓ Requires contracting activities to enter information into the database by a specific date on all existing contracts and other procurement instruments.

**FLASH 2002-09**
**(February 20, 2002)**

- ✓ Furnishes information about GWACs, multi-agency contracts, General Services Administration FSS contracts, BPAs under FSS contracts, and other procurement instruments intended for multiple agency use via the internet at http://www.arnet.gov/gwac/govwide.html

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-10**

DATE: February 26, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Conference and Exhibitor Fair 2002**

SUMMARY: The General Services Administration (GSA) in collaboration with the Procurement Executives Council is sponsoring the 2002 Federal Acquisition Conference and Exhibitor Fair. The conference is designed for acquisition professionals in the Federal system. Conference focus will be on mission accomplishment, making the business deal, and satisfying the customer.

**FLASH 2002-10**
**(February 26, 2002)**

The conference has two dates and locations:

| | |
|---|---|
| April 30 - May 1, 2002 | Washington Convention Center<br>Washington, D.C. |
| May 14 - 15, 2002 | Hotel Inter-Continental<br>Dallas, Texas |

It includes fourteen sessions associated with three tracks:

**Track I**

Through Better Contracts

**Track II**

Through Better Government Operations

**Track III**

Through Continued Excellence in Our People

For registration and hotel information as well as an overview of the sessions offered log onto http://www.fac2002.com

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-11**

DATE: March 1, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Correction of Flash 2002-08!**

SUMMARY: Headquarters Policy Flash 2002-08, dated February 12, 2002, contained an Item 1, entitled "Treatment of Commercially Valuable Information (CVI) Under Department of Energy (DOE) Management and Operating (M&O) Contracts." Attached to that Flash was a memorandum, dated February 4, 2002, providing guidance to Heads of Contracting Activities on CVI and transmitting the legal opinion on which the guidance was based.

**FLASH 2002-11**
**March 1, 2002**

A typographical error has been discovered in the legal opinion. Attached is a corrected copy of page 3 of the legal opinion. The revision inserts the word "not" after "does" and before "purport" in the middle of the second sentence on page 3.

**Note**: Please advise your HCA's or others who have need of this information about the typographical error included in the legal opinion. If you have any other questions please contact Bob Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov

Gwendolyn S. Cowan, Director

Attachment

cc:
PPAG Members

**Analysis**

As stated at 10 C.F.R. § 1004.1, Part 1004 contains DOE's regulations that implement the FOIA and provide information concerning the procedures by which records may be requested by members of the public from DOE offices. The regulation is not directed to, and does not purport to cover, the creation of contractor rights to license CVI. Section § 1004.3(e) addresses, *inter alia*, application of the FOIA to contractor records that are the property of the Government but are not in possession of the Government. Specifically, 10 C.F.R. § 1004.3(e) states: "DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under FOIA (emphasis added)," and 10 C.F.R. §1004.3(e)(2) states that, notwithstanding §1004.3 (e)(1), CVI will "shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b)(2)." The regulation continues, however, by confirming DOE's contractual rights to obtain contractor generated records and to determine their disposition:

> (3) The policies stated in this paragraph:
> (i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and
> (ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

10 C.F.R. § 1004.3(e)(3) (emphasis added).

The "Rights in Data" clause included in all M&O contracts (*see* 48 C.F.R. 970.5227-1 and 48 C.F.R. 970.5227-2) provides at paragraph (b)(1)(i) that the Government has ownership of all technical data and computer software first produced in the performance of the M&O contract, and in (b)(1)(ii) the Government has "unlimited rights" in technical data and computer software specifically used in the performance of the contract except as otherwise provided in the contract. Section 970.5227-2 (b)(iv) provides that the Government has the right to have such first produced data delivered to the Government at any time during the term of the M&O contract. Further, the "Access to and Ownership of Records" clause (*see* 48 C.F.R. 970.5204-3) provides in paragraph (a) that, unless exempted in (b), all records acquired or generated by the M&O contractor in the performance of the contract are the property of the Government and shall be delivered to the Government at any time during the term of the M&O contract. In paragraph (b), technical data and computer software first produced under the M&O contract are not exempted from Government ownership, the only relevant exceptions being protected CRADA information (in (b)(5)(ii)) and patent, copyright, mask work, and trademark application files and related contractor invention disclosures and documents (in (b)(5)(iii)).

# Headquarters Policy Flash

**FLASH 2002-12**

DATE: March 12, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT:
1. Additions to the Office of Procurement and Assistance Management's Professionals Page
2. Availability of Updates to the Government Purchase Card Section of Chapter 13 of the DOE Acquisition Guide

SUMMARY: **1. <u>Additions to the Office of Procurement and Assistance Management's Professional Page</u>**

**FLASH 2002-12**
**March 12, 2002**

Several features have recently been added to the Office of Procurement and Assistance Management's Professionals Page that should prove to be useful to you and your staff. These include:

- **Searchable Department of Energy Acquisition Regulation (DEAR)**

  The DEAR has been modified to make it more searchable. The search engine on the Professionals Page may be used to search the DEAR. Please be advised that the search engine searches the entire Professionals Page (not just the DEAR); however, the response time is very good. A modification is being considered that will provide an option to limit the search to just the DEAR.

- **Facilities Management Contracts Online**

  A number of Facilities Management Contracts are available online via the Professionals Page at:

  http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Management+Contracts?Open Document

- **Procurement and Financial Assistance Forms Online**

  All available Federal Acquisition Regulation (FAR), and numerous Department of Energy procurement and financial assistance forms, are available online via the Professionals Page. Also available are a number of Federal Procurement Data System (FPDS) forms.

  The procurement and FPDS forms are available at:

  http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement Forms?OpenDocument

  The financial assistance forms are available at:

  http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument

- **Multi-agency Contracts Online**

  A number of multi-agency contracts are available online via the Professionals Page at http://www.arnet.gov/gwac/govurls.html

**Note**: Monthly Meetings (conference calls) on the web sites and knowledge management have also been scheduled for interested professionals. The next meeting will be on March 20, 2002, at 1:00 EST. The dial-in number is 202-287-1347 (15 lines).

Contact Paul Coombs at 202-586-4934 or via e-mail paul.coombs@hq.doe.gov if you have any additions, suggestions, or questions related to this subject matter.

**2. Availability of Updates to the Government Purchase Card Section of Chapter 13 of the DOE Acquisition Guide**

Updates to the DOE Acquisition Guide, Chapter 13 titled "Simplified Acquisition Procedures Government Purchase Card" including Guidelines and Operating Procedures for the Use of the GSA SMARTPAY Purchase Card March 2002 Revision are now available at:

http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Regulations+and+Guidance?Open Document

These updates include:

√ Revised the outdated reference to Office of Management Systems from the Best Practices section.

√ Removed the reference to the Purchase Card Program Guide. That document has been revised and attached to this Chapter as the *"Guidelines and Operating Procedures for Use of the GSA SMARTPAY Purchase Card"*.

Guidelines and Operating Procedures for Use of the GSA SMARTPAY Purchase Card - March 2002 Revision

√ Incorporated as part of Chapter 13 of the DOE Acquisition Guide

√ Revised Section 3.a., Responsibilities of the Head of the Contracting Activity to include 3.a.(8) addressing independent receipt of property and recording in facility property accounting records.

√ Added guidance to Section 3.b.4, Responsibilities of the Cardholders, for cardholders to take caution to separate the Government Purchase Card from personal cards to avoid accidental use for personal transactions.

- √ Revised Section 3.d., Responsibilities of Finance Offices, to include 3.d.(5) addressing verification of rebate amounts and the deposit of rebate checks.

- √ Revised Section 22, Competition to include guidance regarding consideration of consolidating requirements if frequent, recurring transactions for similar items occur.

- √ Revised Section 27, Head of the Contracting Activity Review, to include guidance that reviews be conducted annually.

- √ Updated Section 30, Office Supplies and JWOD, to identify new on-line features and updated or new contracts.

- √ Updated Section 31, Blanket Purchase Agreements for Information Technology Products, to identify new products, contracts, and contacts.

Contact Richard Langston at 202-586-8247 or via e-mail richard.langston@hq.doe.gov if you have any questions related to this subject matter.

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-13**

DATE: March 13, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circular (FAC) 2001-05**

SUMMARY: This Policy Flash summarizes FAC 2001-05, which was published in the Federal Register on March 7, 2002, at 67 FR 10528. Contracting personnel should review the details of the FAC in full text available via the internet at http://www.arnet.gov/far/facsframe.html

**FLASH 2002-13**
**(March 13, 2002)**

FAC 2001-05 published in the Federal Register on March 7, 2002, at 67 FR 10528 is effective March 7, 2002. This is an interim rule staying the effectivity of the interim rule published at 66 FR 27414, May 16, 2001.

This interim rule delays the effectivity of FAR 36.202(d), which was made a part of the FAR by the May 16, 2001, interim rule published to implement Executive Order 13202, as amended. Executive Order 13202, as amended, is currently the subject of litigation in the Federal courts and an appeal is pending in the United States Court of Appeals (See Flash 2002-08, Suspension of Project Labor Agreement Implementation, Item 3). Accordingly, paragraph 36.202(d) of the interim rule published May 16, 2001, at 66 FR 27414 Item II amending FAR Subparts 17.6 - Limitations, 22.1- Basic Labor Policies, and 36.2 - Special Aspects of Contracting for Construction, is stayed pending judicial resolution.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-14**

DATE: March 14, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT:
1. Acquisition Letter (AL) 2002-03, Public Relations Requirements
2. Final Plan and Guidance to Implement Executive Order 13148 Requirements to Achieve Ozone-Depleting Substance Reductions

SUMMARY: **1. <u>Acquisition Letter (AL) 2002-03, Public Relations Requirements</u>**

This Acquisition Letter was written to provide contracting activities information concerning the new requirement established by the Deputy Secretary (see attachment) for program offices to coordinate with the Headquarters, Office of Public Affairs regarding the use of public relations firms in the conduct of their program activities. The AL has been approved for release without Field Management Council Review.

Departmental elements may occasionally seek services from private sector public relations firms to assist in collecting and disseminating information about the Department's programs, missions, and activities. Because the Office of Public Affairs represents the internal source for such matters, it is important that program offices coordinate with that office regarding the use of public relations firms in the conduct of their program activities. As necessary, the Office of Public Affairs will establish guidelines for the review and coordination of such activities.

The Al directs that (1) no contract action for the acquisition of public relations services may be initiated without coordination with the Headquarters Office of Public Affairs, (2) procurement request initiators for such services are responsible for obtaining the coordination prior to submission of a procurement request to the cognizant procurement office; and (3) National Nuclear Security Administration elements and field offices should coordinate through NA 3.5, Office of Congressional, Intergovernmental and Public Affairs.

This AL will be available online at www.pr.doe.gov. For questions related to this AL contact Bob Webb at (202) 586-8264, or via e-mail at robert.webb@hq.doe.gov

2. **Final Plan and Guidance to Implement Executive Order 13148 Requirements to Achieve Ozone-Depleting Substance Reductions**

Executive Order 13148, "Greening the Government Through Leadership in Environmental Management," requires agencies to:

- reduce their use of ozone-depleting substances, substitute environmentally
- substitute environmentally preferable alternatives; and
- develop plans to phase out the procurement of Class I ozone-depleting substances

The Office of Environment Safety and Health has issued *"A Plan and Guidance to Implement Executive Order 13148 Requirements to Achieve Ozone-Depleting Substance Reductions."* This guidance details the requirements of the Executive Order regarding ozone-depleting substances and establishes Department goals.

Ozone-depleting substances are identified by EPA in 40 CFR 82.

They include certain gases used in refrigeration and fire suppression equipment and certain solvents. Among these substances are chlorofluorocarbons, halons, carbon tetrachloride, methyl chloroform, and hydrochlorofluorocarbons. Their use is being reduced and they are phased out as Industry is developing alternative products. Some products, such as halon, used in aircraft fire suppression, do not yet have alternative products for the application. Section 505(c) precludes any disposal of excess ozone-depleting substances without prior coordination with the Department of Defense which may have a mission critical requirement for the material. If this is the case, the materials must be transferred to the Department of Defense at their expense. The Environment Safety and Health guidance document is available at:

http://www.eh.doe.gov/oepa/guidance/ozone/odseoguide.pdf

Further information on the Executive Order and FAR coverage can be found at http://professionals.pr.doe.gov. Click on the Acquisition and Environment tab under the Procurement heading.

For questions related to this subject matter contact Richard Langston at (202) 586-8247 or via e-mail at richard.langston@hq.doe.gov

Gwendolyn S. Cowan, Director

Attachment

cc:
PPAG Members

ATTACHMENT

**The Deputy Secretary of Energy**
Washington, DC 20585

February 25, 2002

MEMORANDUM FOR: HEADS OF DEPARTMENTAL ELEMENTS

FROM: FRANCIS S. BLAKE

SUBJECT: Public Relations Activities

It has come to my attention that departmental elements may occasionally seek services from private sector public relations firms to assist in collecting and disseminating information about the Department's programs, missions and activities. Because the Office of Public Affairs represents the internal source for such matters, it is important that program offices coordinate with the Office of Public Affairs regarding the use of public relations firms in the conduct of their program activities.

Effective immediately, departmental elements must coordinate with the Office of Public Affairs prior to seeking contractual services for public relations matters. The Office of Public Affairs will provide guidance concerning the review and coordination process, and the Office of Management, Budget and Evaluation, in coordination with the National Nuclear Security Administration, will provide guidance to field contracting activities to ensure that procurement requests have been staffed through the Office of Public Affairs.

Printed with soy ink on recycled paper

# Headquarters Policy Flash

**FLASH 2002-15**

DATE: March 27, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circular (FAC) 2001-06 and Notice of Proposed Rulemakings: 1) Miscellaneous Cost Principles; 2) Contract Terms and Conditions Required to Implement Statute or Executive Orders-Commercial Items; and 3) Prohibited Sources**

SUMMARY: This Policy Flash summarizes the items in FAC 2001-06, which was published in the Federal Register on March 20, 2002, at 67 FR 13048. Also, provided for your review are summaries of three proposed rules on varying topics published in the Federal Register on March 20, 2002, at 67 FR 13072, 67 FR 13076, and 67 FR 13080. Contracting personnel should review the details of each item in the full text of the FAC and the proposed rules.

**FLASH 2002-15**
**(March 27, 2002)**

## A. Federal Acquisition Circular (FAC) 2001-06

The following eight items are in FAC 2001-06, which was published in the Federal Register on March 20, 2002, at 67 FR 13048. The effective date of each item is April 4, 2002. The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

### 1. Commercial Items SF 1449 (FAR Case 2000-012)

This final rule amends FAR Part 1, Federal Acquisition Regulations System, and Part 53, Forms. The rule makes several revisions to the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, as follows:

- ☞ Addition of a block to indicate that the acquisition is set-aside for HUBZone;
- ☞ Substitution of the NAICS code for the SIC code;
- ☞ Notation that award is made only on the offeror's items specifically listed in block 29; and
- ☞ Addition of several blocks to the area of the form used as a receiving report by the Government.

### 2. Definitions for "Contract Action" and "Contracting Action" (FAR Case 2000-402)

The final rule amends FAR Part 1, Federal Acquisition Regulations System, Part 5 Publicizing Contract Actions, Part 6, Competition Requirements, Part 8, Required Sources of Supplies and Services, Part 17 Special Contracting Methods, Part 19, Small Business Programs, Part 32, Contract Financing, and Part 52, Solicitation Provisions and Contract Clauses, to provide for consistent use of the term "contract action" and makes administrative changes. This final rule-

- ☞ Changes the FAR throughout from the term "contracting action" to "contract action"; and
- ☞ Clarifies the text by making editorial changes.

**3. Definitions for Sealed Bid and Negotiated Procurements (FAR Case 1998-024)**

The final rule amends FAR Part 2, Definitions of Words and Terms, Part 3, Improper Business Practices and Personal Conflicts of Interest and Part 14, Sealed Bidding, Part 15, Contracting by Negotiation, Part 28, Bonds and Insurance, Part 35, Research and Development Contracting, Part 52 Solicitation Provisions and Contract Clauses, to clarify definitions that are used for sealed bid and negotiated procurements. The rule-

- ☞ Moves the definitions of "bid sample" and "descriptive literature" from FAR Part 14 to FAR 2.101, because these definitions apply to more than one FAR part, e.g., Parts 14 and 15;
- ☞ Amends the definitions of "bid sample," "descriptive literature," and "offer" to conform with the new definitions;
- ☞ Adds a new definition for "solicitation" at FAR 2.101;
- ☞ Provides definitions for "bid" and "bidder" in FAR Part 28 because, as used in that part, the terms address sealed bid and negotiated acquisitions; and
- ☞ Clarifies terminology used in FAR 15.201(f), 15.609(e), and 35.007(g) related to "offeror," "prospective offeror," and "potential offeror." Where the term "prospective offeror" is used, it means an entity that is actively seeking a contract. Notwithstanding, these cites describe processes that ensure competition.

**4. Procurement Integrity Rewrite (FAR Case 1998-024)**

This final rule amends FAR Part 2, Definitions of Words and Terms, Part 3, Improper Business Practices and Personal Conflicts of Interest, Part 4, Administrative Matters, Part 9, Contractor Qualifications, Part 15, Contracting by Negotiation, and Part 52, Solicitation Provisions and Contract Clauses to rewrite the procurement integrity coverage in plain language. The final rule-

- ☞ Reemphasizes that FAR 3.104 implements prohibitions, restrictions, and other requirements of the Procurement Integrity Act that are placed on certain agency officials that participate in Federal agency procurements.

- Clarifies that other statutes and regulations also govern the conduct of Government employees while specific guidance at FAR 3.104 does not implement other statutes and regulations, it is very important that agency employees are aware of prohibitions and restrictions contained in these statutes and regulations that deal with the same or related prohibited conduct;

- Alerts agency officials that they should seek advice for agency ethics officials before engaging in certain activities that could have serious consequences, including criminal prosecution (see FAR 3.104-2(b), 3.104-3(c), and 3.104-5(a));

- Prohibits agency officials from taking part in a Federal agency procurement if engaged in certain conduct otherwise prohibited by other statutes and regulations irrespective of the officials' participation meeting the definition in FAR 3.104 of participating personally and substantially.

**5. Acquisition of Helium (FAR Case 2000-008)**

This final rule amends FAR Subpart 8.5, Acquisition of Helium, and the clause at 52.208-8 to implement the Helium Privatization Act of 1966 and associated changes to the Department of Interior final rule affecting the helium program. The rule-

- Changes the definitions;

- Eliminates the requirement for certain contractors and subcontractors to submit helium forecasts; and

- Establishes the requirement that contractors and subcontractors under contracts with a major helium requirement must report purchases of helium from Federal helium suppliers.

**6. HUBZone Program Applicability (FAR Case 2001-003)**

This final rule amends the FAR to simplify the existing language at FAR Part 12, Acquisition of Commercial Items, Part 19, Small Business Programs, and Part 52, Solicitation Provisions and Contract Clauses by expanding the applicability of the HUBZone Program to all FAR covered agencies.

**7. Application of Labor Clauses (FAR Case 1999-612)**

This final rule amends FAR Part 52, Solicitation Provisions and Contract Clauses, to clarify the application of labor clauses. The rule-

- ☞ Revises the clause at 52.213-4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items), makes clear labor clause applicability below the simplified acquisition threshold.

- ☞ Revises the clause at 52.222-26, Equal Opportunity, to incorporate the exception for work performed outside the United States.

**8. Technical Amendments (FAR Case 2001-06)**

The final rule amends the FAR to update sections and make editorial changes at FAR Part 1, Federal Acquisition Regulation System, Part 5, Publicizing Contract Actions, Part 6, Competition Requirements, Part 9, Contractor Qualifications, Part 31, Contract Cost Principles and Procedures, and Part 52, Solicitation Provisions and Contract Clauses.

**B. <u>Notice of Proposed Rulemakings</u>**

The following items, Miscellaneous Cost Principles, Contract Terms and Conditions Required to Implement Statute or Executive Order-Commercial Items, and Prohibited Sources, were published in the Federal Register on March 20, 2002, at 67 FR 13072, 67 FR 13076, and 67 FR 13080, respectively. The proposed rules are available via the Internet at http://www.access.gpo.gov/su_docs/fedreg/a020320c.html

**1. Miscellaneous Cost Principles**

The proposed rule would amend the FAR to delete the cost principle concerning transportation costs, and revise the cost principles concerning cost of money, other business expenses, and deferred research and development costs. Comments on this rule are to forwarded to the General Services Administration on or before May 20, 2002.

## 2. Contract Terms and Conditions Required to Implement Statute or Executive Orders-Commercial Items

This proposed rule would amend the FAR to update the clause regarding contract terms and conditions needed to implement statutes or executive orders under commercial items. The proposed rule-

- ☞ Removes clause 52.222-3, Convict Labor, from 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items, paragraph (a);

- ☞ Adds clauses 52.219-6, Notice of Total Small Business Set-Aside, 52.222-3, Convict Labor, 52.222-19, Child Labor-Cooperation with Authorities and Remedies, 52.225-16, Sanctioned European Union Country Services, 52.232-29, Terms for Financing of Purchases of Commercial Items, 52.232-30, Installment Payments for Commercial Items to 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items, paragraph (b); and

- ☞ Adds to clause 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items, paragraph (e), the clause 52.222-41, Service Utilization of Small Business Concerns.

## 3. Prohibited Sources

The proposed rule would amend the FAR to implement Executive Order 13192, Lifting and Modifying Measures With Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), and other Department of Treasury regulations that enforce economic sanctions imposed by the President of the United States. The proposed rule-

- ☞ Removes Serbia from the list of prohibited sources;

- ☞ Slightly modifies the restrictions relating to acquisition of supplies or services from Cuba, Iran, Iraq, Libya, North Korea, Sudan, and the territory of Afghanistan controlled by the Taliban;

- Requires authorization by the Department of the Treasury for any exceptions to these prohibitions, including purchases made overseas for the use overseas;

- Expands the prohibition against acquisition from entities controlled by the Government of Iraq or other specially designated nationals to include all blocked persons; and

- Provides the Department of Treasury website access to the list of Specially Designated Nationals and Blocked Persons.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-16**

DATE: March 28, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT:
1. **Interim Final Rule - National Industrial Security Program**
2. **Final Rule - Administrative Amendment of the Department of Energy Acquisition Regulation**

SUMMARY: This Policy Flash transmits a summary of two new Rules recently published in the Federal Register. The Rules are also attached to the Flash on the Professionals Homepage.

**FLASH 2002-16**
**March 28, 2002**

1. **Interim Final Rule - National Industrial Security Program**

This interim final rule, published at page 14873 of the March 28, 2002 issue of the *Federal Register*, completes implementation of Executive Order 12829, National Industrial Security Program. That Executive Order requires agencies to ensure a uniform and simplified security system for contractors and others requiring access authorizations for classified national security or restricted atomic information.

A benefit of adopting the National Industrial Security Program is the elimination of the separate Department of Energy unique Foreign Ownership, Control, and Influence questionnaire, and associated solicitation provision and contract clause. Under the National Industrial Security Program all agencies use a Standard Form (SF) 328, "Certificate Pertaining to Foreign Interests," to gather information relative to foreign ownership, control, or influence. Instructions pertaining to use of the form are contained in a new solicitation provision titled "Facility Clearance." Instructions regarding the disclosure of changes in ownership during contract administration are now contained in a new paragraph (j) of the "Security" clause.

The changes also implement Section 828 of the National Defense Authorization Act for Fiscal Year 1997, which authorized the Secretary of Energy to waive the prohibition on award of a national security contract to an entity controlled by a foreign government if an environmental restoration requirement is involved.

The Interim Final Rule is effective May 28, 2002. At that time, it will replace Acquisition Letters 97-03, "Prohibition on Contracting with Entities Controlled by Foreign Governments"(National Security Program Contracts), and 99-03, "Foreign Ownership, Control, or Influence."

Public comments are due April 29, 2002. For further information on this Rule, contact Richard Langston at 202-586-8247 or via e-mail at richard.langston@hq.doe.gov.

2. **Final Rule - Administrative Amendment of the Department of Energy Acquisition Regulation**

This final rule, published at page 14869 of the March 28, 2002 issue of the *Federal Register*, makes several technical and administrative changes to the Department of Energy Acquisition Regulation.

They include revising and expanding definitions to distinguish the National Nuclear Security Administration (NNSA) as an agency within the DOE; acknowledging the Administrator of the NNSA as an agency head; and recognizing the Senior Procurement Executives for DOE, the NNSA, and the Federal Energy Regulatory Commission (FERC). Additional changes include removing obsolete coverage; renumbering and updating certain parts of the regulation to conform with the Federal Acquisition Regulation (FAR); and correcting typographical errors.

For further information on this Rule, contact Denise Wright at 202-586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-17**

DATE: May 3, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circular (FAC) 2001-07**

SUMMARY: On April 30, 2002, a final rule, FAC 2001-07 was published in the Federal Register at 67 FR 21532. Contracting personnel should review the details of each item in the full text of the FAC.

**FLASH 2002-17**
**(May 3, 2002)**

**Federal Acquisition Circular (FAC) 2001-07**

The following four items are in FAC 2001-07, which was published in the Federal Register on April 30, 2002, at 67 FR 21532. *The effective date of each item is May 15, 2002.* The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

**1. Preference for Performance-Based Contracting (FAR Case 2000-307)**

This final rule converts the interim rule published in the Federal Register at 66 FR 22082, on May 2, 2001, amending FAR 7.105, Contents of Written Acquisition Plans. The FAR rule -

- Provides that performance-based contracting is the preferred method for acquiring services;
- Delineates the order of precedence; and
- Clarifies the documentation required in an acquisition when acquiring services.

**2. Revisions to Balance of Payments Program (FAR Case 1999-616)**

The final rule amends the FAR by removing Subpart 25.3, Balance of Payments Program, and makes conforming changes to FAR Parts 13, Simplified Acquisition Procedures, 25, Foreign Acquisition, and 52 Solicitation Provisions and Contract Clauses. This rule -

- Reduced the administrative burdens on the Government and the public;
- Eliminates the requirement for contracting officers to use balance of payments procedures to evaluate foreign offers when acquiring supplies or construction services for use outside of the United States-

  Supplies - >$100,000 but not more than $186,000 and
  Construction - <$6,909,500; and

- Maintains the existence of the Balance of Payments Program for the Department of Defense.

**FLASH 2002-17**
**(May 3, 2002)**

**3. European Union Trade Sanctions (FAR Case 2001-002)**

The final rule amends FAR 25.1103(c)(2)(i) to exclude solicitations issued and contracts awarded by the Department of Defense. This rule corrects the clause prescription for the clauses, 52.225-15, Sanctioned European Union Country End Products, and 52.225-16, Sanctioned European Union Country Services, that implement European Union trade sanctions by specifically exempting solicitations and contracts.

**4. Technical Amendments**

The amendments update sections and make editorial changes at FAR 12.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, 52.214-20, Bid Samples, and 52.244-2, Subcontracts for Commercial Items.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

Federal Register

Tuesday,
April 30, 2002

# Part VI

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

48 CFR Chapter 1
Federal Acquisition Circular 2001–07;
Final Rules

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2001–07; Introduction**

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

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

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–07. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.arnet.gov/far.*

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

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–07 and specific FAR case number(s). Interested parties may also visit our website at *http://www.arnet.gov/far.*

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | Preference for Performance-Based Contracting | 2000–307 | Wise |
| II | Revisions to Balance of Payments Program | 1999–616 | Davis |
| III | European Union Trade Sanctions | 2001–002 | Davis |
| IV | Technical Amendments. | | |

**SUPPLEMENTARY INFORMATION:** Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–07 amends the FAR as specified below:

**Item I—Preference for Performance-Based Contracting (FAR Case 2000–307)**

This final rule converts the interim rule published as Item I of FAC 97–25 at 66 FR 22082, May 2, 2001, to a final rule with an amendment at FAR 7.105. The rule implements Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398). The rule affects contracting officers that buy services by explicitly establishing a preference for performance-based contracts or task orders. Guidance for performance-based contracting is available at the following websites: *http://www.arnet.gov/Library/OFPP/BestPractices/, http://oamweb.osec.doc.gov/pbsc/index.html,* or *http://www.gsa.gov/Portal/content/pubs-content.jsp? content OID = 119969&contentType = 1008&PMVP = 1.*

**Item II—Revisions to Balance of Payments Program (FAR Case 1999–616)**

This final rule amends the FAR by removing Subpart 25.3, Balance of Payments Program, and making conforming changes to FAR Parts 13, 25, and 52. This revision will reduce administrative burdens on both the Government and the public. The FAR no longer requires contracting officers to use balance of payments procedures to evaluate foreign offers when acquiring supplies for use outside the United States that are valued at more than $100,000, but not more than $186,000, or when awarding a construction contract to be performed outside the United States and valued at less than $6,909,500. However, the Balance of Payments Program will be continued in the Department of Defense, and a Defense Federal Acquisition Regulation Supplement rule is being processed for this purpose.

**Item III—European Union Trade Sanctions (FAR Case 2001–002)**

This final rule revises FAR 25.1103(c)(2)(i) to specifically exclude solicitations issued and contracts awarded by DoD from the clause prescription for the use of FAR clauses 52.225–15, Sanctioned European Union Country End Products, and 52.225–16, Sanctioned European Union Country Services. This rule is a clarification of existing policy. DoD contracting officers must ensure that the clauses implementing European Union trade sanctions are not included in DoD solicitations and contracts.

**Item IV—Technical Amendments**

These amendments update sections and make editorial changes at FAR 12.301, 52.214–20, and 52.244–2.

Dated: April 23, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001–07 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–2007 are effective May 15, 2002.

Dated: April 19, 2002.

**Deidre A. Lee,**

*Director, Defense Procurement.*

Dated: April 18, 2002.

**Joseph A. Neurauter,**

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

Dated: April 17, 2002.

**Tom Luedtke,**

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

[FR Doc. 02–10368 Filed 4–29–02; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 7, and 37**

**[FAC 2001–07; FAR Case 2000–307; Item I]**

**RIN 9000–AJ12**

## Federal Acquisition Regulation; Preference for Performance-Based Contracting

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 821 of the Floyd D. Spence National Defense Authorization Act. The FAR rule explicitly states that performance-based contracting is the preferred method for acquiring services, enumerates an order of precedence, and further clarifies the documentation required in an acquisition plan when acquiring services.

**DATES:** Effective Date: May 15, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Procurement Analyst, at (202) 208–1168. Please cite FAC 2001–07, FAR case 2000–307.

**SUPPLEMENTARY INFORMATION:**

### A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 66 FR 22082, May 2, 2001. The interim rule explicitly stated that performance-based contracting is the preferred method for acquiring services and enumerated the order of precedence established by Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398). The coverage contained in the final rule is the same as that in the interim rule except that the final rule amends paragraph (b)(4) of FAR 7.105 to clarify that contracting officers must provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis (see 37.102(a) and 16.505(a)(3)).

Two respondents submitted comments on the interim rule. The first comment suggested that the language changes in FAR Parts 2 and 37 in this rule should be incorporated into FAR Part 8. While the Councils do not believe added references in Part 8 are needed as a general matter with respect to this rulemaking, revisions to Subpart 8.4 regarding use of the Federal Supply Schedules for the acquisition of services are under development and references to Part 37 policies on performance-based service contracting will be considered for incorporation as appropriate as part of that regulatory initiative.

The second comment stated that the FAR Part 2 definition for performance-based contracting is internally inconsistent because it calls for requirements to be set forth in clear, specific, and objective terms with measurable outcomes but also dictates the use of "broad and imprecise" statements of work. The Councils disagree. As revised, the definition of performance-based contracting, consistent with section 821(e) of the Defense Authorization Act for FY 01, explains what performance-based contracting should not include (*e.g.*, broad and imprecise work statements, a structure centering on the manner that the work should be performed), and what it should contain (*e.g.*, a work statement that has clear, specific, and objective terms with measurable outcomes).

This commenter further suggested that the regulations do not need to be changed, but acquisition personnel need to be trained in developing performance-based requirements. The regulatory changes in this rule are not meant as a substitute for training that will enhance the knowledge and skills of acquisition personnel in performance-based contracting. Guidance is available at the following websites:

*http://www.arnet.gov/Library/OFPP/BestPractices/,*
*http://oamweb.osec.doc.gov/pbsc/index.html, or*
*http://www.gsa.gov/Portal/content/pubscontent.jsp?contentOID=119969&contentType=1008&PMVP=1.*

Finally, the Office of Federal Procurement Policy has advised the FAR Council that it is establishing an inter-agency group to ensure a common understanding among the agencies regarding performance-based contracting requirements.

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

### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose a new policy requirement on small entities. The FAR currently promotes the use of and documentation of performance-based service contracting and the use of firm-fixed-price type of contracts and task orders when it is appropriate to do so. Therefore, a Final Regulatory Flexibility Analysis (FRFA) was not performed. The Councils invite comments from small businesses and other interested parties. The Councils will also consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–07, FAR Case 2000–307), in correspondence.

### C. Paperwork Reduction Act

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

### List of Subjects in 48 CFR Parts 2, 7, and 37

Government procurement.

Dated: April 23, 2002

**Al Matera,**

*Director, Acquisition Policy Division.*

### Interim Rule Adopted as Final with One Change

Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2 and 37 that was published in the **Federal Register** at 66 FR 22082, May 2, 2001, as a final rule with the following change:

## PART 7—ACQUISITION PLANNING

1. The authority citation for 48 CFR part 7 continues to read as follows:

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

2. Amend section 7.105 by adding a sentence to the end of paragraph (b)(4) to read as follows:

**7.105 Contents of written acquisition plans.**

* * * * *

(b) * * *

(4) * * * Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis (see 37.102(a) and 16.505(a)(3)).

* * * * *

[FR Doc. 02–10369 Filed 4–29–02; 8:45 am]

BILLING CODE 6820–EP–P

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 13, 25, and 52

**[FAC 2001–07; FAR Case 1999–616; Item II]**

**RIN 9000–AI90**

## Federal Acquisition Regulation; Revisions to Balance of Payments Program

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to remove the language pertaining to the Balance of Payments Program.

**DATES:** Effective Date: May 15, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2001–07, FAR case 1999–616.

**SUPPLEMENTARY INFORMATION:**

### A. Background

This final rule amends FAR part 25, Foreign Acquisition, to remove subpart 25.3, Balance of Payments Program, and makes conforming changes to FAR parts 13 and 52. This revision will reduce the administrative burdens on both the Government and the public, without significant impact on our international balance of payments.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 54936, September 11, 2000. One public comment was received. The commenter raised three specific issues: (1) This rule is a significant rule under E.O. 12866 and represents a major rule; (2) concern that no effort was made to coordinate the proposed changes and elimination of the Balance of Payments Program with the Department of Commerce; and (3) industry would be adversely impacted by the elimination of the Balance of Payments Program by the deletion of FAR 25.3. In response to these concerns, this rule is not deemed a significant rule nor a major rule and not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule applies primarily to civilian agency acquisitions of supplies valued at more than $100,000, but not more than $186,000, for use outside the United States. Few acquisitions meet all of these limitations. In reference to the coordination issue with the Department of Commerce, the Department of Commerce has a representative on the Civilian Agency Acquisition Council and raised no objection when the proposed rule was discussed and agreed upon. In addressing the commenter's economic concerns, it appears the commenter is unaware that the Balance of Payments Program will be continued within the Department of Defense, and is unaware of the DFARS case that has been opened to address this program.

Civilian agencies have limited overseas purchases and given the small range of products and services to which the Balance of Payments Program applies, the benefits derived from applying the Balance of Payments Program to Civilian agency procurements does not equal the time and effort expended. The Councils, with the recommendations of the International Acquisition Committee, thoroughly considered this comment before agreeing to convert the proposed rule to a final rule without change.

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

### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies primarily to civilian agency acquisitions of supplies valued at more than $100,000, but not more than $186,000, for use outside the United States. Few acquisitions meet all of these limitations.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR will reduce information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0023, 9000–0130, and 9000-0141 by approximately 1,121 hours.

### List of Subjects in 48 CFR Parts 13, 25, and 52

Government procurement.

Dated: April 23, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 13, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 13, 25, and 52 continues to read as follows:

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

## PART 13—SIMPLIFIED ACQUISITION PROCEDURES

2. Amend section 13.302–5 by revising paragraph (d)(3)(i) to read as follows:

**13.302–5 Clauses.**

* * * * *

(d) * * *

(3)(i) When an acquisition for supplies for use within the United States cannot be set aside for small business concerns and trade agreements apply (see Subpart 25.4), substitute the clause at FAR 52.225–3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act, used with Alternate I or Alternate II, if appropriate, instead of the clause at FAR 52.225–1, Buy American Act—Supplies.

* * * * *

## PART 25—FOREIGN ACQUISITION

**25.000 [Amended]**

3. Amend section 25.000 by removing "the Balance of Payments Program,".

**25.001 [Amended]**

4. Amend section 25.001 by removing paragraph (b) and redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d), respectively; and by removing "and the Balance of Payments Program" from the first sentence of newly redesignated paragraph (b).

**25.002 [Amended]**

5. Amend the table in section 25.002 as follows:

a. In the first column by removing "25.3 Balance of Payments Program" and adding, in its place, "25.3 [Reserved]"; and

b. In the third and fifth columns by removing "X" and adding, in their place, "—".

6. Amend section 25.003 by revising the definition "Eligible product" to read as follows:

**25.003 Definitions.**

* * * * *

*Eligible product* means a foreign end product that is not subject to discriminatory treatment under the Buy American Act due to applicability of a trade agreement to a particular acquisition.

* * * * *

**Subpart 25.3—[Reserved]**

7. Remove and reserve subpart 25.3.

**25.402 [Amended]**

8. Amend section 25.402 in the first and fourth sentences by removing "or the Balance of Payments Program"; and in the fourth sentence by removing the word "such" and inserting "those" in its place.

**25.403 [Amended]**

9. Amend section 25.403 in paragraph (a)(1) by removing "and the Balance of Payments Program".

**25.405 [Amended]**

10. Amend section 25.405 in the second sentence of paragraph (a) by removing "or the Balance of Payments Program".

**25.406 [Amended]**

11. Amend section 25.406 by removing "or the Balance of Payments Program".

**25.501 [Amended]**

12. Amend section 25.501 in paragraph (d) by removing "and Balance of Payments Program".

**25.502 [Amended]**

13. Amend section 25.502—

a. In the introductory text of paragraph (c) by removing "or the Balance of Payments Program";

b. In paragraph (c)(3) by removing "and the Balance of Payments Program provide" and adding "provides" in its place;

c. In the introductory text of paragraph (c)(4) by removing "or 25.304";

d. In paragraph (d)(2) by removing "or Balance of Payments Program"; and

e. In paragraph (d)(3) by removing "and Balance of Payments Program".

14. Revise section 25.504 to read as follows:

**25.504 Evaluation Examples.**

The following examples illustrate the application of the evaluation procedures in 25.502 and 25.503. The examples assume that the contracting officer has eliminated all offers that are unacceptable for reasons other than price or a trade agreement (see 25.502(a)(1)). The evaluation factor may change as provided in agency regulations.

15. Amend section 25.504–1 by revising the section heading and paragraphs (b)(1) and (b)(2) to read as follows:

**25.504–1 Buy American Act.**

* * * * *

(b)(1) *Example 2.*

| | | |
|---|---|---|
| Offer A | $11,000 | Domestic end product, small business |
| Offer B | $10,700 | Domestic end product, small business |
| Offer C | $10,200 | U.S.-made end product (not domestic), small business |

(2) *Analysis:* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American Act applies. Perform the steps in 25.502(a). Offer C is evaluated as a foreign end product because it is the product of a small business but is not a domestic end product (see 25.502(c)(4)). After applying the 12 percent factor, the evaluated price of Offer C is $11,424. Award on Offer B at $10,700 (see 25.502(c)(4)(ii)).

16. Amend section 25.1101 by revising paragraphs (a), (b), and (c)(1) to read as follows:

**25.1101 Acquisition of supplies.**

* * * * *

(a)(1) Insert the clause at 52.225–1, Buy American Act—

Supplies, in solicitations and contracts with a value exceeding $2,500 but not exceeding $25,000; and in solicitations and contracts with a value exceeding $25,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

(i) The solicitation is restricted to domestic end products in accordance with Subpart 6.3;

(ii) The acquisition is for supplies for use within the United States and an exception to the Buy American Act applies (*e.g.*, nonavailability or public interest); or

(iii) The acquisition is for supplies for use outside the United States.

(2) Insert the provision at 52.225–2, Buy American Act Certificate, in solicitations containing the clause at 52.225–1.

(b)(1)(i) Insert the clause at 52.225–3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act, in solicitations and contracts if—

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the value of the acquisition is more than $25,000, but is less than $177,000; and

(B) No exception in 25.401 applies. For acquisitions of agencies not subject to the Israeli Trade Act (see 25.406), see agency regulations.

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

(iii) If the acquisition value is $50,000 or more but is less than $54,372, use the clause with its Alternate II.

(2)(i) Insert the provision at 52.225–4, Buy American Act—North American Free Trade Agreement—Israeli Trade Act Certificate, in solicitations containing the clause at 52.225–3.

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

(iii) If the acquisition value is $50,000 or more but is less than $54,372, use the provision with its Alternate II.

(c)(1) Insert the clause at 52.225–5, Trade Agreements, in solicitations and contracts valued at $177,000 or more, if the Trade Agreements Act applies (see 25.401 and 25.403) and the agency has determined that the restrictions of the

Buy American Act are not applicable to U.S.-made end products. If the agency has not made such a determination, the contracting officer must follow agency procedures.

* * * * *

17. Amend section 25.1102 by revising the introductory text of paragraph (a), paragraph (b), the introductory text of paragraph (c), and paragraphs (d)(1) and (d)(2) to read as follows:

**25.1102 Acquisition of construction.**

(a) Insert the clause at 52.225–9, Buy American Act—Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than $6,806,000.

* * * * *

(b)(1) Insert the provision at 52.225–10, Notice of Buy American Act Requirement—Construction Materials, in solicitations containing the clause at 52.225–9.

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers, use the provision with its Alternate I.

(c) Insert the clause at 52.225–11, Buy American Act— Construction Materials under Trade Agreements, in solicitations and contracts for construction that is performed in the United States valued at $6,806,000 or more.

* * * * *

(d)(1) Insert the provision at 52.225–12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements, in solicitations containing the clause at 52.225–11.

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers, use the provision with its Alternate I.

* * * * *

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

18. Amend section 52.212–3 by—

a. Revising the date of the provision;

b. Removing "—Balance of Payments Program" from the introductory text of paragraph (f) (twice), and from paragraph (f)(1);

c. Removing "—Balance of Payments Program" from the introductory text of paragraph (g)(1) (twice), paragraphs (g)(1)(i), (g)(1)(ii), and (g)(1)(iii);

d. Revising paragraphs (g)(2) and (g)(3); and

e. Removing "or the Balance of Payments Program" from the second sentence of paragraph (g)(4)(iii). The revised text reads as follows:

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

* * * * *

Offeror Representations and Certifications—Commercial Items (May 2002)

* * * * *

(g) * * *

(2) *Buy American Act—North American Free Trade Agreements—Israeli Trade Act Certificate, Alternate I (May 2002).* If Alternate I to the clause at FAR 52.225–3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

(g)(1)(ii) The offeror certifies that the following supplies are Canadian end products as defined in the clause of this solicitation entitled "Buy American Act—North American Free Trade Agreement—Israeli Trade Act":

Canadian End Products:

Line Item No.

_____

_____

_____

*(List as necessary)*

(3) *Buy American Act—North American Free Trade Agreements—Israeli Trade Act Certificate, Alternate II (May 2002).* If Alternate II to the clause at FAR 52.225–3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

(g)(1)(ii) The offeror certifies that the following supplies are Canadian end products or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act—North American Free Trade Agreement—Israeli Trade Act":

Canadian or Israeli End Products:

Line Item No.

_____

_____

_____

Country of Origin

_____

_____

_____

*(List as necessary)*

* * * * *

19. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(18) and (b)(19)(i) 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 (May 2002)

(b) * * *

__(18) 52.225–1, Buy American Act—Supplies (41 U.S.C. 10a–10d).

__(19)(i) 52.225–3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act (41 U.S.C. 10a–10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).

* * * * *

**52.213–4 [Amended]**

20. Amend section 52.213–4 in the clause heading by removing "(APR 2002)" and adding "(May 2002)" in its place; and in paragraph (b)(1)(viii) by removing "—Balance of Payments Program", and by removing "(Feb 2000)" and adding "(May 2002)" in its place.

21. Amend section 52.225–1 by revising the section and clause headings; by revising paragraph (b); and by removing "—Balance of Payments Program" from paragraph (d). The revised text reads as follows:

**52.225–1 Buy American Act—Supplies.**

Buy American Act—Supplies (May 2002)

* * * * *

(b) The Buy American Act (41 U.S.C. 10a–10d) provides a preference for domestic end products for supplies acquired for use in the United States.

* * * * *

22. Amend section 52.225–2 by revising the section and provision headings; and in paragraph (a) by removing "— Balance of Payments Program". The revised text reads as follows:

**52.225–2 Buy American Act Certificate.**

* * * * *

Buy American Act Certificate (May 2002)

* * * * *

23. Amend section 52.225–3 by—

a. Revising the section and clause headings;

b. Revising paragraph (c);

c. Removing "—Balance of Payments Program" from the third sentence of paragraph (d); and

d. Removing from Alternates I and II "*(Feb 2000)*" and adding "(May 2002)" in their place; and removing "—Balance of Payment Program" from paragraph (d). The revised text reads as follows:

**52.225–3 Buy American Act—North American Free Trade Agreement—Israeli Trade Act.**

* * * * *

Buy American Act—North American Free Trade Agreement—Israeli Trade Act (May 2002)

* * * * *

(c) *Implementation.* This clause implements the Buy American Act (41 U.S.C. 10a–10d), the North American Free Trade Agreement Implementation Act (NAFTA) (19 U.S.C. 3301 note), and the Israeli Free Trade Area Implementation Act of 1985 (Israeli Trade Act) (19 U.S.C. 2112 note) by providing a preference for domestic end products, except for certain foreign end products that are NAFTA country end products or Israeli end products.

* * * * *

**52.225–4 [Amended]**

24. Amend section 52.225–4 by removing "—Balance of Payments Program" from the section and provision headings, paragraphs (a), (b), and (c), and Alternates I and II; and by revising the dates of the provision heading and Alternates I and II to read "(MAY 2002)".

25. Amend section 52.225–6 by revising the date of the provision and paragraph (c) to read as follows:

**52.225–6 Trade Agreements Certificate.**

* * * * *

Trade Agreements Certificate (May 2002)

* * * * *

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation. For line items subject to the Trade Agreements Act, the Government will evaluate offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products without regard to the restrictions of the Buy American Act. The Government will consider for award only offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products unless the Contracting Officer determines that there are no offers for those products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

26. Amend section 52.225–9 by—

a. Revising the section and clause headings;

b. Removing "and the Balance of Payments Program" from paragraph (b)(1);

c. Revising paragraph (b)(3)(i); and

d. Removing the words "or Balance of Payments Program" from paragraph (b)(3)(ii), the introductory text of paragraph (c), the first sentence of paragraph (c)(2), and in paragraph (c)(3) (twice). The revised text reads as follows:

**52.225–9 Buy American Act—Construction Materials.**

* * * * *

Buy American Act—Construction Materials (May 2002)

* * * * *

(b) * * *

(3) * * *

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the requirements of the Buy American Act is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

* * * * *

(End of clause)

27. Amend section 52.225–10 by—

a. Revising the section and provision headings;

b. Removing "Balance of Payments Program—" from paragraph (a);

c. In the first and third sentences of paragraph (b) of the provision by removing "or Balance of Payments Program";

d. In paragraph (c)(1) of the provision by removing "or Balance of Payments Program"; and

e. In Alternate I by removing "(*Feb 2000*)" and adding "(May 2002)" in its place; and by removing from paragraph (b) of the Alternate "or Balance of Payments Program". The revised text reads as follows:

**52.225–10 Notice of Buy American Act Requirement— Construction Materials.**

* * * * *

Notice of Buy American Act Requirement—Construction Materials (May 2002)

* * * * *

(End of provision)

28. Amend section 52.225–11 by—

a. Revising the section and clause headings;

b. Removing the words "and the Balance of Payments Program" from paragraph (b)(1);

c. Revising paragraph (b)(4)(i) of the clause;

d. Removing the words "or Balance of Payments Program" from paragraph (b)(4)(ii), the introductory text of paragraph (c), the first sentence of paragraph (c)(2), and paragraph (c)(3) (twice); and

e. Revising the date and paragraph (b)(1) of Alternate I. The revised text reads as follows:

**52.225–11 Buy American Act—Construction Materials under Trade Agreements.**

* * * * *

Buy American Act—Construction Materials Under Trade Agreements (May 2002)

* * * * *

(b) * * *

(4) * * *

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the restrictions of the Buy American Act is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

* * * * *

(End of clause)

*Alternate I (May 2002)*

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the Trade Agreements Act applies to this acquisition. Therefore, the Buy American Act restrictions are waived for designated country construction materials.

* * * * *

29. Amend section 52.225–12 by—

a. Revising the section and provision headings;

b. Removing "Balance of Payments Program—" from paragraph (a) of the provision;

c. Removing "or Balance of Payments Program" from the first and third sentences of paragraph (b) of the provision;

d. Removing "or Balance of Payments Program" from paragraph (c)(1) of the provision;

e. Removing "(*Feb 2000*)" from Alternate I and adding "(May 2002)" in its place, and by removing "or Balance of Payments Program" from paragraph (b) of the Alternate; and

f. Removing "(*June 2000*)" from Alternate II and adding "(May 2002)" in its place, and by removing "Balance of Payments Program—" from paragraph (a) of the Alternate. The revised text reads as follows:

**52.225–12 Notice of Buy American Act Requirement— Construction Materials under Trade Agreements.**

* * * * *

Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements (May 2002)

* * * * *

[FR Doc. 02–10370 Filed 4–29–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 25

[FAC 2001–07; FAR Case 2001–002; Item III]

RIN 9000–AJ37

## Federal Acquisition Regulation; European Union Trade Sanctions

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to correct the clause prescription for the clauses that implement European Union trade sanctions by specifically exempting solicitations issued and contracts awarded by the Department of Defense.

**DATES:** Effective Date: May 15, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2001–07, FAR case 2001–002.

**SUPPLEMENTARY INFORMATION:**

### A. Background

This final rule revises FAR 25.1103(c)(2)(i) to specifically exclude solicitations issued and contracts awarded by DoD from the clause prescription for the use of FAR clauses 52.225–15, Sanctioned European Union Country End Products, and 52.225–16, Sanctioned European Union Country Services. FAR 25.600 clearly states that European Union trade sanctions do not apply to the Department of Defense.

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

### B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR part 25 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–07, FAR case 2001–002), in correspondence.

### C. Paperwork Reduction Act

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

### List of Subjects in 48 CFR Part 25

Government procurement.

Dated: April 23, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR part 25 as set forth below:

## PART 25—FOREIGN ACQUISITION

1. The authority citation for 48 CFR part 25 continues to read as follows:

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

2. Amend section 25.1103 by revising paragraph (c)(2)(i) to read as follows:

**25.1103 Other provisions and clauses.**

* * * * *

(c) * * *

(2) * * *

(i) Solicitations issued and contracts awarded by—

(A) A contracting activity located outside of the United States, provided the supplies will be used or the services will be performed outside of the United States; or

(B) The Department of Defense;

* * * * *

[FR Doc. 02–10371 Filed 4–29–02; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12 and 52

[FAC 2001–07; Item IV]

## Federal Acquisition Regulation; Technical Amendments

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

**ACTION:** Final rule.

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

**DATES:** *Effective Date:* May 15, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755. Please cite FAC 2001–07, Technical Amendments.

### List of Subjects in 48 CFR Parts 12 and 52

Government procurement.

Dated: April 23, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12 and 52 as set forth below:

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

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

## PART 12—ACQUISITION OF COMMERCIAL ITEMS

**12.301 [Amended]**

2. Amend section 12.301 at the end of paragraphs (b)(1) and (b)(2) by removing the semi-colons and adding a period in their places; and at the end of paragraph (b)(3) by removing "; and" and adding a period in its place.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 52.214–20 by revising the introductory text of Alternates I and II to read as follows:

**52.214–20 Bid Samples.**

* * * * *

*Alternate I (May 2002).* As prescribed in 14.201–6(o)(2)(i), insert the following Alternate I:

* * * * *

*Alternate II (May 2002).* As prescribed in 14.201–6(o)(2)(ii), insert the following Alternate II:

* * * * *

**52.244–6 [Amended]**

4. Amend section 52.244–6 by revising the date of the clause to read "(May 2002)"; removing from paragraph (c)(1)(ii) "(Feb 1999)" and adding "(Apr 2002)" in its place; and removing from paragraph (c)(1)(v) "Flagged" and adding "Flag" in its place.

[FR Doc. 02–10372 Filed 4–29–02; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

## Federal Acquisition Regulation; Small Entity Compliance Guide

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–07 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–07 which precedes this document. These documents are also available via the Internet at *http://www.arnet.gov/far.*

**FOR FURTHER INFORMATION CONTACT:** Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–07

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | Preference for Performance-Based Contracting | 2000–307 | Wise. |
| II | Revisions to Balance Of Payments Program | 1999–616 | Davis. |
| III | European Union Trade Sanctions | 2001–002 | Davis. |
| IV | Technical Amendments. | | |

### Item I—Preference for Performance-Based Contracting (FAR Case 2000–307)

This final rule converts the interim rule published as Item I of FAC 97–25 at 66 FR 22082, May 2, 2001, to a final rule with an amendment at FAR 7.105. The rule implements Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398). The rule affects contracting officers that buy services by explicitly establishing a preference for performance-based contracts or task orders. Guidance for performance-based contracting is available at the following websites:

*http://www.arnet.gov/Library/OFPP/BestPractices/,*

*http://oamweb.osec.doc.gov/pbsc/index.html,* or

*http://www.gsa.gov/Portal/content/pubs__content.jsp?contentOID=119969&contentType=1008&PMVP=1.*

### Item II—Revisions to Balance of Payments Program (FAR Case 1999–616)

This final rule amends the FAR by removing Subpart 25.3, Balance of Payments Program, and making conforming changes to FAR Parts 13, 25, and 52. This revision will reduce administrative burdens on both the Government and the public. The FAR no longer requires contracting officers to use balance of payments procedures to evaluate foreign offers when acquiring supplies for use outside the United States that are valued at more than $100,000, but not more than $186,000, or when awarding a construction contract to be performed outside the United States and valued at less than $6,909,500. However, the Balance of Payments Program will be continued in the Department of Defense, and a Defense Federal Acquisition Regulation Supplement rule is being processed for this purpose.

### Item III—European Union Trade Sanctions (FAR Case 2001–002)

This final rule revises FAR 25.1103(c)(2)(i) to specifically exclude solicitations issued and contracts awarded by DoD from the clause prescription for the use of FAR clauses 52.225–15, Sanctioned European Union Country End Products, and 52.225–16, Sanctioned European Union Country Services. This rule is a clarification of existing policy. DoD contracting officers must ensure that the clauses implementing European Union trade sanctions are not included in DoD solicitations and contracts.

### Item IV—Technical Amendments

These amendments update sections and make editorial changes at FAR 12.301, 52.214–20, and 52.244–2.

Dated: April 23, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 02–10373 Filed 4–29–02; 8:45 am]

BILLING CODE 6820–EP–P

# Headquarters Policy Flash

**FLASH 2002-18**

DATE: May 14, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Office of Federal Procurement Policy (OFPP) Determination of Executive Compensation Benchmark Amount**

SUMMARY: The Administrator of OFPP has determined that the "benchmark compensation amount" that is allowable under government contracts is $387,783 for costs incurred during contractors' fiscal year (FY) 2002. This determination was made pursuant to Section 39 of the OFPP Act (41 U.S.C. 435) and was published in the Federal Register Vol. 67, No. 87, May 6, 2002.

**FLASH 2002-18**
**May 14, 2002**

This "benchmark compensation amount" is to be used for contractor FY 2002 and subsequent contractor FYs unless and until revised by OFPP. This benchmark compensation amount applies to contract costs incurred after January 1, 2002, under covered contracts of both defense and civilian procurement agencies as specified in Section 808 of Pub. L. 105-85.

This "benchmark compensation amount" supercedes the amount cited in Headquarters Policy Flash 2001-15, May 18, 2001.

Applicability to FAR and M&O contracts is addressed at 48 CFR 31.205-6(p) and 48 CFR 970.3102-05-6(p), respectively.

Questions regarding this Flash should be directed to Terry Sheppard at (202) 586-8193 or via e-mail at terry.sheppard@hq.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

Federal Register

Monday,
May 6, 2002

Part IV

# Office of Management and Budget

**Office of Federal Procurement Policy; Determination of Executive Compensation Benchmark Amount Pursuant to Section 808 of Public Law 105–85; Notice**

## OFFICE OF MANAGEMENT AND BUDGET

### Office of Federal Procurement Policy; Determination of Executive Compensation Benchmark Amount Pursuant to Section 808 of Public Law 105–85

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Notice.

**SUMMARY:** The Office of Management and Budget (OMB) is hereby publishing the attached memorandum to heads of agencies concerning the determination of the maximum "benchmark" compensation that will be allowable under government contracts during contractors' FY 2002—$387,783. This determination is required to be made pursuant to Section 808 of Public Law 105–85. It applies equally to both defense and civilian procurement agencies.

**FOR FURTHER INFORMATION CONTACT:** Richard C. Loeb, Acting Deputy Administrator, Office of Federal Procurement Policy, on (202) 395–3254.

**Angela B. Styles,**
*Administrator.*

**To The Heads of Executive Departments and Agencies**

*Determination of Executive Compensation Benchmark Amount Pursuant to Section 808 of Public Law 105–85*

This memorandum sets forth the "benchmark compensation amount" as required by Section 39 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 435), as amended. Under Section 39, the "benchmark compensation amount" is "the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available." The "benchmark compensation amount" established as directed by Section 39 limits the allowability of compensation costs under government contracts. The "benchmark compensation amount" does not limit the compensation that an executive may otherwise receive.

Based on a review of commercially available surveys of executive compensation and after consultation with the Director of the Defense Contract Audit Agency, I have determined pursuant to the requirements of Section 39 that the benchmark compensation amount for contractor fiscal year 2002 is $387,783. This benchmark compensation amount is to be used for contractor fiscal year 2002, and subsequent contractor fiscal years, unless and until revised by OMB. This benchmark compensation amount applies to contract costs incurred after January 1, 2002, under covered contracts of both the defense and civilian procurement agencies as specified in Section 808 of Public Law 105–85.

Questions concerning this memorandum may be addressed to Richard C. Loeb, Acting Deputy Administrator, Office of Federal Procurement Policy, on (202) 395–3254.

**Angela B. Styles,**
*Administrator.*

[FR Doc. 02–11138 Filed 5–3–02; 8:45 am]
BILLING CODE 3110–01–P

# Headquarters Policy Flash

**FLASH 2002-19**

DATE: July 9, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **NAICS Appeal of SCI Consulting, Inc. in re Solicitation No. DE-RQ01-02NA00019, Department of Energy, Office of Procurement Operations, Washington, D.C., No. NAICS-2002-05-06-17, June 12, 2002**

SUMMARY: This is an important decision which enables Federal agencies to make better use of GSA schedules to make awards to small businesses.

➤ **FACTS**: The Department of Energy (DOE) issued a Request for Quotation (RFQ) for computer-related technologies, information systems, and operational support under a General Services Administration (GSA) Federal Supply Schedule (FSS) contract (Schedule #70, SIN 132-51). That GSA FSS contract contained a small business size standard, encourages preference for small business, and authorizes contracting officers to "limit consideration (in the issuance of orders) to those schedule contractors that are small business concerns."

The DOE RFQ did not state a NAICS code. It did state "Pursuant to (the GSA FSS Contract), only small business concerns will be eligible for award of this task order" and "NNSA intends to award one task order to the responsible small business contractor whose proposal is responsive to the solicitation and determined to be the best value to the Government."

The appellant entered its appeal before the Small Business Administration's (SBA's) Office of Hearings and Appeals (OHA) requesting that OHA assign a NAICS code to the RFQ. It alleged that the RFQ was a *de facto* small business set-aside.

GSA responded in support of DOE, and SBA intervened in support of the appellant.

➤ **ISSUE**: Does an appellant have standing before the SBA OHA where the procuring agency does not publish a NAICS code in an RFQ under a GSA FSS contract?

➤ **CONCLUSION**: The OHA held that the RFQ was not a small business set-aside since it did not contain the relevant provisions associated with a set-asides, effectively saying there is no such thing as a *de facto* small business set-aside. Furthermore, it held that where a procurement is not a set-aside, standing is not automatic and the protestor must demonstrate that it "would receive some special benefit as a small business under the procurement." Here the appellant did not establish that it would obtain any benefit because of its status as a small business or that it was adversely affected by a lack of a NAICS code. Therefore, it lacked standing to bring the size standard appeal.

➤ **IMPLICATION OF THE DECISION**: Pursuant to DOE policy, contracting officers should limit the solicitation of orders under GSA FSS contracts to small businesses, wherever possible. When doing so, the RFQs should not state a NAICS code, not use the term "small business set-aside," not use set-aside provisions or clauses, or not do anything that would indicate that the RFQ is a formal small business set-aside.

Instead, the RFQ is effectively using the NAICS code (s) and the size standard (s) of the GSA contract. Offerors responding to the RFQ do not need to affirm their status as a small business, since size was determined at the time of the award of the GSA FSS contract.

For questions related to this subject matter, please contact Robert Webb at 202-586-8264 or via e-mail at Robert.Webb@pr.doe.gov

Gwendolyn S. Cowan, Director

Attachment

cc: PPAG Members

NAICS-4488

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

| | |
|---|---|
| NAICS APPEAL OF:<br><br>SCI Consulting, Inc.<br><br>Appellant<br><br>Solicitation No. DE-RQ01-02NA00019<br>Department of Energy<br>Office of Procurement Operations<br>Washington, DC | Docket No. NAICS-2002-05-06-17<br><br>Decided: June 12, 2002 |

## APPEARANCES

Thomas P. Humphrey, Esq., John E. McCarthy, Jr., Esq.
Crowell & Moring LLP, for Appellant SCI Consulting, Inc.

Paul A. Gervas, Esq., for the Department of Energy

Thedius L. Thompson, Esq., for Intervenor General Services Administration

Kenneth Dodds, Esq., for Intervenor Small Business Administration

## DIGEST

For a North American Industrial Classification (NAICS) code appeal to be justiciable, this Office must have jurisdiction over its subject matter and the Appellant must have standing to file an appeal with this Office.

## DECISION

BLAZSIK, Administrative Judge:

## Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

## Issue

Whether this NAICS code appeal is justiciable.

## Facts

On April 24, 2002, the Contracting Officer (CO) for the Department of Energy, Office of Procurement Operations, in Washington, D.C. (DOE), issued a Request for Quotations (RFQ) to selected vendors from the General Services Administration (GSA) Federal Supply Schedule (FSS) #70, Special Line Number (SIN) 132-51, to submit proposals for a single task order (with multiple task assignments), to be placed under the awardee's FSS contract.[1] The contractor will provide computer-related technologies, information systems, and operational support for the National Nuclear Security Administration (NNSA).

The CO did not assign to the task order a size standard or a North American Industry Classification System (NAICS) code. The solicitation stated: "Pursuant to GSA Schedule #70, SIN 132-51, only small business concerns will be eligible for award of this task order." Attachment C stated: "NNSA intends to award one task order to the responsible small business contractor whose proposal is responsive to the solicitation and determined to be the best value to the Government."[2] Proposals were due on May 31, 2002.

## Appeal and Responses

SCI Consulting, Inc. (Appellant) filed this appeal on May 6, 2002. Appellant asserts that, although there is no NAICS code shown in the solicitation, it is a "de facto small business set-aside." Also, DOE is evading the small business regulations by not

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[1] The Federal Acquisition Regulation (48 C.F.R. or FAR), at Subpart 8.4, uses the terms Federal Supply Schedule (FSS) and Multiple Award Schedule (MAS) interchangeably.

[2] There are no references to "set-aside" and no other references to "small business" in the RFQ. The remainder of the RFQ contains no FAR provisions or clauses relating to small business set-asides, i.e., 48 C.F.R. § 52.219-6, Notice of Total Small Business Set-Aside; 48 C.F.R. § 52.219-7, Notice of Partial Small Business Set-Aside; 48 C.F.R. § 52.219-14, Limitations on Subcontracting.

On May 29, 2002, the SBA intervened in this proceeding in support of Appellant.[6] SBA asserts that, because DOE limited competition for this task order to small business concerns, it has, in fact, set it aside for small businesses, even though it has not assigned it a NAICS code or a size standard. SBA agrees with Appellant that DOE's action is to evade the size protest process.

SBA asserts this Office has recognized that FAR does not prohibit MAS procurements from being set aside for small business concerns, although the self-certifications submitted to GSA as part of the MAS contracting process are not relevant here. *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (*SETA-FEMA*), at 11 (2002). Further, the GSA FSS contract, SIN 132-51, contains not one NAICS code and size standard, but many different ones based on both number of employees and annual receipts. If a NAICS code and size standard are not assigned to this task order, businesses of varying sizes will be competing for it. Clearly, asserts SBA, there is one NAICS code "which best describes the principal purpose of the product or service being acquired" by DOE, and if DOE will not designate it, this Office should. 13 C.F.R. § 121.402(b).

## Discussion

The appeal was filed within 10 calendar days from the issuance of the solicitation. Thus it is timely filed. 13 C.F.R. § 134.304(a)(3).

Even though this Office has subject matter jurisdiction over NAICS code designation appeals, 13 C.F.R. §§ 121.1102 & 134.102(k), the Administrative Judge must dismiss the appeal. This task order is not a small business set-aside and Appellant has failed to demonstrate that it would be adversely affected by the lack of a NAICS code designation on an unrestricted task order. Thus, Appellant lacks standing to bring this appeal. 13 C.F.R. §§ 121.1103(a) & 134.302(b).

First, it is clear from an examination of the record, that the instant task order is not a small business set-aside. The FAR defines "set-aside for small business" as "the reserving of an acquisition exclusively for participation by small business concerns." 48 C.F.R. § 19.501(a). All solicitations involving set-asides must specify the applicable small business size standard and NAICS code. 48 C.F.R. § 19.501(g). The FAR further requires the CO to insert into solicitations involving small business set-asides certain clauses, i.e., 48 C.F.R. § 52.219-14, Limitations on Subcontracting; and either 48 C.F.R. § 52.219-6, Notice of Total Small Business Set-Aside; or 48 C.F.R. § 52.219-7, Notice of Partial Small Business Set-Aside, as applicable. 48 C.F.R. § 19.508(c)-(e). Thus, in a small business set-aside, the solicitation will clearly

[6] The SBA may intervene at any time in any case prior to final decision. 13 C.F.R. § 134.210(a).

indicate that the entire procurement, or part of it, is restricted to small business offerors. Such standard FAR clauses in solicitations help to determine whether a particular procurement is a set-aside. *See SIC Appeal of Applied Management & Services*, SBA No. SIC-3589, at 3 & n.5 (1992).

There is no indication that the instant task order is a small business set-aside. The RFQ contains none of the required FAR clauses. It nowhere refers to a "set-aside."[7] Moreover, in this proceeding, the CO's response stated and reiterated that the task order is not a set-aside. Therefore, notwithstanding the two references to "small business" in the RFQ, the Administrative Judge concludes, based on the preponderance of the evidence in the record before her, that the instant task order is not a small business set-aside. 13 C.F.R. § 134.224.[8]

Second, this Appellant lacks standing to bring this appeal because of its failure to demonstrate that it would be adversely affected by the lack of a NAICS code designation on this unrestricted task order.

The Administrative Judge notes that in NAICS code appeals, the distinction between jurisdiction and standing usually is not significant. Nearly all procurements litigated are small business set-asides and adverse effect of a NAICS code or size standard on a prospective offeror is obvious. Here, in contrast, the distinction is significant.

Where a procurement is not a set-aside for small business, standing is not automatic. Generally, an appellant will argue that it would receive some special benefit as a small business under the procurement. This benefit may be in the form of a 10 percent evaluation preference for a small disadvantaged business appellant, *SIC Appeal of Andrew Searcy, Jr. d/b/a Xerxe Group*, SBA No. SIC-4260, at 2 & n.2 (1997); or a preferential award, *SIC Appeal of Right Away Foods Corporation*, SBA No. SIC-2309 (1985). Also, *see generally Earth Property*, supra at 11-18.

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[7] In contrast, the RFQ's cover sheet in *SETA-FEMA* stated the procurement there was totally set aside for small business, and the RFQ included FAR clause 52-219-1 designating a NAICS code and requiring each quoter to self-certify whether it is or is not a small business. *See SETA-FEMA, supra* at 3.

[8] Appellant's appeal essentially is a request for this Office to set-aside this task order for small business and assign it a NAICS code. However, it is well-established that this Office has no authority to order a contracting officer to set aside a procurement for small business. *SIC Appeals of Earth Property Services, Inc., et al.*, SBA No. SIC-3296, at 17 (1990). This Office specifically has held so where, as here, the Appellant is the incumbent contractor on a small business set-aside, and the follow-on is unrestricted. *SIC Appeal of Griffin Services, Inc.*, SBA No. SIC-3297 (1990).

Here, Appellant has not established that it would obtain any benefit because of its status as a small business, on this unrestricted task order.[9] Accordingly, because the instant task order is not a small business set-aside, and Appellant has not shown otherwise that it is adversely affected by the lack of a NAICS code, the Administrative Judge concludes Appellant lacks standing to bring this appeal.

Conclusion

For the above reasons, the Administrative Judge DISMISSES the instant appeal.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

GLORIA E. BLAZSIK
Administrative Judge

[9] In asserting that the self-certifications submitted to GSA as part of the MAS contracting process are not relevant here, SBA ignores the distinction, pointed out in *SETA-FEMA*, between a task order and a Blanket Purchase Agreement (BPA) under an MAS contract. A task order is not a separate procurement from the MAS contract, while a BPA is. Thus, in the event of a size protest, different rules would apply concerning protest timeliness and the date as of when the challenged firm's size is measured. *See* 13 C.F.R. § 121.1004(a)(3); *SETA-FEMA, supra* at 11-12 & n.7, *Size Appeal of Advanced Technologies and Laboratories International, Inc.*, SBA No. SIZ-4484, at 4 (2002).

## CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2002, I served the foregoing, by facsimile and first-class mail, to the following:

Thomas P. Humphrey, Esq.
John E. McCarthy, Jr., Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
Fax (202) 628-5116

Irie W. Clarke, Contracting Officer
Department of Energy
Headquarters Office of Procurement Operations
1000 Independence Avenue, S.W.
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Thedlus L. Thompson, Esq.
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Paul A. Gervas, Esq,
Office of the Assistant General Counsel
For Procurement and Financial Assistance, GC-61
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585
Fax (202) 586-6918

I hereby certify that, on June 12, 2002, I served the foregoing, by facsimile and internal agency mail, to the following:

John W. Klein, Esq.
Assoc. General Counsel for Procurement Law
U.S. Small Business Administration
409 Third Street, S.W.
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Robert L. Gangwere, Esq.
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409 Third Street, S.W.
Washington, DC 20416
Fax (202) 205-6873

Patricia Lee

Patricia Lee
Office of Hearings and Appeals

# Headquarters Policy Flash

**FLASH 2002-20**

DATE: July 9, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter (AL) 2002-04, Processing Requests for Indemnification or Other Extraordinary Contractual Relief Under Pub. L. 85-804**

SUMMARY: This Acquisition Letter describes the process for the Department of Energy's coordination and determination to grant a request of a DOE contractor for indemnification or other form of extraordinary contractual relief pursuant to Pub. L. 85-804. It also includes a flow diagram for processing such requests.

**FLASH 2002-20**
**July 9, 2002**

This AL has been reviewed by the Field Management Council and approved by the Secretary for release.

This AL will be available online at www.pr.doe.gov. For questions related to this AL contact Bob Webb at (202) 586-8264, or via E-mail at robert.webb@hq.doe.gov

Gwendolyn S. Cowan,
Director

Attachment

cc: PPAG Members

# Headquarters Policy Flash

**FLASH 2002-21**

DATE: July 10, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter (AL) 2002-05, Greening the Government Requirements in Contracting**

SUMMARY: The Field Management Council has completed its review and the Secretary has approved a new Environmental Acquisition Letter. This new Acquisition Letter replaces Acquisition Letter 2000-03.

**FLASH 2002-21**
**July 10, 2002**

This new AL implements the series of (5) Executive Orders intended to improve the Federal impact on the environment and lead others along the route of environmental responsibility.

The **Orders** are:

- ❒ 13101 - Greening the Government Through Waste Prevention, Recycling and Federal Acquisition;
- ❒ 13123 - Greening the Government Through Efficient Energy Management;
- ❒ 13148 - Greening the Government Through Leadership in Environmental Management;
- ❒ 13149 - Greening the Government Through Fleet and Transportation Efficiency, and;
- ❒ 13221 - Energy Efficient Standby Power Devices.

The Acquisition Letter continues the use of the Green Acquisition Advocates who were appointed by the Heads of the Contracting Activities pursuant to Acquisition Letter 2000-03 and adds coverage for three new Greening the Government Executive Orders not originally included in Acquisition Letter 2000-03.

For information on this AL, contact Richard Langston at 202-586-8247 or via e-mail at richard.langston@hq.doe.gov.

Gwendolyn S. Cowan,
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-22**

DATE: July 11, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circular (FAC) 2001-08 and Advanced Notice of Proposed Rulemaking: Section 508 Contract Clause (FAR Case 2001-033)**

SUMMARY: On June 27, 2002, FAC 2001-08 was published in the Federal Register at 67 FR 43512. Also, provided for your review and comment is a summary of the advanced notice of proposed rulemaking published in the Federal Register on June 27, 2002, at 67 FR 43524. Contracting personnel should review the details of each item in the full text of the FAC and the advance notice of proposed rulemaking.

**FLASH 2002-22**
**(July 11, 2002)**

## A. Federal Acquisition Circular (FAC) 2001-08

The following four items are in FAC 2001-08, which was published in the Federal Register on June 27, 2002, at 67 FR 43512. *The effective date of each item is July 29, 2002.* The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

### 1. Definition of "Claim" and Terms Relating to Termination (FAR Case 2000-406)

This final rule in no way changes the intended purpose of FAR text or clauses. However, this rule-

- Clarifies the applicability of definitions by revising and relocating language in FAR 33.201 Definitions, 49.001, Definitions, and 17.103, Definitions to FAR 2.101 Definitions;

- Eliminates redundant or conflicting definitions by-

  - Adding a definition to FAR 2.101, Definition and new language at FAR 17.104, General, explaining the distinction between termination for convenience and cancellation as deleted from the definition of Termination of convenience;

  - Revises FAR 33.213(a), Obligation to Continue Performance, by clarifying distinction of Claims arising under and relating to a contract; and

  - Provide consistency in the definition of Claims as discussed in FAR clause 52.233-1, Disputes and FAR 2.101 Definitions.

- Streamlines the process for locating definitions by amending FAR 2.101, Definitions.

### 2. Federal Supply Schedule Order Disputes and Incidental Items (FAR Case 1999-614)

The final rule amends FAR Part 8, Required Sources of Supplies and Services to-

- incorporate policies for disputes in schedule contracts; and

- Remove the requirement to notify GSA when a schedule contractor refuses to honor an order placed by a Government contractor.

**3. Relocation Costs (FAR Case 1997-032)**

The final rule amends FAR 31.205-35, Relocation Costs, to-

- Remove ceilings imposed on individual relocation cost elements;
- Recognize the increasing commercial practice of reimbursing lump-sum relocation costs in certain situations;
- Make allowable payments for employment assistance for spouses and increased employee income FICA taxes incident to allowable reimbursed relocation costs;
- Increase the ceiling for allowable miscellaneous relocation costs; and
- Make a number of editorial changes.

**4. Technical Amendments**

The amendments update sections and make editorial changes at FAR 52.202-1, Definitions, 52.212-3, Notice to Supplier, and 52.225-11, Buy American - Construction Materials Under Trade Agreements.

**B. <u>Notice of Proposed Rulemaking</u>**

The following item was published in the Federal Register on June 27, 2002, at 67 FR 43524. The advanced notice of proposed rulemaking is available via the Internet at http://www.acqnet.gov/far/ProposedRules/2001-033.pdf

**Section 508 Contract Clause**

The advance notice of proposed rulemaking is issued to determine whether there is a need to change the FAR or acquisition guidance in order to promote a more consistent and effective implementation of Section 508 of the Rehabilitation Act of 1973. Also, respondents are requested to discuss advantages and disadvantages of specific changes deemed necessary to further implement Section 508.

**FLASH 2002-22**
**(July 11, 2002)**

The Office of Procurement and Assistance Policy will consolidate DOE comments on this advanced notice. Comments are to be forwarded to Denise Wright no later than August 5, 2002.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

Federal Register

Thursday,
June 27, 2002

Part V

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

48 CFR Chapter 1, et al.
Federal Acquisition Circular 2001–08;
Final Rule

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2001–08; Introduction**

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

**ACTION:** Summary presentation of final rules, and technical amendments and corrections.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–08. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.arnet.gov/far.*

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

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–08 and specific FAR case number(s). Interested parties may also visit our website at *http://www.arnet.gov/far.*

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | Definition of "Claim" and Terms Relating to Termination | 2000–406 | Klein. |
| II | Federal Supply Schedule Order Disputes and Incidental Items | 1999–614 | Nelson. |
| III | Relocation Costs | 1997–032 | Olson. |
| IV | Technical Amendments | | |

**SUPPLEMENTARY INFORMATION:** Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–08 amends the FAR as specified below:

**Item I—Definition of "Claim" and Terms Relating to Termination (FAR Case 2000–406)**

The purpose of this final rule is to clarify the applicability of definitions, eliminate redundant or conflicting definitions, and streamline the process for locating definitions. This rule is not intended to change the meaning of any FAR text or clause. Movement of various definitions to FAR 2.101 is not intended to change the operation of the cost principles and, specifically, the movement of the definition of "claim" to FAR 2.101 is not intended to change the scope or context of FAR 31.205–47(f)(1).

This final rule—

- Revises and moves the definitions of "claim" from FAR 33.201; "continued portion of the contract," "partial termination," "terminated portion of the contract" from FAR 49.001; and "termination for convenience" from FAR 17.103;
- Adds a definition of "termination for default" at FAR 2.101 and a new paragraph (d) at FAR 17.104 that explains the distinction between "termination for convenience" and "cancellation" that was deleted from the definition of "termination for convenience" that was moved from FAR 17.103;
- Revises FAR 33.213(a) to clarify the distinction between claims "arising under a contract" and claims "relating to a contract"
- Revises the definition of "claim" in the FAR clause at 52.233–1 to conform to the definition at FAR 2.101; and
- Makes other editorial revisions for clarity.

**Item II—Federal Supply Schedule Order Disputes and Incidental Items (FAR Case 1999–614)**

This final rule amends the FAR to add policies on disputes and incidental items under Federal Supply Schedule contracts and to remove the requirement to notify GSA when a schedule contractor refuses to honor an order placed by a Government contractor. This rule affects all ordering offices acquiring supplies or services subject to the procedures of FAR Subpart 8.4.

**Item III—Relocation Costs (FAR Case 1997–032)**

This final rule amends the relocation cost principle at FAR 31.205–35. The rule will only affect contracting officers that price contracts using cost analysis, or that are required by a contract clause to use cost principles for the determination, negotiation, or allowance of costs.

The relocation cost principle addresses the allowability of costs incurred by an existing contractor employee incident to the permanent change of the employee's assigned work location for a period of 12 months or more, or upon recruitment of a new employee. The final rule revises the cost principle by making allowable payments for spouse employment assistance and for increased employee income and Federal Insurance Contributions Act taxes incident to allowable reimbursed relocation costs, increasing the ceiling for allowance of miscellaneous costs of relocation, and making a number of editorial changes.

**Item IV—Technical Amendments**

These amendments update sections and make editorial changes at FAR 52.202–1, 52.212–3, and 52.225–11.

Dated: June 19, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001–08 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–08 are effective July 24, 2002.

Dated: June 18, 2002.

**Deidre A. Lee,**

*Director, Defense Procurement.*

Dated: June 10, 2002.

**David A. Drabkin,**

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

Dated: June 10, 2002.

**Tom Luedtke,**

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

[FR Doc. 02–15939 Filed 6–26–02; 8:45 am]

BILLING CODE 6820–EP–P

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 2, 17, 31, 33, 49, and 52

**[FAC 2001–08; FAR Case 2000–406; Item I]**

**RIN 9000–AJ19**

## Federal Acquisition Regulation; Definition of "Claim" and Terms Relating to Termination

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify and move the definitions of "claim" and certain terms relating to termination to the FAR part regarding definitions.

**DATES:** *Effective Date:* July 29, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Klein, Procurement Analyst, at (202) 501–3775. Please cite FAC 2001–08, FAR case 2000–406.

**SUPPLEMENTARY INFORMATION:**

### A. Background

The purpose of this rule is to clarify the applicability of definitions, eliminate redundant or conflicting definitions, and streamline the process for locating definitions. This rule is not intended to change the meaning of any FAR text or clause. Movement of various definitions to FAR 2.101 is not intended to change the operation of the cost principles, and specifically the movement of the definition of "claim" to FAR 2.101 is not intended to change the scope or context of FAR 31.205–47(f)(1).

This final rule—

- Revises and moves the definitions of "claim" from 33.201; "continued portion of the contract," "partial termination," "terminated portion of the contract" from FAR 49.001; and "termination for convenience" from FAR 17.103;
- Adds a definition of "termination for default" at FAR 2.101 and a new paragraph 17.104(d) that explains the distinction between "termination for convenience" and "cancellation" that was deleted from the definition of "termination for convenience" that was moved from FAR 17.103;
- Revises FAR 33.213(a) to clarify the distinction between claims "arising under a contract" and claims "relating to a contract";
- Revises the definition of "claim" in the clause at FAR 52.233–1 to conform to the definition at FAR 2.101; and
- Makes other editorial revisions for clarity.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 66 FR 42922, August 15, 2001, with a request for comment. One respondent submitted two comments to the proposed rule. The Councils considered and accepted both comments. The rule was modified as a result. The first comment recommended that the parenthetical reference at FAR 31.205(f)(1) be changed to reflect the new location of the definition of "claim" at FAR 2.101. This was done. The second comment recommended that a clarifying statement be added to the **Federal Register** notice stating that the movement of the various definitions to FAR 2.101 is not intended to change the operation of the cost principles, and specifically the movement of the definition of "claim" to FAR 2.101 is not intended to change the scope of FAR 31.205–47(f)(1). This was also done.

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

### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not change policy. We did not receive any comments regarding this determination as a result of publication of the proposed rule in the **Federal Register** on August 15, 2001 (66 FR 42922).

### C. Paperwork Reduction Act

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

### List of Subjects in 48 CFR Parts 2, 17, 31, 33, 49, and 52

Government procurement.

Dated: June 19, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 17, 31, 33, 49, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 17, 31, 33, 49, and 52 continues to read as follows:

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

## PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding, in alphabetical order, the definitions "Claim," "Continued portion of the contract," "Partial termination," "Termination for convenience," "Termination for default," and "Terminated portion of the contract" to read as follows:

**2.101 Definitions.**

* * * * *

*Claim* means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in

33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

* * * * *

*Continued portion of the contract* means the portion of a contract that the contractor must continue to perform following a partial termination.

* * * * *

*Partial termination* means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

* * * * *

*Termination for convenience* means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest.

*Termination for default* means the exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

*Terminated portion of the contract* means the portion of a contract that the contractor is not to perform following a partial termination. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

* * * * *

## PART 17—SPECIAL CONTRACTING METHODS

**17.103 [Amended]**

3. Amend section 17.103 by removing the definition "Termination for convenience."

4. Amend section 17.104 by adding paragraph (d) to read as follows:

**17.104 General.**

* * * * *

(d) The termination for convenience procedure may apply to any Government contract, including multiyear contracts. As contrasted with cancellation, termination can be effected at any time during the life of the contract (cancellation is effected between fiscal years) and can be for the total quantity or partial quantity (where as cancellation must be for all subsequent fiscal years' quantities).

## PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

**31.205–47 [Amended]**

5. Amend section 31.205–47 in paragraph (f)(1) by removing "(see 33.201)" and adding "(see 2.101)" in its place.

## PART 33—PROTESTS, DISPUTES, AND APPEALS

**33.201 [Amended]**

6. Amend section 33.201 by removing the definition "Claim."

7. Amend section 33.213 by revising paragraph (a) to read as follows:

**33.213 Obligation to continue performance.**

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, the Act, at 41 U.S.C. 605(b), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233–1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233–1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233–1.) This distinction is recognized by the clause with its Alternate I (see 33.215).

* * * * *

## PART 49—TERMINATION OF CONTRACTS

**49.001 [Amended]**

8. Amend section 49.001 by removing the definitions "Claim," "Continued portion of the contract," "Partial termination," and "Terminated portion of the contract."

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**52.213–4 [Amended]**

9. Amend section 52.213–4 by revising the date of the clause to read "(7/02)"; and by removing from paragraph (a)(2)(v) "(Dec 1998)" and adding "7/02" in its place.

10. Amend section 52.233–1 by revising the date and paragraph (c) of the clause; and by revising the introductory paragraph of Alternate I to read as follows:

**52.233–1 Disputes.**

* * * * *

**Disputes (7/02)**

* * * * *

(c) *Claim,* as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

* * * * *

*Alternate I (Dec 1991).* As prescribed in 33.215, substitute the following paragraph (i) for paragraph (i) of the basic clause:

* * * * *

[FR Doc. 02–15940 Filed 6–26–02; 8:45 am]
BILLING CODE 6820–EP–P

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 8 and 51**

**[FAC 2001–08; FAR Case 1999–614; Item II]**

**RIN 9000–AJ01**

## Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to incorporate policies for disputes in schedule contracts and the handling of incidental items, and to remove the requirement to notify GSA when a schedule contractor refuses to honor an order placed by a Government contractor.

**DATES:** *Effective Date:* July 29, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 2001–08, FAR case 1999–614.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 79702, December 19, 2000. Nine respondents submitted comments in response to the **Federal Register** notice. The public comments were received from contractors, professional associations, and Federal agencies. Clarifying revisions have been made to FAR 8.401(d) and 8.405–7(d) of the rule as a result of the public comments. A summary of the significant comments and concerns expressed by respondents is summarized below.

• *Addition of Open Market, Noncontract Items on a Schedule Order.* Some respondents believed that the intent regarding the incorporation of open market, noncontract items on a schedule order needed further clarification and recommended alternative language. The Councils agreed that absent a definition of "open market" or "noncontract" items in the FAR further clarification is needed. Accordingly, it has substituted the expression "items not on the Federal Supply Schedule" to best characterize what these items mean.

• *Inclusion of FAR Part 19 in the Listing of Applicable Acquisition Regulations.* One respondent expressed concern regarding the omission of a reference to FAR Part 19, Small Business Programs, in the proposed language in FAR 8.401(d) for adding open market, noncontract items to a Federal Supply Schedule BPA. The respondent believes that the omission of FAR Part 19 in the list of applicable acquisition regulations an agency must follow will allow ordering offices to circumvent the requirement that all procurements valued between $2,500 and $100,000 be set aside for small business concerns.

The Councils agreed that FAR Part 19 should be included in the list of applicable regulations in FAR 8.401(d)(1). Even though FAR 13.003(b)(1) addresses small business set-asides for acquisitions above the micro-purchase threshold, the inclusion of FAR Part 19, in addition to FAR Part 13, further emphasizes that ordering offices must consider small business programs when acquiring items not on the Federal Supply Schedule.

• *FAR Reference to Alternative Dispute Resolution (ADR) Procedures for Schedule Disputes.* One respondent suggested that in lieu of the proposed language in FAR 8.405–7(d) ("The contracting officer should use the alternative dispute resolution (ADR) procedures, when appropriate (see 33.214)"), the language should be revised to cite the policy statement as it is set forth in FAR 33.204, that ADR should be used "to the maximum extent practicable." The respondent further suggested that either FAR 33.204 be cited alone, or that 33.204 be cited in addition to 33.214. Since the language in FAR 33.204 speaks to policy regarding the use of ADR, while 33.214 provides additional information regarding ADR, the Councils agreed that, for clarity, both citations be included in the final rule, and that the language in FAR 8.405–7(d) be revised.

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

**B. Regulatory Flexibility Act**

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

**C. Paperwork Reduction Act**

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

**List of Subjects in 48 CFR Parts 8 and 51**

Government procurement.

Dated: June 19, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 8 and 51 as set forth below:

1. The authority citation for 48 CFR parts 8 and 51 continues to read as follows:

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

## PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Amend section 8.401 by adding paragraph (d) to read as follows:

**8.401 General.**

* * * * *

(d) For administrative convenience, an ordering office contracting officer may add items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if—

(1) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (*e.g.*, publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (Part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19));

(2) The ordering office contracting officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;

(3) The items are clearly labeled on the order as items not on the Federal Supply Schedule; and

(4) All clauses applicable to items not on the Federal Supply Schedule are included in the order.

3. Revise section 8.405–7 to read as follows:

**8.405–7 Disputes.**

(a) *Disputes pertaining to the performance of orders under a schedule contract.* (1) Under the Disputes clause of the schedule contract, the ordering office contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering office contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) *Disputes pertaining to the terms and conditions of schedule contracts.* The ordering office contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) *Appeals.* Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

(d) *Alternative dispute resolution.* The contracting officer should use the alternative dispute resolution (ADR) procedures, to the maximum extent practicable (see 33.204 and 33.214).

## PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

**51.103 [Amended]**

4. Amend section 51.103 by removing paragraph (b); and by redesignating paragraph (c) as (b).

[FR Doc. 02–15941 Filed 6–26–02; 8:45 am]

BILLING CODE 6820–EP–P

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Part 31

**[FAC 2001–08; FAR Case 1997–032; Item III]**

**RIN 9000–AH96**

## Federal Acquisition Regulation; Relocation Costs

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) "relocation costs" cost principle by (1) making allowable payments for spouse employment assistance and (2) for increased employee income and Federal Insurance Contributions Act (FICA) (26 U.S.C. chapter 21) taxes incident to allowable reimbursed relocation costs, increasing the ceiling for allowance of miscellaneous costs of relocation, and making a number of editorial changes.

**DATES:** *Effective Date:* July 29, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501–3221. Please cite FAC 2001–08, FAR case 1997–032.

**SUPPLEMENTARY INFORMATION:**

### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 64 FR 28330, May 25, 1999, that revised the cost principle at FAR 31.205–35, Relocation costs, to—

- Remove the numerous ceilings imposed on individual relocation cost elements;
- Recognize the growing commercial practice of reimbursing relocation costs on a lump-sum basis in certain situations;
- Make allowable payments for employment assistance for spouses and for increased employee income and FICA taxes incident to allowable reimbursed relocation costs;
- Increase the ceiling for allowable miscellaneous relocation costs; and
- Make a number of editorial changes.

The final rule amends the FAR to—

- Increase the limit for miscellaneous expenses when a lump-sum approach is used. The current FAR requires the reimbursement of miscellaneous expenses to be limited to actual expenses or $1,000 (if the lump-sum approach is used). The proposed rule removed the $1,000 limitation in its entirety. To reduce the Government's risk in this area, the final rule maintains a ceiling for miscellaneous expenses when a contractor uses the lump-sum payment method, but increases the limit from $1,000 to $5,000. The cost principle continues to have no ceiling for miscellaneous expenses when reimbursement is based on actual expenses;
- Add two new categories of allowable relocation costs. Consistent with the proposed rule, the final rule makes allowable two categories of expenses that are currently unallowable: (1) Payments for increased employee income and FICA taxes incident to allowable reimbursed relocations costs, and (2) payments for spouse employee assistance. Since contractors incur these types of costs in a good faith effort to keep transferred employees from being adversely affected by the relocation, it appears equitable to reimburse contractors for these types of costs. In addition, the Employee Relocation Council (ERC) data showed that it is a common industry practice to reimburse relocating employees for both of these costs; and
- Make a number of editorial changes, including revising the "compensation for personal services" cost principle at FAR 31.205–6(e)(2) to clarify that the differential allowances paid to compensate for increased taxes on employee compensation is unallowable, but that the payments to compensate for increased taxes incident to allowable reimbursed relocation costs is allowable.

Twenty-two respondents submitted public comments. The Councils considered all comments when developing the final rule. A discussion of the major comments follows:

- *Inadequate Analysis.* One commenter expressed the opinion that "the proposed changes to FAR 31.205–35 have not been adequately researched and the potential impact has not been documented." The commenter went on to suggest that all of the proposed changes, except for the lump-sum payment option, have been carefully considered by the FAR drafters in the past and that those previous decisions should not be overturned lightly and without thorough research and documentation that demonstrate how the conditions have changed to make previously rejected proposed changes now acceptable. In a related comment, another commenter cautioned that "the councils should carefully review the information provided in response to the questions directed to industry respondents to determine that the administrative time and cost savings will offset increased costs before eliminating the ceilings."

*Response to Comments:* As an integral part of its review of the public comments submitted in response to this proposed rule, current industry relocation practices were carefully analyzed (primarily using data compiled by the ERC in its 1998 report entitled "Relocation Assistance:

Transferred Employees"), together with the past regulatory history of the relocation cost principle.

- *Disagree With Removing Ceilings.* Four commenters opposed the removal of the current ceilings on individual relocation cost elements, while two of them added that "if the current limitations are not adequate, they should be adjusted but not eliminated." These two commenters disagreed with the **Federal Register** justification that the "ceilings represent unnecessary micromanagement of contractor business practices." One stated that "cost ceilings are a means of controlling business expenses reimbursed with taxpayer dollars," and the other argued that "the ceilings merely represent the maximum the Government believes is reasonable." The commenter continued: "The FAR ceilings were initially implemented to assure that reasonableness determinations were consistently applied to all contractors and that unreasonable costs would not be paid because the cost principle is too general or unenforceable."

One commenter stated that "the ceilings * * * are necessary to protect the Government from liability for reimbursement of excessive costs." Another maintained that since the 14 percent limitation on closing costs and

the continuing costs of ownership of a former residence (FAR 31.205–35(a)(3) and (4)) and the 5 percent limitation on costs for purchasing a new home (FAR 31.205–35(a)(6)(ii)) were based on commercial industry standards, there is no justification for their removal. Another stated that these 14 percent and 5 percent caps appeared reasonable, but added that waivers "may be acceptable on a case-by-case basis."

*Response to Comments:* Three alternatives were evaluated during consideration of this issue: removal of the ceilings, adjustment of the ceilings, and retention of the current ceilings. The alternatives are discussed below:

*Alternative 1—Remove Ceilings as Reflected in the Proposed Rule.* The ERC data indicated that some of the current FAR ceilings on individual relocation cost elements were too low. One alternative to eliminating this relationship is for the ceilings to be eliminated as shown in the proposed rule, rather than adjusted. This alternative would be a fundamental shift in how the Government evaluates the allowability of contractor relocation costs. An argument can be made that this change is consistent with promoting greater acceptance of commercial practices. Under this approach, the Government would place greater reliance upon contractors' individual corporate relocation policies to limit such costs to reasonable amounts, rather than continuing to micromanage contractor business practices. This would involve a systems approach requiring greater use of professional judgment by our auditors and contracting officers to ensure that relocation costs in total are reasonable, which is more difficult than utilizing a series of caps to determine cost allowability. This alternative would tend to satisfy those who believe that the various ceilings on individual relocation cost elements have made the current cost principle unnecessarily detailed.

*Alternative 2—Retain Ceilings With Appropriate Adjustments.* This alternative is more consistent with the argument that the rationale behind the numerous past decisions to retain the ceilings was sound. That is, (1) industry practice varies widely, (2) reasonableness determinations should be consistently applied to all contractors, and (3) the cost principle without ceilings is too general and unenforceable. Further, the Federal procurement process argues for the retention of the ceilings. Without these stated ceilings, contracting officers would be put in the unenviable position of determining what constitutes reasonable relocation costs without ready access to the necessary information to make this determination. By performing the necessary market research and setting reasonable ceilings in this cost principle, the Government avoids the inefficient process of having hundreds of different procurement personnel performing various levels of research and making inconsistent determinations. The ceilings should be set at a level that allows contractors to be reimbursed for reasonable relocation costs that are not unallowable.

*Alternative 3—Retain Current Ceilings but Reevaluate.*

The basis for this alternative is that the rationale supporting a shift either to eliminate or to adjust the ceilings is incomplete, and a reasoned policy change cannot be made at this time. There is sufficient information to justify evaluation of whether a policy change should be considered, but there is not sufficient information to determine what a better policy might be. This is the approach adopted by the FAR Council.

• *Lump-Sum Approach.*

*Lump-Sum Approach Would Result in Savings.* Nine commenters argued that an expanded lump-sum approach would result in significant savings for contractors and the Government. One stated that at a Government business segment using a lump-sum approach, instead of an actual and reasonable method, savings achieved for the temporary living portion of relocation costs averaged $4,432 per relocated employee for a total savings on Government contracts of almost $200,000 per year. Similarly, another indicated that it is experiencing savings of $6.4 million per year by offering a lump-sum option for reimbursement of temporary living expenses to relocated employees in its commercial segments. This commenter projected that it has "the potential to save an additional $1 million per year by offering the same option within its businesses that sell goods and services to the U. S. Government." Another commenter indicated an estimated saving of between $400,000 and $500,000 per year due to the lump-sum relocation option.

*Disagree With Lump-Sum Approach.* One commenter objected "to the lump-sum payment as proposed because it would increase administrative cost with no evident benefit for the Government." The commenter added that "few contractors use a lump-sum approach for total relocation cost," and expressed concern that "expanding the lump-sum approach beyond miscellaneous expenses (for which a lump-sum up to $1,000 is already permitted) would make it virtually impossible to assure that the lump-sum payment does not include unallowable costs." While not directly opposing an expanded use of the lump-sum approach, three other commenters expressed concerns that "in the absence of a database that establishes what constitutes reasonable relocation expenses in various locations, contracting officers will have difficulty negotiating advance agreements on a broad range of relocation expenses." One commenter added: "Without some objective data, it is unreasonable to impose the burden of determining reasonableness on the contracting officer."

*Response to Comments:* Review of the ERC data found that there is no current industry practice of using lump-sum reimbursements for the purchase or sale of a home. It appears inappropriate for the cost principle to recognize lump-sum payments for these types of relocation costs if there is no evidence of such an industry practice.

Additionally, an industry association commenter noted that in its survey of member companies, "no respondent used the lump-sum approach on all relocation costs." Accordingly, the broad lump-sum reimbursement approach was removed from the rule.

The lump-sum reimbursement approach covering miscellaneous expenses only that is currently in the FAR was retained, but the ceiling amount was increased from $1,000 to $5,000. An unlimited lump-sum for miscellaneous expenses could easily become a sub rosa vehicle for reimbursing unallowable costs (such as a loss on the sale of a home) or for awarding a hidden bonus to the relocating employee. While some commenters contend that contractors and the Government will share in cost reductions through use of lump-sum payments, others believe the opposite will occur. No convincing data were found one way or the other. This is further bolstered by indications from ERC that companies use lump-sum reimbursements primarily to improve employee morale and to reduce administrative costs. The net cost impact is unclear. This issue may be pursued again in a separate FAR case to determine if there is a clear answer justifying adoption of a broader lump-sum approach.

• *Remove Mandatory Advance Agreement Requirement for Lump-Sum Approach.* Eight commenters recommended that the requirement for an advance agreement with the Government prior to using the lump-sum payment option be eliminated.

Some argued that "the requirement for an advance agreement is not necessary" because "lump-sum payments are an accepted commercial practice" and "are more cost effective than actual cost tracking." One added that "at times, whether or not an advance agreement is executed depends on subjective rather than objective factors." It added that "inconsistent actions concerning the execution of an advance agreement on lump-sum payments could put companies on an unequal footing when bidding on Government contracts." Another observed that "formal acceptance by the contracting officer of what is likely to be a case-by-case implementation of lump-sums is not consistent with streamlining or acceptance of commercial practices." Another stated that the mandatory advance agreement requirement "is contrary to the spirit of Acquisition Reform" and "creates another administrative burden."

*Response to Comments:* The original rationale for including a mandatory advance agreement requirement in the proposed rule was to give the Government additional control over the broadly worded lump-sum guidance. However, we have revised paragraph (b)(2) of FAR 31.205–35 to delete the mandatory advance agreement requirement, since we have removed the lump-sum approach from the rule.

• *Disagree/Agree With Removing Mortgage Interest Differential and Rental Differential Payments.* Two commenters saw no reason for removing the specific references to mortgage interest differential and rental differential payments currently found at paragraphs (a)(7) and (a)(8) of FAR 31.205–35. One stated: "Our survey data, along with analysis of published relocation survey data, did not demonstrate any significant difference in conditions that exist now versus conditions that existed when these provisions were included in the cost principle. Therefore, we cannot determine the basis for the statement that coverage of these types of costs is no longer needed." Conversely, another commenter expressed its belief that "eliminating paragraphs FAR 31.205–35(a)(7) and (8) will provide the advantage of simplification without adding costs to the Government."

*Response to Comments:* Although interest rates are currently very low and the impact of interest differential is now very limited, interest rates could increase in the future. We have added both of these types of payments back into the paragraph (a) list of allowable relocation costs.

• *Delete FAR 31.205–35 (a)(1) thru (a)(9).* Three commenters, noting that the proposed rule would remove the specific references to mortgage interest differential and rental differential payments, expressed concern "that Government auditors may assert that these costs are now unallowable, notwithstanding the statements pertaining to them included in the background section of this proposed rule." To avoid such disputes over these and other relocation costs not specifically mentioned under paragraph (a), they suggested that the whole list of allowable relocation costs at FAR 31.205–35(a) (1) thru (a)(9) be deleted.

*Response to Comments:* The Councils agree that removing the specific references to mortgage interest differential and rental differential payments from the cost principle could create confusion about the future allowability of such costs, and they have added both of these types of payments back into the paragraph (a) list of allowable relocation costs. The Councils are also convinced there is great benefit in making it absolutely clear that the listed types of relocation costs in paragraph (a) are allowable and do not think this list should be deleted.

• *Agree/Disagree With Making Spouse Employment Assistance Payments and Tax Gross-Ups Allowable.* Eight commenters agreed with the equitable treatment rationale in the **Federal Register** for making two new categories of relocation costs allowable: (1) Payments for spouse employment assistance, and (2) payments for increased employee income and FICA taxes incident to allowable reimbursed relocation costs (commonly referred to as "tax gross-ups"). Several commenters "applauded" this change which, as one commenter put it, "acknowledges that contractors find it necessary to make such payments to avoid unfairly penalizing the relocating employee."

On the other hand, another commenter found it "illogical" to use the "good faith effort" rationale to allow these costs, but not the other unallowable relocation costs. However, after noting that "there is some evidence that spousal employment assistance is becoming a general industry practice," that commenter stated that it does "not object to the reconsideration of the allowability of spouse employment assistance (subject to reasonable limitations) after adequate research and analysis is performed."

Regarding tax gross-ups, that commenter quoted from a 1985 Cost Principles Committee report: "We believe that there was no Congressional intention to grant tax relief to contractor employees, but that it was the intent to grant such relief to Federal employees in order to reduce the out-of-pocket costs heretofore being borne by Federal employees." That commenter also pointed out that past Cost Principles Committee reports have concluded tax gross-ups are actually a compensation cost, and not a relocation cost. Finally, the commenter disagreed "with the theory that contractors should be reimbursed for these types of costs merely because Federal employees are." In support of this position, the commenter cited OFPP's 1986 "Study of Relocation Costs," which found that "the policies governing the payment for contractor relocation should remain separate from the policies governing the relocation benefits paid to Federal employees."

*Response to Comments:* The ERC data showed that it is a common industry practice to reimburse relocating employees for both of these costs. The Councils believe they are *bona fide* relocation costs and that it is fair to make them allowable now on Government contracts, just as it was fair to begin reimbursing Federal employees for them.

• *Apparent Conflict Between Tax Gross-Ups and Taxes Cost Principle.* One commenter noted an apparent conflict between the new language allowing tax gross-ups for reimbursed relocation costs and the taxes cost principle provision that makes Federal income taxes unallowable (FAR 31.205–41(b)(1)).

*Response to Comments:* The Councils do not see a conflict. The taxes cost principle makes contractor Federal income tax payments unallowable, not contractor reimbursements to an employee for the relocating employee's increased tax liability.

• *Federal Employees Do Not Get Tax Gross-Ups on FICA.* One commenter noted that "Government employees are reimbursed income taxes on relocation reimbursements, but not FICA. Employees, particularly employees of private contractors, theoretically receive a future benefit from increased FICA contributions. Therefore, reimbursement of FICA could be considered inappropriate, and we would recommend reimbursement of income taxes, but not FICA."

*Response to Comments:* The Councils disagree with this recommendation. They do not believe the allowability of contractor relocation costs must always parallel the treatment afforded relocating Federal employees; nor do they see uncertain future benefits as a valid reason for excluding FICA from

allowable contractor tax gross-ups. The Councils believe this is a *bona fide* relocation cost, which should be made allowable.

• *Administrative Costs Will Decrease/Increase.* Thirteen commenters agreed with the **Federal Register** rationale that the proposed rule would reduce administrative costs. As one commenter put it: "We believe that the proposed changes would result in savings to both contractors and the Government by reducing or eliminating a number of burdensome administrative processes. For instance, with the elimination of thresholds, contractors would no longer need to track applicable costs separately and compare them to artificial thresholds. Detailed training on how to apply the thresholds would no longer be required. We believe that, to the extent that contractors find it otherwise appropriate and feasible to adopt lump-sum practices, record-keeping requirements would be reduced for both the contractor and the relocating employee. Finally, internal and external oversight requirements would be streamlined."

In contrast, two commenters maintained that administrative costs would increase under the proposed rule. One argued that "audit effort will necessarily increase (as will the contractor support of the increased audit effort) since instead of having stated reasonableness limitations, the auditor will now be forced to evaluate individual contractor systems for assuring reasonableness." The commenter added that "using a broad criterion such as reasonableness naturally leads to differences of opinion," which "will result in increased disputes which will increase the effort required by contractors, contracting officers, and the courts to settle these disputes." Finally, the commenter stated: "Our survey of Government contractors found that the administrative cost incurred by contractors to comply with the requirements of FAR 31.205–35 is immaterial. Any potential savings would certainly be offset by the administrative cost involved in obtaining an advance agreement for the use of lump-sum payments." The other commenter expressed concern that "without the ceilings, we anticipate contracting officers will need to perform a greater amount of analysis to determine the reasonableness of a contractor's proposed relocation costs."

*Response to Comments:* The Councils expect that adoption of the rule will result in reduced administrative burden for contractors and increased administrative burden for the Government; but, they have no way to quantify these anticipated impacts. They do not consider an increase in the Government's administrative effort, by itself, to be a valid reason for retaining the existing FAR language.

• *Relocation Costs Will Increase.* Three commenters argued against the proposed rule because they believed it will result in higher relocation costs being claimed under Government contracts. Based on its own analysis of more than 50 Government contractors, one commenter projected that "the proposed rule may result in more than $130 million in additional relocation costs claimed by Government contractors annually." However, another commenter countered that "concerns about added costs or potential savings that may result from a policy change should be irrelevant to the objective at hand; *i.e.*, ensuring that the Government pays fair and reasonable expenses under noncompetitive and cost reimbursable contracts."

*Response to Comments:* While relocation costs claimed on Government contracts may increase if the proposed rule is adopted, that is not a valid argument for retaining the existing FAR language. The Councils believe the cost principles should ensure that contractors are treated fairly, consistent with sound public policy. The cost principles should not be used as a cost containment mechanism.

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

**B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis and do not require application of the cost principles contained in this rule.

**C. Paperwork Reduction Act**

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

**List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: June 19, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

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

## PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 31 continues to read as follows:

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

2. Revise paragraph (e)(2) of section 31.205–6 to read as follows:

**31.205–6 Compensation for personal services.**

* * * * *

(e)(1) * * *

(2) Differential allowances for additional Federal, State, or local income taxes resulting from domestic assignments are unallowable. (However, payments for increased employee income or Federal Insurance Contributions Act taxes incident to allowable reimbursed relocation costs are allowable under 31.205–35(a)(10).)

* * * * *

3. Revise paragraphs (a), (b), (c), and (f)(1) of section 31.205–35 to read as follows:

**31.205–35 Relocation costs.**

(a) Relocation costs are costs incident to the permanent change of assigned work location (for a period of 12 months or more) of an existing employee or upon recruitment of a new employee. The following types of relocation costs are allowable as noted, subject to the limitations in paragraphs (b) and (f) of this subsection:

(1) Costs of travel of the employee and members of the employee's immediate family (see 31.205–46) and transportation of the household and personal effects to the new location.

(2) Costs of finding a new home, such as advance trips by the employee or the spouse, or both, to locate living quarters, and temporary lodging during the transition period for the employee and members of the employee's immediate family.

(3) Closing costs incident to the disposition of the actual residence owned by the employee when notified of the transfer (*e.g.*, brokerage fees, legal fees, appraisal fees, points, and finance charges), except that these costs, when

added to the costs described in paragraph (a)(4) of this subsection, shall not exceed 14 percent of the sales price of the property sold.

(4) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, and mortgage interest, after the settlement date or lease date of a new permanent residence, except that these costs, when added to the costs described in paragraph (a)(3) of this subsection, shall not exceed 14 percent of the sales price of the property sold.

(5) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(6) Costs incident to acquiring a home in the new work location, except that—

(i) These costs are not allowable for existing employees or newly recruited employees who were not homeowners before the relocation; and

(ii) The total costs shall not exceed 5 percent of the purchase price of the new home.

(7) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who, before the relocation, were not homeowners and the total payments are limited to an amount determined as follows:

(i) The difference between the mortgage interest rates of the old and new residences times the current balance of the old mortgage times 3 years.

(ii) When mortgage differential payments are made on a lump-sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.

(8) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payments may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.

(9) Costs of canceling an unexpired lease.

(10) Payments for increased employee income or Federal Insurance Contributions Act (26 U.S.C. chapter 21) taxes incident to allowable reimbursed relocation costs.

(11) Payments for spouse employment assistance.

(b) The costs described in paragraph (a) of this subsection must also meet the following criteria to be considered allowable:

(1) The move must be for the benefit of the employer.

(2) Reimbursement must be in accordance with an established policy or practice that is consistently followed by the employer and is designed to motivate employees to relocate promptly and economically.

(3) The costs must not be otherwise unallowable under subpart 31.2.

(4) Amounts to be reimbursed shall not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in paragraph (a)(5) of this subsection, a flat amount, not to exceed $5,000, may be allowed in lieu of actual costs.

(c) The following types of costs are unallowable:

(1) Loss on the sale of a home.

(2) Costs incident to acquiring a home in the new location as follows:

(i) Real estate brokers' fees and commissions.

(ii) Costs of litigation.

(iii) Real and personal property insurance against damage or loss of property.

(iv) Mortgage life insurance.

(v) Owner's title policy insurance when such insurance was not previously carried by the employee on the old residence. (However, the cost of a mortgage title policy is allowable.)

(vi) Property taxes and operating or maintenance costs.

(3) Continuing mortgage principal payments on a residence being sold.

(4) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

* * * * *

(f) * * *

(1) The term of employment is 12 months or more;

* * * * *

[FR Doc. 02–15942 Filed 6–26–02; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 52**

**[FAC 2001–08; Item IV]**

## Federal Acquisition Regulation; Technical Amendments

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

**ACTION:** Final rule.

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

**DATES:** *Effective Date:* July 29, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755. Please cite FAC 2001–08, Technical Amendments.

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

Government procurement.

Dated: June 19, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

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

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

**52.202–1 [Amended]** Definitions

2. Amend section 52.202–1 by removing from Alternate I "(Mar 2001)" and adding "(May 2001)" in its place.

**52.212–3 [Amended]** Notice to Supplier

3. Amend section 52.212–3 in the provision heading by removing "(May 2002)" and adding "(July 2002)" in its place; removing from paragraph (c)(10)(i) of the provision "principal place of ownership" and adding "principal office" in its place; and removing from the first sentence of paragraph (c)(10)(ii) "on the joint" and adding "in the joint" in its place.

**52.225–11 [Amended]**

4. Amend section 52.225–11 in the clause heading by removing "(May 2002)" and adding "(July 2002)" in its

Buy American Act - Construction Materials under Trade Agreements

place; and in the third sentence of paragraph (b)(1) of the clause by removing "and Balance of Payments Program".

[FR Doc. 02–15943 Filed 6–26–02; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Chapter 1

## Federal Acquisition Regulation; Small Entity Compliance Guide

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–08 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–08 which precedes this document. These documents are also available via the Internet at *http://www.arnet.gov/far.*

**FOR FURTHER INFORMATION CONTACT:** Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–08

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | Definition of "Claim" and Terms Relating to Termination | 2000–406 | Klein. |
| II | Federal Supply Schedule Order Disputes and Incidental Items | 1999–614 | Nelson. |
| III | Relocation Costs | 1997–032 | Olson. |
| IV | Technical Amendments | | |

### Item I—Definition of "Claim" and Terms Relating to Termination (FAR Case 2000–406)

The purpose of this final rule is to clarify the applicability of definitions, eliminate redundant or conflicting definitions, and streamline the process for locating definitions. This rule is not intended to change the meaning of any FAR text or clause. Movement of various definitions to FAR 2.101 is not intended to change the operation of the cost principles and, specifically, the movement of the definition of "claim" to FAR 2.101 is not intended to change the scope or context of FAR 31.205–47(f)(1).

This final rule—

- Revises and moves the definitions of "claim" from FAR 33.201; "continued portion of the contract," "partial termination," "terminated portion of the contract" from FAR 49.001; and "termination for convenience" from FAR 17.103;
- Adds a definition of "termination for default" at FAR 2.101 and a new paragraph (d) at FAR 17.104 that explains the distinction between "termination for convenience" and "cancellation" that was deleted from the definition of "termination for convenience" that was moved from FAR 17.103;
- Revises FAR 33.213(a) to clarify the distinction between claims "arising under a contract" and claims "relating to a contract";
- Revises the definition of "claim" in the FAR clause at 52.233–1 to conform to the definition at FAR 2.101; and
- Makes other editorial revisions for clarity.

### Item II—Federal Supply Schedule Order Disputes and Incidental Items (FAR Case 1999–614)

This final rule amends the FAR to add policies on disputes and incidental items under Federal Supply Schedule contracts and to remove the requirement to notify GSA when a schedule contractor refuses to honor an order placed by a Government contractor. This rule affects all ordering offices acquiring supplies or services subject to the procedures of FAR Subpart 8.4.

### Item III—Relocation Costs (FAR Case 1997–032)

This final rule amends the relocation cost principle at FAR 31.205–35. The rule will only affect contracting officers that price contracts using cost analysis, or that are required by a contract clause to use cost principles for the determination, negotiation, or allowance of costs.

The relocation cost principle addresses the allowability of costs incurred by an existing contractor employee incident to the permanent change of the employee's assigned work location for a period of 12 months or more, or upon recruitment of a new employee. The final rule revises the cost principle by making allowable payments for spouse employment assistance and for increased employee income and Federal Insurance Contributions Act taxes incident to allowable reimbursed relocation costs, increasing the ceiling for allowance of miscellaneous costs of relocation, and making a number of editorial changes.

### Item IV—Technical Amendments

These amendments update sections and make editorial changes at FAR 52.202–1, 52.212–3, and 52.225–11.

Dated: June 19, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 02–15944 Filed 6–26–02; 8:45 am]

BILLING CODE 6820–EP–P

Federal Register

Thursday,
June 27, 2002

Part VI

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

48 CFR Parts 39 and 52
Federal Acquisition Regulation; FAR Case 2001–033, Section 508 Contract Clause; Proposed Rule

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 39 and 52**

## Federal Acquisition Regulation; FAR Case 2001–033, Section 508 Contract Clause

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

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are considering whether there is a need at this time for changes to the Federal Acquisition Regulation or other acquisition guidance to promote more consistent and effective implementation of Section 508 of the Rehabilitation Act of 1973 and, if so, what specific changes are needed. The Councils request that interested parties provide comments.

**DATES:** Interested parties should submit comments in writing on or before August 26, 2002 to be considered in the formulation of a proposed rule.

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

Submit electronic comments via the Internet to— *farnotice.2001–033@gsa.gov*

Please submit comments only and cite FAR Case 2001–033, Section 508 Contract Clause (Notice) in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501–4755 for information pertaining to status or publication schedules. The TTY Federal Relay Number for further information is 1–800–877–8973. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAR Case 2001–033, Section 508 Contract Clause (Notice).

**SUPPLEMENTARY INFORMATION:** Section 508 of the Rehabilitation Act of 1973 requires that when Federal departments or agencies develop, procure, maintain, or use electronic and information technology (EIT), they must ensure that the EIT allows (1) Federal employees with disabilities to have access to and use of information and data that is comparable to the access and use of information and data by other Federal employees; and (2) members of the public with disabilities seeking information from an agency to have access to and use of information and data that is comparable to the access and use of information and data by other members of the public who are not individuals with disabilities. The Councils agreed to amend the Federal Acquisition Regulation (FAR) under FAR Case 1999–607, Electronic and Information Technology Accessibility, to implement Section 508 (see **Federal Register** published at 66 FR 20894, April 25, 2001). The final rule became effective on June 25, 2001.

The FAR final rule incorporated standards developed by the Architectural and Transportation Barriers Compliance Board (also referred to as the "Access Board"). Among other things, the standards set forth the technical and functional performance criteria for EIT accessibility. While only Federal agencies must comply with the requirements of Section 508; vendors interested in selling EIT to the Federal government are responsible for providing products or services that meet the applicable Access Board standards (and will be bound by the terms and conditions of the contract into which they enter).

The FAR rule implementing Section 508 does not require vendors to certify that offered products or services comply with the requirements of Section 508. Agencies are not to require such certification as a matter of policy, unless they have followed the procedures set forth in (i) FAR Subpart 1.3 on agency acquisition rulemaking, implementing section 22 of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. 418b, and (ii) section 29 of the OFPP Act, 41 U.S.C. 425, addressing contractor certification requirements. (Section 29(c)(2) of the OFPP Act prohibits an executive agency from promulgating a regulation requiring certification unless it is required by statute, or approved on an exception basis by the agency head after the senior procurement executive provides written justification.)

As part of the implementation effort some have suggested a need for additional guidance. For example, some assert that the inclusion of an EIT clause in the FAR will promote greater consistency and reduce confusion in the implementation of Section 508 by avoiding the proliferation of agency specific clauses. By contrast, others contend that EIT standards are a "requirements issue" and are best addressed through the statement of work or other specifications instead of a clause.

The Councils are seeking the following input to help them determine the best approach to promote more consistent and effective implementation of Section 508.

1. *Need for additional guidance.* The Councils ask that respondents discuss whether additional acquisition guidance to implement Section 508 is needed at this time. Respondents are encouraged to discuss potential advantages and disadvantages.

2. *Form of guidance.* To the extent additional guidance is desired, the Councils ask respondents to identify if such guidance should be in the form of a FAR clause, a solicitation provision, other FAR coverage, or non-regulatory guidance. If a clause is desirable, respondents are encouraged to identify the types of EIT purchases on which a clause should focus (*e.g.,* all EIT purchases, EIT services only). The non-regulatory guidance may be in the form of reference material or frequently asked questions on the web site at *http://www.section508.gov.* Respondents are encouraged to discuss potential advantages and disadvantages of the form of guidance they suggest and why they believe other forms of guidance would be less beneficial or not appropriate.

3. *Content of guidance.* The Councils invite respondents' ideas regarding what should be included in the guidance.

Dated: June 20, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 02–15976 Filed 6–26–02; 8:45 am]

BILLING CODE 6820–EP–P

# Headquarters Policy Flash

**FLASH 2002-23**

DATE: July 23, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Replacement System for PADS Pre-Award Functions**

SUMMARY: During the Procurement Policy Advisory Group (PPAG) and Financial Assistance Advisory Council (FAAC) meetings in April this year, questions were raised regarding the elimination of the pre-award functions in the Procurement and Assistance Data System (PADS), and whether a replacement system would be available. The Office of Procurement and Assistance Management has developed a web-based application of a new system "Procurement Action Tracking System (PATS)" for contracting activities to use as they deem appropriate. The system and training will be available in the near future.

**FLASH 2002-23**
**July 23, 2002**

➡ **Procurement Action Tracking System (PATS)**

PATS is a web-based application that has been developed to replace the pre-award functions of the PADS. The primary function of this application is to aid contracting personnel, analysts, negotiators, and program office officials in tracking the milestones and status of procurement and financial assistance actions from receipt of the action to award, including both new awards and modifications. Users must register in order to obtain access to the system, and user rights (read only, read and edit, etc.) will be controlled at each office by an administrator. Offices will be able to determine which type of actions they wish to track, as well as the milestones associated with each action.

More information will be made available during the training sessions for PADS scheduled for August and September at Headquarters and the Field. Questions concerning this new system should be addressed to David Hoexter at (202) 586-9062 or via e-mail at david.hoexter@pr.doe.gov.

Gwendolyn S. Cowan,
Director

cc:
PPAG Members
FAAC Members

# Headquarters Policy Flash

**FLASH 2002-24**

DATE: July 26, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Final Rule - Revisions of Patent Regulations Relating to the Department of Energy (DOE) Management and Operating (M&O) Contracts**

SUMMARY: This Policy Flash transmits a summary of a new Rule recently published in the Federal Register. The Rule is also attached to the Flash on the Professionals Homepage.

**FLASH 2002-24**
**July 26, 2002**

**Final Rule - Revisions of Patent Regulations Relating to the Department of Energy (DOE) Management and Operating (M&O) Contracts**

A rule amending the Department of Energy Acquisition Regulation (DEAR) to improve the patent coverage relating to the Department's management and operating (M&O) contracts, was published on July 25, 2002. (67 FR 48568)

This rule finalized an interim final rule published on November 15, 2000. (65 FR 68932) In general the rule adapts patent-related clauses to subcontracting under M&O contracts, results in clauses stated in plain language, and provides a complete set of patent clauses for all varieties of M&O contracts.

Changes from the interim final rule were made to:

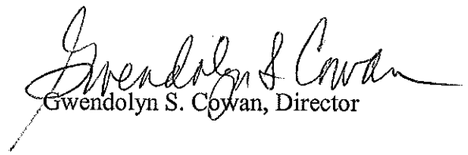
- implement two statutes that affect the Technology Transfer Mission clause at 970.5227-3.
- the clause at 970.5227-4, Authorization and Consent
- the clause at 970.5227-5, Notice and Assistance Regarding Patent and Copyright Infringement
- the clause at 970.5227-8, Refund of Royalties
- the last words of paragraph (b)(6) of the clause at 970.5227-10, Patent Rights-Management and Operating Contracts, Nonprofit Organizations or Small Business Firm Contractor
- paragraph (b)(9) of the clause at 970.5227-12, Patent Rights-Management and Operating Contracts, For-Profit Contractor, Advance Class Waiver; and
- refer to the National Nuclear Security Administration was made in the definition of "weapons related inventions" in Alternates I to the clauses at 970.5227-10 and -12.

The final rule also reflects a renumbering that occurred in the republication of DEAR Part 970. (65 FR 80994, Dec. 22, 2000)

The changes made by this final rule are effective August 26, 2002.

**FLASH 2002-24**
**July 26, 2002**

For questions related to this Rule, please contact Bob Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov



Gwendolyn S. Cowan, Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-25**

DATE: August 8, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Updates of the DOE Acquisition Guide**

SUMMARY: Two Chapters in the DOE Acquisition Guide have been updated - Chapter 13 "Simplified Acquisition Procedures" and Chapter 42.2 "Past Performance."

**FLASH 2002-25**
**August 8, 2002**

➤ **Chapter 13 - Simplified Acquisition Procedures**

This chapter has been updated by replacing the Guidelines and Operating attachment at the end of the Guide chapter. The Guidelines have been updated as a result of the June 2002 Purchase Card Review Team Report issued by the Office of Management, Budget and Evaluation. The revisions are extensive and are shown in redline/strikeout format. The changes are primarily increased management controls to minimize the potential for abuse of the card. The Affirmative Procurement Training for Cardholders referenced in the Guidelines is not yet available at the On Line Learning Center but should be available by the new fiscal year. Anyone wishing to preview the materials can review them at the Acquisition and the Environment section of our Home Page.

The Office of Management, Budget and Evaluation is currently conducting a follow up review using a new Auditor's Handbook they have developed. That Handbook may be found at:

http://www.mbe.doe.gov/progliaison.pcardguide.htm

Questions concerning this Guide Chapter should be directed to Richard Langston at (202) 586-8247 or via e-mail at richard.langston@hq.doe.gov

➤ **Chapter 42.2 - Past Performance**

This chapter has also been updated. The URL for electronic copies of the OFPP Guide has been corrected as well as the telephone number to request paper copies of the OFPP Guide. The revised chapter emphasizes the importance of training for both the contract and program officials on the NIH Contractor Performance System. Under Best Practices it stresses that contractors should not be downgraded for filing protests or claims or not agreeing to use alternate dispute resolution techniques. Conversely it cautions against upgrading a contractor for not having filed a protest or claim.

Questions concerning this Guide Chapter should be addressed to Richard Leotta at (202) 586-9073 or via e-mail at richard.leotta@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-26**

DATE: August 14, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter (AL) 2002-06, Domestic and Foreign Procurement Preference Rules**

SUMMARY: This Policy Flash announces the issuance of Acquisition Letter (AL) 2002-26, entitled "Domestic and Foreign Procurement Preferences," dated August 14, 2002. The AL supersedes AL-96-05, dated May 10, 1996.

**FLASH 2002-26**
**August 14, 2002**

The AL provides updated guidance on the implementation of the Buy American Act, North American Free Trade Agreement, and the Trade Agreements Act for the Department of Energy (DOE), the National Nuclear Security Administration (NNSA), and the Power Marketing Administrations (PMAs).

The AL:

- √ discusses the effects of each of the Acts on contract awards by DOE, NNSA, and the PMAs;
- √ provides guidance for contracting officers in approving management and operating (M&O) contractor purchasing systems and methods with regard to domestic and foreign procurement preferences;
- √ prescribes appropriate clauses for use by DOE contracting officers;
- √ discusses sanctions and prohibitions against the purchase of end products, construction material, and services from certain countries; and
- √ updates citations in the Department of Energy Acquisition Regulation that are outdated due to revisions made to part 25.

Attached to the AL are Federal Acquisition Regulation (FAR) clauses, amended to reflect the special treatment of DOE, NNSA, and the PMAs (both redline/strikeout and conformed versions) for use in DOE, NNSA, and PMA contracts. There is also a determination signed by the Secretary, authorizing waiver of the FAR sanctions clause from certain M&O contracts, as discussed in the AL. Finally, there is a deviation authorizing use of the special clauses and solicitation provisions provided by the AL in place of the prescribed FAR clauses.

For further questions related to this AL, please contact Bob Webb at (202) 586-8264 or via e-mail at Robert.Webb@pr.doe.gov

Gwendolyn S. Cowan, Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-27**

DATE: August 20, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Guidelines for Physician Panel Determinations**

SUMMARY: The Office of Environment, Safety and Health (EH) issued a final rule, 67FR157, pages 52841-52857, August 14, 2002 at 10 CFR 852. It provides that a DOE contractor employee or an employee's estate or survivor can seek assistance from the DOE Office of Worker Advocacy in filing a claim with their State workers' compensation system based on an illness or death that arose out of exposure to a toxic substance during the course of employment at a DOE facility. The rule is effective September 13, 2002.

**DISCUSSION**: The EH rule implements Part D of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), 42 U.S.C. 7385, to provide guidance on, among other things, how an individual may submit an application for review and assistance; how the Physician Panel determines whether the illness or death of a DOE contractor employee arose out of; and in the course of employment by a DOE contractor and through exposure to a toxic substance. In addition, Section 852.19, "What is the effect of the acceptance by the Program Office of a determination by a Physician Panel in favor of an applicant?" includes two provisions that are of special interest to contracting officials.

❒ Section 852.19, paragraph (c) of the rule states that "The Program Office must advise the cognizant DOE Secretarial Officer to recommend to the Contracting Officer (CO) for a DOE contractor that, to the extent permitted by law, the CO direct the contractor not to contest an applicant's workers' compensation claim or award in any administrative or judicial forum with respect to the same health condition for which the applicant received a favorable final Physician Panel determination;"

❒ Section 852.19, paragraph (d) states "Any costs of contesting a claim or award identified in paragraph (c) of this section - that is, any costs of supporting arguments or activities with the intent or effect of delaying or defeating such a claim or award - are not allowable costs under a DOE contract." Paragraph (e) makes costs incurred as a result of a positive Physician Panel determination allowable, reimbursable contract costs to the full extent permitted under the DOE contractor's contract with DOE.

You should note that this rulemaking applies to existing, as well as, future DOE contracts and its applicability is not limited to site and facility management contracts. Since the requirements in this rulemaking flow directly from statutory provisions, a contract clause or cost principle is not necessary to apply the rulemaking to contractors."

The program point of contact for this EH rule is Loretta Young in the DOE EH Office of Worker Advocacy. She can be reached at (202) 586-2819 or by e-mail at loretta.young@eh.doe.gov.

Gwendolyn S. Cowan, Director

Attachment

cc: PPAG Members

# Rules and Regulations

Federal Register
Vol. 67, No. 157
Wednesday, August 14, 2002

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Federal Crop Insurance Corporation

### 7 CFR Part 457

### Common Crop Insurance Regulations; Sugarcane Crop Insurance Provisions

**AGENCY:** Federal Crop Insurance Corporation, USDA.

**ACTION:** Final rule; correction.

**SUMMARY:** This document contains corrections to the final rule, Common Crop Insurance Regulations; Sugarcane Crop Insurance Provisions that the Federal Crop Insurance Corporation published in the **Federal Register** on Friday, July 12, 2002 (67 FR 46093–46096).

**EFFECTIVE DATE:** August 14, 2002.

**FOR FURTHER INFORMATION CONTACT:** Arden Routh, Risk Management Specialist, Product Development Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 6501 Beacon Drive, Kansas City, MO, 64133, telephone (816) 926–7730.

**SUPPLEMENTARY INFORMATION:** On page 46093, in the first column, under Summary, the year 2003 should read 2004, and on page 46095, in the second column, under Section 457.116, Sugarcane crop insurance provisions, introductory text, the year 2003 should read 2004. These changes are needed because the final rule was published after the contract change date for the 2003 crop year.

Signed in Washington DC, on August 7, 2002.

**Ross J. Davidson, Jr.,**

*Administrator, Federal Crop Insurance Corporation.*

[FR Doc. 02–20522 Filed 8–13–02; 8:45 am]

BILLING CODE 3410–08–P

## DEPARTMENT OF ENERGY

### 10 CFR Part 852

### RIN 1901–AA90

### Guidelines for Physician Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is today publishing a final rule providing procedures to implement Part D of the Energy Employees Occupational Illness Compensation Program Act of 2000 under which a DOE contractor employee or an employee's estate or survivor can seek assistance from the DOE Office of Worker Advocacy (Program Office) in filing a claim with the appropriate State workers' compensation system based on an illness or death that arose out of exposure to a toxic substance during the course of employment at a DOE facility. These procedures deal with how: (1) An individual may submit an application to the Program Office for review and assistance; (2) the Program Office determines whether to submit an application to a Physician Panel; (3) a Physician Panel determines whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility; (4) the Program Office processes a determination by a Physician Panel; and (5) appeals may be undertaken.

**EFFECTIVE DATE:** September 13, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Loretta Young, telephone: 202–586–2819; fax: 202–586–0956; e-mail: *loretta.young@eh.doe.gov;* address: Office of Advocacy, EH–8, U.S. Department of Energy, 1000 Independence Avenue, Washington, DC 20585.

**SUPPLEMENTARY INFORMATION:**

I. Introduction
II. Discussion of Rule
III. Regulatory Review and Procedural Requirements
A. Review under Executive Order 12866
B. Review under the Regulatory Flexibility Act
C. Review under the Paperwork Reduction Act
D. Review under the National Environmental Policy Act
E. Review under Executive Order 13132
F. Review under Executive Order 12988
G. Review under the Unfunded Mandates Reform Act
H. Review under the Treasury and General Government Appropriations Act, 1999
I. Review under Executive Order 13211
J. Congressional Notification

## I. Introduction

Part A of the Energy Employees Occupational Illness Compensation Program Act of 2000 ("the Act") (42 U.S.C. 7384, *et seq.*) establishes a program for compensating covered DOE and DOE contractor employees, as well as covered employees of certain private companies that did work for DOE and its predecessor agencies, including work involved in nuclear weapons production (Part A program). Covered workers with certain illnesses, including chronic beryllium disease, radiation-induced cancers, and silicosis, may be eligible for specified Federal benefits under the Part A program. Executive Order 13179 (65 FR 77487, December 7, 2000) assigns the Department of Labor (DOL) primary responsibility for that program. Workers with illnesses eligible for compensation under the Part A program, as well as workers with illnesses not eligible for the Part A program, may also apply to their respective State workers' compensation systems if they wish to receive benefits not provided by the Federal compensation system, notably lost wages and benefits for permanent partial disability.

Part D of the Act (42 U.S.C. 7385) authorizes the Secretary of Energy to enter into an agreement with each State to provide assistance to a DOE contractor employee in filing a claim under that State's workers' compensation system for an illness caused by exposure to a toxic substance at a DOE facility ("State Agreement"). An applicant can submit an application to the Program Office at DOE for assistance in filing a claim with that State's workers' compensation system. If the application comes within the terms and conditions of the relevant State Agreement and contains reasonable evidence that the illness or death of a covered worker may be related to employment at a DOE facility, then DOE must submit the application to a Physician Panel established under the

Act to determine the validity of the applicant's claim that the illness or death arose out of exposure to a toxic substance during the course of employment at a DOE facility. Section 3661(d) of Part D of the Act provides that a Physician Panel must make its determination "under guidelines established by the Secretary [of Energy], by regulation." If a Physician Panel makes a positive determination and the Program Office accepts it, then the Program Office must assist the applicant in filing a claim with the relevant State's workers' compensation system. In addition, DOE may not contest the applicant's workers' compensation claim or any award made to settle the claim to the extent such claim or award is based on the same health condition that was the subject of a positive determination by a Physician Panel. And, to the extent permitted by law, DOE may direct a DOE contractor not to contest such a claim or award. Furthermore, if the DOE contractor employer contests the claim or award, the costs of contesting the claim or award are not allowable costs under a DOE contract.

Part D operates to ensure that DOE will assist, and not hinder, the processing of an applicant's claim under a State workers' compensation system if the claim is based on the same health condition that was the subject of a positive determination by a Physician Panel. DOE will not contest and DOE will direct its contractors not to contest such a claim. Part D, however, does not federalize State workers' compensation standards, or affect the normal operation of State workers' compensation systems other than the limits Part D places on the extent to which DOE and DOE contractors can contest certain claims. Part D does not expand or contract the scope of any State workers' compensation system, and does not change the rights, obligations, conditions, and compensation amounts for a claimant under any such system. Thus, significant variations will continue to exist among State workers' compensation systems with respect to matters such as benefit levels, length of coverage, and the types and computation of medical costs, lost wages and disabilities eligible for compensation. Moreover, neither Part D nor DOE's rules implementing Part D will make a worker eligible for compensation under a State workers' compensation system if the worker is not otherwise eligible. However, use contract administration to encourage DOE contractors to pay workers' compensation claims against which they might have technical defenses not going to the question of whether a contractor employee's illness arose out of employment at DOE. DOE will seek to carry out this statutory mandate faithfully.

DOE published a notice of proposed rulemaking (NOPR) under Part D on September 7, 2001, 66 FR 46742. DOE received numerous comments on the NOPR during the comment period, and continued to receive comments after the close of the comment period from various Members of Congress and their staffs, as well as other commenters.

## II. Discussion of Rule

### *A. What Is The Purpose of This Rule?*

The rule establishes procedures for implementing Part D of the Act. Section 852.1(a) of the final rule provides that these procedures address how: (1) An individual may obtain and submit an application to the Program Office for review and assistance; (2) the Program Office determines whether to submit an application to a Physician Panel; (3) a Physician Panel determines whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility; (4) the Program Office processes a determination by a Physician Panel; and (5) appeals may be undertaken.

### *B. What Is the Scope of This Rule?*

Section 852.1(b) makes clear that the procedures only cover applications that meet three criteria. First, the application must be filed by or on behalf of a DOE contractor employee, or a deceased employee's estate or survivor. Second, the application must be based on the illness or death of DOE contractor employee that may have been caused by exposure to a toxic substance. Third, the application must be based on an illness or death that may have been related to employment at a DOE facility.

Consistent with the statutory emphasis on State Agreements as a precondition for action under Part D of the Act, section 852.1(c) provides that all DOE actions under the Part D program must be pursuant to a relevant State Agreement and consistent with its terms and conditions.

### *C. What Definitions Are Used in This Rule?*

The rule contains definitions of "Act", "Applicant", "DOE", "DOE contractor employee", "DOE facility", "Physician Panel", "Program Office", "State Agreement", and "Toxic Substance".

### *D. What Is the Act?*

The Act is the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384, *et seq.*)

### *E. Who Is an Applicant?*

An applicant is an individual seeking assistance from the Program Office in filing a claim with the relevant State workers' compensation system, including but not limited to a living DOE contractor employee, the estate of a deceased DOE contractor employee, or any survivor of a deceased DOE contractor employee who is eligible to apply for a death benefit or a survivor's benefit under the State workers' compensation system for which the applicant is seeking assistance in filing a claim.

Proposed section 852.2 had defined an applicant as a DOE contractor employee or the employee's estate seeking assistance from the Program Office in filing a claim with the relevant State workers' compensation system. In the final rule, the definition has been extended to survivors because State workers' compensation systems generally provide income benefits to specific survivors, notably spouses and dependent children of deceased workers. The final rule permits such individuals to apply to DOE for assistance in filing for State workers' compensation benefits, based upon the illness or death of the deceased DOE contractor employee.

### *F. Who Is a DOE Contractor Employee?*

Section 852.2 defines a DOE contractor employee to be an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months, or an individual who is or was employed at a DOE facility by either an entity that contracted with DOE to provide management and operating, management and integration, or environmental remediation at the facility, or a contractor or subcontractor that provided services, including construction and maintenance, at the facility. This definition repeats the language used to define a DOE contractor employee in section 3621(11) of the Act and is the same as the definition in the NOPR that referenced the definition found in section 3621(11) of the Act. DOE believes incorporating the actual statutory language into the rule will make the rule more understandable and easier to use.

The term "DOE contractor employee" does not include all employees eligible for the Part A program. It does not

include atomic weapons or beryllium vendor employees who were not employed by a DOE contractor at a DOE facility. In addition, it does not include Federal employees.

A commenter stated that the definition of a DOE contractor employee needs to include subcontractor employees. DOE agrees that subcontractor employees are covered by Part D of the Act, but no change in the rule is necessary to confirm this coverage. The definition of a DOE contractor employee clearly includes an individual who is or was employed at a DOE facility by a subcontractor that provided services at that facility.

*G. What Is a DOE Facility?*

As with the definition of DOE contractor employee, section 852.2 of this final rule defines "DOE facility" by repeating the definition found in section 3621(12) of the Act, rather than merely cross-referencing the statutory definition as the proposed rule did. This is a nonsubstantive change to the proposed rule, and is made only for the purposes of clarity in the text of the final rule. "DOE facility" thus is defined as any building, structure, or premise, including the grounds upon which such building, structure, or premise is located in which operations are, or have been, conducted by, or on behalf of, DOE and with regard to which DOE has or had a proprietary interest; or entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. Further, this definition specifically excludes facilities covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program. DOE has published a list of facilities it considers to be DOE facilities for purposes of the Act. (66 FR 4003, January 17, 2001; revised 66 FR 31218, June 11, 2001).

*H. What Are Physician Panels?*

Physician Panels are appointed by the Secretary of Health and Human Services (HHS) in response to requests by DOE pursuant to Part D of the Act. Physician Panels provide DOE with impartial and independent determinations as to whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. Physician Panels may be asked to review new applications that have not undergone prior Physician Panel review, or to reexamine applications that have already undergone Physician Panel review.

*I. What Is the Program Office?*

The Program Office is the DOE Office of Worker Advocacy or any other DOE office subsequently designated by the Secretary of Energy.

*J. What Is a State Agreement?*

Section 852.2 defines "State Agreement" as an agreement negotiated between DOE and a State that sets forth the terms and conditions for dealing with an application for assistance under Part D of the Act in filing a claim with the State's workers' compensation system. The existence of a State Agreement with a particular State is necessary before the Program Office can refer to a Physician Panel a claim by an applicant who will file his/her worker's compensation claim in that State. Part D is clear that any action by DOE must be in accordance with the terms and conditions of the relevant State agreement.

*K. What Is a Toxic Substance?*

Section 852.2 defines "toxic substance" as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." This definition is the same as that proposed in the NOPR. DOE believes that this definition is consistent with the intent of Part D of the Act and will permit DOE to assist claimants with claims based on illnesses or deaths that arose from exposure to toxic substances to the extent such claims are recognized by a State workers' compensation system.

There were a number of comments on the NOPR definition of "toxic substance." Many commenters supported the NOPR definition, though others suggested modifications to the definition. One commenter suggested that noise should be included as a toxic substance. DOE understands that noise can cause harm to workers in certain situations. However, the dictionary defines "toxic" as "of, relating to, or caused by a poison or toxin." DOE does not believe that noise operates to poison people because it does not injure by chemical action. Hence, it does not fit comfortably within the ordinary meaning of "toxic substance." Neither the text of Part D nor its legislative history suggests otherwise.

Another commenter suggested that only chemicals be considered toxic substances for the purpose of the rule. However, radioactive or biologically harmful substances are commonly described as being "toxic," and these substances fit comfortably within the ordinary meaning of "toxic substance." Given the content of the legislation, DOE does not believe it would be consistent with the general thrust of the Act to limit "toxic substances" to chemicals and to exclude other substances, or to define the term solely by reference to the chemical properties of a substance and to ignore radioactive or biological properties.

*L. How Does an Individual Obtain and Submit an Application for Review and Assistance?*

Section 852.3 describes how an individual obtains and submits an application for review and assistance. An application can be obtained in person from the Program Office, from any Resource Center, and from any DOE-sponsored Former Worker Program project. A Resource Center is a publicly accessible office administered jointly by DOE and DOL for the purpose of assisting an individual in applying for assistance or benefits under the programs established under the Act. There are currently ten Resource Centers located throughout the United States. There are presently approximately one dozen Former Worker Program projects throughout the United States. These pilot projects currently offer screening examinations for the detection of occupational illnesses for individuals formerly employed at some DOE facilities. The Program Office's current mailing address, phone number and web site, at time of publication of this final rule are included in this section. Any future changes in this contact information will be published in the **Federal Register** and noted on the Program Office's web site.

A commenter suggested that applications should also be obtainable in person from any DOE Operations or Area Offices, or from an employer who is currently a DOE contractor. Other commenters requested that section 852.3 include the Program Office's mailing address and web site. DOE finds that it would be logistically difficult for the Program Office to assure that complete application packages would be available at all times from all of the many DOE contractor facilities and DOE Operations and Area Offices. DOE believes that the nationwide network of Resource Centers, coupled with the availability of applications through mail or telephone requests to the Program Office, or in a printable format, from the Program Office's web site, provide adequate accessibility to application materials. The program has and will continue to be publicized so that potential applicants are aware of the

program and how to apply. In the final rule, section 852.3 has been revised to include the Program Office's current phone number and mailing address for requesting an application, as well as the web site from which application forms can be printed.

Section 852.3 also describes how an application is submitted. An application can be submitted in person to the Program Office, to any Resource Center, or to any DOE-sponsored Former Worker Program, where staff will be available to answer questions and assist the individual in filling out the application. An application can also be submitted by mail to the Program Office.

Section 852.4 describes the information and materials that the individual must submit as a part of the application for Physician Panel review, additional discretionary information and materials that the applicant may choose to submit, and the essential information that must be included in records released by a third party or submitted by the applicant in support of an application.

Section 852.4 specifies that the individual must complete and sign any application forms required by the Program Office. The application forms request basic information about the applicant and the worker upon whose illness or death the application is based.

In order to assure that the Program Office has reasonable evidence to determine whether an individual meets the eligibility criteria for Physician Panel review, and that the Physician Panel has sufficient information to make a causation determination on an application, section 852.4 requires the applicant to provide:

(a) the name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have been related to exposure to a toxic substance while the employee was employed at a DOE facility and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based; and

(b) a signed medical release, authorizing non-DOE sources of medical information to provide the Program Office with any diagnosis, medical opinion and medical records documenting the diagnosis or opinion relevant to whether the employee has or had an illness and whether the illness arose from exposure to a toxic substance while the employee was employed at a DOE facility.

The requirement that the applicant submit the information identified in section 852.4 is intended to satisfy the statutory provision that an applicant must supply the Program Office with reasonable evidence that the statutory threshold is met for referral to a Physician Panel. Among other things, and even though an applicant is not required to supply a physician's diagnosis as part of an application, applicants who wish to rely on such a diagnosis to support their applications should identify the diagnosing physician and submit a copy of the diagnosis. DOE encourages the submission of diagnoses where possible because they will enable the Program Office and Physician Panels to do their work more quickly, efficiently and reliably.

Part D neither directs DOE to provide nor bars DOE from providing assistance to an applicant in obtaining a medical diagnosis or developing other medical evidence to support the applicant's application before a decision is made whether to refer it to a Physician Panel. However, and while Part D makes clear that the applicant bears primary responsibility for submitting sufficient information to support his/her application and meet the requirements of section 852.6 of the final rule, DOE will assist applicants as it is able. Specifically, DOE may be able to provide certain types of information as discussed below in connection with section 852.6.

Section 852.4 of the final rule also permits the applicant to submit to the Program Office any other information or materials providing evidence that the employee has or had an illness that arose from exposure to a toxic substance during the course of employment at a DOE facility.

The applicant must sign an affidavit attesting to the authenticity and completeness of any information or materials submitted to the Program Office, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals.

To the extent practicable and appropriate, the records submitted by the worker or released by a third party must also include an occupational history obtained by a physician, an occupational health professional, or a DOE-sponsored Former Worker Program. DOE does not intend that a worker should incur financial or other hardship in having such a history taken, but instead requests that any such occupational history already in a worker's medical records be submitted to the Program Office by the applicant. If the worker's records do not already include such a history, then DOE requests that the worker have such a history obtained and have this history released to the Program Office, if the worker can readily have such a history obtained from a Former Worker Program or other source without incurring undue hardship. If such an occupational history is not reasonably available by these means; and is deemed by the Program Office to be needed for the fair adjudication of the claim, then the Program Office must assist the applicant in obtaining this history, if it can be obtained from the worker upon whom the application is based.

In section 852.4(d) of the NOPR, there was a provision for submission of an "employment history" as a part of the application. In the final rule, the requirement for submission of an "employment history" appears in section 852.4(a)(4), and the term "employment history" is changed to "occupational history" because the latter is in more general usage in the occupational health field. The other changes in this section were made to assure that an adequate occupational history is available for Physician Panel review.

Omitted from the final rule is section 852.4(c) of the NOPR which would have required an applicant to sign a release of information permitting the Program Office to obtain any records under the control of DOE and relevant to the application. Under the Privacy Act of 1974, as it pertains to DOE records system "DOE–10 Worker Advocacy Records" (66 FR 27307), such a release is not required for DOE to obtain records controlled by DOE for legitimate purposes related to this program.

*M. What Information May an Employer Submit in Response to an Application Submitted to a Physician Panel?*

New section 852.5 requires the Program Office to notify an employer when the Program Office has determined that an application by or on behalf of a current or former employee of that DOE contractor meets the requirements of section 852.4. After receiving this notification, the employer has 15 working days to provide the Program Office with any information deemed by the employer to be relevant to the application. The employer must sign an affidavit attesting to the authenticity and completeness of any information or materials submitted to the Program Office for this purpose, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals. DOE will provide the Physician Panel with

materials submitted by an employer for use in making its determination.

Two commenters expressed the opinion that the contractor has the right to be notified that a claim has been filed, and be given the opportunity to provide information relevant to the application, including information that might rebut the claim. Others noted that the employer may be the only source of certain relevant information, including information relating to the issue of causation, and noted that, under the proposed rule, the employer would not be able to present evidence to a Physician Panel or to present evidence to contest a determination by a Physician Panel in a State workers' compensation proceeding. Both commenters felt that the employer should be afforded the opportunity to provide the Program Office with evidence relevant to the application. DOE agrees with these commenters and has added this new section 852.5 to provide employers with notice and the opportunity to submit relevant information before the Program Office makes a determination whether to submit an application to a Physician Panel.

*N. How Does the Program Office Decide Which Applications To Submit to a Physician Panel?*

As proposed in the NOPR, section 852.6 (proposed as section 852.5) would have required DOE to apply eligibility criteria contained in the relevant State workers' compensation statutes and used by the relevant State in determining the validity of a workers' compensation claim. The criteria would have been specified in the State Agreement with the State in which the claim would be filed, as specified in proposed section 852.6. In the NOPR, DOE solicited comments on whether these State criteria should be applied by the Program Office, or alternatively, by State officials on a reimbursable basis. DOE also requested comments as to whether the use of a screening mechanism is consistent with the statutory framework and whether the use of applicable State criteria or uniform Federal criteria better achieves the statutory objectives.

Commenters generally opposed the application of State specific criteria during the screening of applications and urged that the Program Office submit to the Physician Panel those applications that meet the minimum statutory criteria identified in the Act. Commenters also expressed the concern that application of State specific criteria at this stage would erect barriers to claims that should be presented to the Physician Panel. Still other commenters urged the establishment of a uniform Federal standard for eligibility and causality.

Some States commented that they would not be willing to screen applications on a reimbursable basis. Several States also questioned whether DOE would be able to screen applications on the basis of whether an application presented a compensable claim under a State workers compensation system.

After considering the comments, DOE has decided that the eligibility criteria for referral of a claim to a Physician Panel should be based on the criteria specifically set forth in the Act, and should focus on whether the applicant provides reasonable evidence of an illness or death that may have been caused by exposure to a toxic substance during the course of employment at a DOE facility. Thus, section 852.6(a)(1) and section 852.6(a)(3) of the final rule track the language in Part D. Section 852.6(a)(2) further requires that an applicant submit reasonable evidence that the employee's illness or death "may have been caused by exposure to a toxic substance." While this requirement does not appear in section 7385o(b)(2) of the statute, it reflects part of the determination that Part D requires a Physicians Panel to make if the panel is to render a determination in an applicant's favor. DOE believes that it is only logical for the applicant to be required to submit, and for the Program Office only to refer to Physician Panels applications in which the applicant has submitted, reasonable evidence in support of the determination the Physician Panel is being asked to make.

Consistent with the general tenor of the comments, today's final regulations provide that applications which satisfy these minimum criteria should be submitted to a Physician Panel for review. It is the role of the Physician Panel to determine if the applicant can satisfy the medical criteria for causation specified in these final regulations. Non-medical criteria, such as statutes of limitations, should not be used by the Program Office to screen applications, or by the Physician Panels to make medical causation determinations.

DOE is aware that by excluding non-medical criteria from the screening process, it may submit to a Physician Panel an application by an applicant whose State workers' compensation claim might be barred by non-medical criteria (such as the applicable statute of limitations). A Physician Panel could in turn make a causation determination in favor of an applicant, and the Program Office could accept such a determination even though there might be various medical or non-medical impediments to the applicant's State workers' compensation claim as will be discussed below. Part D is designed to remove obstacles to recovery of this type when it can do so through contract administration tools. These results do not impose a Federal standard on a State workers' compensation system. States will continue to have the ability to administer their workers' compensation systems in accordance with applicable State law. DOE's action merely would constitute a decision by DOE not to raise defenses to a workers' compensation claim by an applicant who has received a favorable Physician Panel determination.

Section 852.6 identifies the criteria the Program Office uses to determine whether to submit an application to a Physician Panel. An application must contain reasonable evidence allowing the Program Office to make an initial determination that the following three conditions are met. First, the application was filed by or on behalf of a DOE contractor employee or the employee's estate or survivor. Second, the illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance. Third, the illness or death may have been related to employment at a DOE facility. The Program Office must refer to a Physician Panel any application that provides reasonable evidence meeting each of these criteria. Applicants with a medical diagnosis to support their applications should submit that diagnosis and supporting medical documentation because such information likely will constitute the strongest evidence in support of an applicant's causation argument. Applicants who do not submit a diagnosis by a licensed physician will have a more difficult time meeting the section 852.6 standard. However, the regulations do not require that a medical diagnosis be submitted before an application meets the applicable standard, and as section 852.4 makes clear, applicants are free to submit whatever information they have that they believe supports their application.

*O. What Provisions Does a State Agreement Contain?*

Proposed section 852.6 in the NOPR identified three elements to be included in a State Agreement: a provision that the State would identify the applicable criteria used to determine the validity of a workers' compensation claim under State workers' compensation law and describe how these criteria are applied in a State workers' compensation

proceeding; a provision that only those applications that could satisfy the identified applicable criteria would be submitted to a Physician Panel; and a provision that the Program Office would provide assistance only to those applicants that satisfy the applicable criteria.

DOE intends the State Agreement to be the understanding between DOE and a State as to the terms and conditions for dealing with an application for DOE assistance in filing a workers' compensation claim. State Agreements are not intended to alter State criteria.

As noted in the discussion of section 852.6, a number of commenters objected to the concept of the Program Office using State criteria to screen applicants for assistance prior to submission of an application to a Physician Panel. As a result, that section has been revised to eliminate consideration of State criteria at that point in the screening process. Similarly, several commenters objected to inclusion in the State Agreements of State criteria for determining causation and other medical eligibility issues. Some commenters stated that State Agreements should contain Federal standards to be applied in determining eligibility and causality. As will be discussed below, DOE believes that it is consistent with the statutory requirement and structure of the program under Part D for the Physician Panels to use a uniform federal standard for determining causation rather than the specific causation requirements of the workers' compensation system for the State in which an applicant will file his/her claim.

DOE also solicited comments as to what other provisions should be included in State Agreements. Commenters argued that the State Agreements should include a provision for reimbursement or indemnification to contractors or insurance carriers for claims accepted under Part D. DOE has determined that such provisions should not be placed in the State Agreements. Rather, section 852.19 of the final rule provides for reimbursement of contractors for additional workers' compensation costs incurred as a result of workers' compensation awards on claims based on the same health condition that was the subject of a positive Physician Panel determination. However, the Act does not authorize DOE to reimburse or indemnify insurers; nor does it authorize the appropriation of funds to do so. Therefore, neither the final regulations nor the State Agreements provide for reimbursement or indemnification of insurers.

Commenters also expressed concern for the precedential effect of a Physician Panel finding of medical causation. A positive finding by a Physician Panel is not binding on a State worker's compensation system or any person other than DOE and, if so directed by DOE, a DOE contractor. The effect of a positive Physician Panel determination is to obligate DOE to assist the applicant in the State worker's compensation proceeding. It does not prevent anyone other than DOE or a DOE contractor so directed by DOE from contesting causation or any other issue.

One commenter observed that Part D of the Act is permissive, not required, and that the Secretary has the option to decide not to negotiate State Agreements with States. While the commenter is correct that the program under Part D is discretionary and dependent on the negotiation of State Agreements, DOE believes Congress did not enact Part D in the expectation that DOE would make it a dead letter by refraining from attempting to negotiate any State Agreements. DOE therefore has determined that it should seek to negotiate agreements with the States as anticipated by this Part. Of course, implementation of the program under this Part with respect to any particular State or state workers' compensation program will depend on the successful negotiation of a State Agreement between DOE and the relevant State.

One commenter expressed concern that there are jurisdictions without a State agency to enter into such an agreement. DOE finds that all jurisdictions have a workers' compensation administrative agency with which DOE believes it can work.

As revised, section 852.7 provides for four standard provisions in State Agreements. First, the State Agreement must include a provision that an application will be submitted to a Physician Panel only if it contains reasonable evidence, including appropriate medical documentation, that (1) the worker who is the subject of the application is or was a DOE contractor employee, (2) the worker has, had or died of an illness that may have been caused by exposure to a toxic substance, and (3) the exposure occurred during the course of employment at a DOE facility.

Second, a State Agreement must include a provision that requires a Physician Panel to apply the standard of causation set forth in section 852.8 of DOE's regulations when making determinations of medical causation.

Third, a State Agreement must include a statement that the Program Office provides assistance only to an applicant who receives a positive determination from a Physician Panel.

Fourth, a State Agreement must include a statement that a positive determination by a Physician Panel has no effect on the normal operation of a State workers' compensation system. However, as provided elsewhere in this rule, the determination will prevent DOE from contesting a State workers' compensation claim or award with regard to the health condition that was the subject of the Physician Panel determination. It also will result in DOE's direction to the relevant DOE contractor not to contest such claims or awards. State processes concerning issues such as benefit level determinations, disability determinations such as permanent partial disability (PPD), and apportionment, will proceed according to routine State workers' compensation system operation.

*P. What Guidelines Does a Physician Panel Use To Determine Whether an Illness or Death Arose Out of and in the Course of Employment by a DOE Contractor and Exposure to a Toxic Substance at a DOE Facility?*

Section 852.8 provides that a Physician Panel determines whether an illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility based whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death.

In proposed section 852.7 of the NOPR, a common federal causation standard and burden of proof were specified, namely, that it is more likely than not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor caused the illness or death. DOE solicited and received a number of comments on the appropriate burden of proof and causation standard to be applied by the Physician Panels. Some commenters expressed support for an "as likely as not," or a "more likely than not" standard. Other commenters supported a standard of "any contributing factor" or "a substantial contributing factor." Still other commenters suggested a standard of "significant factor in aggravating, contributing to or causing illness, disability or death," and other commenters supported State-specific causation standards.

DOE has decided, for several reasons, that Physician Panels should not use standards of the individual States with regard to medical causality or burden of proof determinations, and that instead, the regulations should require Physician Panels to use the single uniform federal standard for burden of proof and medical causality set forth in section 852.8. First, while Part D certainly is susceptible of more than one interpretation on this point, DOE believes the best interpretation of the statutory text is that DOE should adopt a uniform federal standard. Nowhere does the statute indicate that Physician Panels should apply State standards for burden of proof or causation; indeed, 42 USC § 7385o(d)(3) speaks in terms that seem to call for a single federal standard (i.e., the panels shall determine "whether the illness or death that is the subject of the application arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy facility").

Second, DOE believes it will better effectuate the purpose and policy of Part D for the Physician Panels to apply a uniform federal standard. In DOE's view, the primary purposes of Part D are for DOE to assist deserving applicants in applying for and obtaining State workers' compensation benefits, to ease the administrative burden on applicants when applying for State workers' compensation benefits, and to enable some applicants to gain benefits that they might not receive under normal operation of the State systems by requiring DOE and its contractors not to contest certain State workers' compensation claims, using contract administration tools to encourage outcomes of this type. These purposes can be better fulfilled through a uniform federal causation standard for the Physician Panels. If the Physician Panels were required to use State standards of causation and burden of proof, applicants potentially would be forced to endure the administrative burden at the Physician Panel stage that Part D in fact wishes to relieve applicants from bearing at the State worker compensation proceeding stage.

Third, DOE believes that application of a single federal standard by the Physician Panels will make administration of the Part D program much more equitable and efficient. A requirement that Physician Panels (as well as the Program Office in reviewing Physician Panel determinations) use State-specific causation and burden of proof standards would require that the panels and Program Office become intimately familiar with the laws of numerous different States, and likely would lead to inconsistencies in how State law is interpreted and applied by the States, the Program Office and the Physician Panels. Such inconsistencies could, in turn, lead to inequitable results and wasteful controversy and litigation. A single federal standard will be easier for the Program Office and the Physician Panels to administer and will allow DOE to treat equally similarly situated applicants in different States.

Fourth, DOE believes a uniform federal causation standard allows DOE to promote the purposes of Part D by setting the standard at a level that fairly interprets the statutory command while also attempting to assist the largest possible number of deserving applicants. The use of State-specific causation standards would prevent DOE from furthering the statutory purposes in this manner. Such a result would be particularly inequitable and would not be a sound policy choice or interpretation of Part D, simply because Part D quite clearly does not compel the Program Office or Physician Panels to use State-specific causation standards.

As to the federal standard to be adopted and promulgated in section 852.8, DOE has decided that a Physician Panel must render a causation determination in the applicant's favor if the panel determines that it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue. DOE intends that, as used in this context, the word "significant" should have its normal dictionary definition and meaning—that is, "meaningful" and/or "important."

DOE believes that the standard set forth in section 852.8 fairly interprets the text of Part D. It also represents a policy decision by DOE to aggressively pursue the purposes of Part D by setting the causation standard at a level that is below the level of proof that applicants might be required to demonstrate to obtain workers' compensation benefits in some States.

DOE has decided to adopt the "significant factor" causation standard rather than the "more likely than not" standard proposed in the NOPR because the "more likely than not" standard is too high and could result in deserving applicants being denied the assistance Part D was intended to afford. On the other hand, DOE rejects extremely lenient standards (such as "any contributing factor") because such standards do not constitute a fair interpretation of the statutory language (*i.e.*, that the illness or death "arose out of and in the course of" employment at a DOE facility and exposure to a toxic substance).

DOE recognizes that the causation standard in section 852.8, and the causation standard applied by DOL for certain benefits determinations under other compensation programs established by the Act, are different. DOE further recognizes that this difference in causation standards may contribute to some applicants who file applications in both the DOE and DOL programs receiving inconsistent causation determinations from the two agencies. However, DOE determined that nothing in the Act required that the same causation standard be used for both the program administered by DOL and the Part D program administered by DOE. Indeed, the Act itself sets forth different causation standards for the different programs.

Furthermore, and as noted above, DOE intends to aggressively pursue the purposes of Part D. DOE believes as a policy matter that this objective can best be accomplished through DOE's adoption of the "significant factor" causation standard set forth in section 852.8 even thought it may differ from the standards that DOL is required by law to apply.

In addition, regardless what standard DOE adopts, it is extremely unlikely that all applicants would receive identical causation determinations from both the DOL and DOE programs. The statutory language for the two agencies' programs is different, the two programs focus on entirely different benefit mechanisms (i.e., DOE's program under Part D focuses on assisting applicants obtain State workers' compensation benefits while the program administered by DOL focuses on direct federal payments to applicants), the programs are administered by two different federal agencies, and the Act requires that independent Physician Panels make the causation determinations for the applications submitted to DOE under the Part D program. DOE believes that rather than adopting a causation standard set forth in another part of the Act in a vain attempt to assure consistency in outcomes between the DOE and DOL programs, it should adopt the "significant factor" causation standard set forth in section 852.8. This standard is similar to the causation tests applied by many State workers' compensation programs and is appropriate for all the other reasons explained above. In short, DOE believes that the standard it has adopted is appropriate and properly carries out the intent of Part D, and that DOE should

not adopt a causation standard that attempts to mandate the same result for all applicants from both the DOE and DOL programs when perfect consistency in outcomes is extremely unlikely regardless of the causation standard DOE adopts.

Section 852.8 further specifies that Physician Panels should use the "at least as likely as not" burden of proof when determining whether exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue. The NOPR stated that a panel would make its determination based on "whether there is sufficient information to support" the applicant's requested finding; that language implied that panels should use a preponderance of the evidence burden of proof. The final rule adopted by DOE is more favorable to applicants in that it requires that they meet only an "at least as likely as not" burden of proof.

The standard adopted today in section 852.8 is, DOE believes, very favorable to applicants while at the same time being consistent with the statutory language and good policy. DOE believes this standard will result in its being able to assist the largest number of deserving claimants consistent with the structure and statutory text of Part D.

*Q. What Materials Must a Physician Panel Review Prior to Making a Determination?*

Section 852.9 (proposed as section 852.8) stipulates that the Physician Panel must review all records relating to the application that are provided by the Program Office. Such records may include medical records, employment records, exposure records, an occupational history, workers' compensation records, pertinent medical literature or reports, and any other records or evidence pertaining to the applicant's request for assistance, including additional discretionary information submitted by the applicant or the employer. For a deceased worker, such records may include a Medical Examiner's or Coroner's report or a death certificate. For an applicant who has also submitted a claim to DOL under the Act, such records may include any available information submitted as a part of such a claim or developed by DOL or HHS in the course of processing such a claim, including estimates of an applicant's cumulative radiation dose and the calculated probability that the employee's illness or death was caused by that radiation dose.

Proposed section 852.8 had stated that each Physician Panel should review all such records prior to making a determination. A commenter expressed an opinion that a Physician Panel must be required to review all relevant information, both supportive and non-supportive, and render a determination based on all of the information. DOE agrees that a fair and accurate adjudication of a claim is predicated on a Physician Panel reviewing all available information presented to it, and has accordingly changed "should" to "must" in section 852.9.

Several commenters asked questions or made suggestions as to what role DOE should have in assisting the applicant in gathering information in support of an application, including a suggestion that an independent medical examination might help expedite the Physician Panel review by focusing on information relevant to determining compensability under State law. Commenters expressed the opinion that DOE should pay for the development of medical evidence in support of an application, and suggested that DOE should use the Former Worker Medical Surveillance Program to accelerate and enhance implementation of Part D.

Part D does not authorize DOE to create a new program of examination and testing for applicants, nor does it authorize appropriations for this purpose. DOE believes that the Program Office's role is to assist an applicant in obtaining and assembling existing information relevant to a claim, including employment, exposure and medical information under the control of DOE and its contractors, information provided by the applicant, and information from outside sources whose transmittal to DOE has been authorized by the applicant.

However, where it is able, DOE will assist applicants by providing to them and to the Physician Panel relevant information in DOE's control. DOE's Former Worker Medical Surveillance Program currently consists of pilot projects run by consortia of universities, unions and occupational health experts funded through cooperative agreements with DOE for the purpose of providing former DOE contractor employees with medical surveillance examinations directed at detecting potential work-related disorders. The Former Worker Medical Surveillance Program is distinct from the program authorized by Part D of the Act and administered by the Program Office. The Program Office intends to utilize information generated by the Former Worker Program projects in the following manner. First, the Program Office will utilize the projects' hazard surveys of DOE sites (know as "Phase I/Needs Assessments") as sources of occupational exposure information for use by the Physician Panels. Second, if an applicant has previously received a medical surveillance examination through a Former Worker Program project, the Program Office will ask the applicant to sign a release so that the Program Office can obtain the results of this examination.

A commenter stated that in assisting the applicants seeking compensation from their State's workers compensation systems, DOE should make use of state-of-the-art analytical techniques to determine amounts of radionuclide body burdens that the applicants may have. As stated above, DOE is not funding further medical examinations of applicants under this program. However, HHS will be conducting radiation dose reconstructions for those applicants who have submitted a claim for cancer to DOL under Part A of EEOICPA and whose claim is not for compensation under provisions governing compensation for members of the Special Exposure Cohort. These dose reconstructions will evaluate and make use of existing information from DOE and other sources, including claimants, relevant to estimating the radiation doses incurred by cancer claimants in the performance of duty for DOE and it contractors. HHS will report the methods and results of these dose reconstructions to claimants, DOL and DOE. DOE intends to provide copies of these reports to the Physician Panels for radiation-related claims. In these cases, the applicant may also want to provide the Physician Panel with the probability of causation determination established by DOL based on the NIOSH dose reconstruction.

*R. How May a Physician Panel Obtain Additional Information or a Consultation That It Needs To Make a Determination?*

A Physician Panel may, on occasion, need additional information or consultations to make its determination. For expediency, documentation of evidence, maintenance of confidentiality, and records control, section 852.10 (proposed as section 852.9) requires the Physician Panel to make all requests for additional information through the Program Office. The panel may request an interview with the applicant, if the panel believes that only the applicant can supply the necessary information. Based upon the experiences of similar physician panels, including the Expert Panel of the

Fernald II Workers' Settlement Fund,[1] it is anticipated that such a request will be unusual, but may be necessary in rare cases in order to obtain essential information. The panel can also request that the applicant provide additional medical information. The Physician Panel may request consultation with specialists in fields relevant to its deliberations, if needed, as provided for in section 3661(d)(4) of the Act, or refer to relevant medical and scientific literature. The Program Office will maintain a roster of available specialists for this purpose.

New section 852.10(c) was added in the final regulations in order to codify within the rule a requirement of section 3661(d)(4) of the Act. Section 3661(d)(4) requires that, at the request of a Physician Panel, DOE or a DOE contractor who employed the DOE contractor employee must provide additional information relevant to the panel's deliberations. Under new section 852.10(c), a Physician Panel may also request additional information under the control of DOE or its contractors. It is anticipated that these will be important sources of information in many cases.

One commenter expressed an opinion that a duty to produce the historical exposure records should be placed on the contractor, instead of placing it wholly on the Program Office. DOE notes that section 3661(d)(4) of the Act (42 U.S.C. 7385o(d)(4)) implicitly places this obligation on both DOE and on the DOE contractor. Section 852.10(c) permits a Physician Panel to request relevant information in control of DOE or its contractors. DOE intends that all relevant information should be provided to a Physician Panel whether in possession of DOE or its contractor, to the extent permitted by law.

A commenter stated that requiring applicants to interview before a Physician Panel may result in a financial burden and physical hardship on applicants and stated that alternative methods of obtaining information should be explored. This commenter asked who will pay for any travel associated with an applicant's interview, if a panel requests such an interview. This commenter also asked whether a specialist will be paid, when consultation with a specialist is required, and what the rate of pay for specialists will be.

DOE recognizes the hardships for the applicant associated with an interview, and anticipates that such an interview will only be required in those unusual instances when essential information is not available from any other source. When an interview with the applicant is required, the Program Office will strive to arrange such an interview at a time and place convenient to the applicant and consider alternatives (e.g., telephone interviews) to face to face meetings. As discussed previously, the applicant is responsible for developing the medical information upon which the applicant bases its claim, and therefore DOE is not responsible for paying for the development of new medical information. However, to the extent the Physician Panel requests a consultation with a specialist to discuss medical information already in its possession, DOE will pay the costs associated with this consultation.

*S. How Is a Physician Panel To Carry Out Its Deliberations and Arrive at a Determination?*

After each member of a Physician Panel reviews the information submitted to the panel, the panel members will discuss an application and arrive at a determination. Because it is anticipated that Physician Panels will be spread out geographically, section 852.11 (proposed as section 852.10) permits teleconferencing. This system has worked well for prior Physician Panels, such as the Expert Panel of the Fernald II Workers' Settlement Fund.[2]

In the NOPR, DOE proposed that the panel members be required to reach a "common" determination. The NOPR did not explain what might happen if such a common or unanimous determination could not be reached. Some commenters objected to the requirement for panel unanimity, apparently on the ground that this could result in a single panel member defeating the will of the majority to make a causation determination in an applicant's favor.

DOE has decided that a panel determination should require only a majority of the panel members approving that determination, and thus DOE had modified the text of section 852.11 accordingly. This approach will promote the purposes of the statute by enabling more deserving employees to receive favorable panel determinations. This approach also will promote efficient administration of the program by eliminating the problems that otherwise might arise with respect to a non-unanimous panel. Furthermore, allowing panel determinations to be based on a majority rather than a unanimous decision by the panel members better accommodates the inherent uncertainty of some medical and medical causation decisions, and ensures that applicants will receive a fair determination even in situations where, for whatever reason, the determination is not unanimous.

*T. How Must a Physician Panel Issue Its Determination?*

In order to ensure that a Physician Panel has made its determination based upon the relevant evidence and that it has provided the basis for its determination, section 852.12 (proposed as section 852.11) requires the Physician Panel to identify the materials it has reviewed in making its determination, and express the determination and its basis in a series of findings that logically links the evidence reviewed to the conclusions drawn.

DOE anticipates that some covered workers who have applied for benefits under the DOL program will also apply for assistance from the Program Office in filing a claim with a State workers' compensation system. However, filing a claim under the DOL program is not a requirement for the DOE program. In addition, and as explained above, some applicants who submit applications in both the DOE and DOL programs may receive different causation determinations from the two agencies. For example, under the DOL program, a member of a Special Exposure Cohort, as defined in section 3621(14) of the Act (42 U.S.C. 7384l(14)), who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8. As to non-Special Cohort members in the DOL program, factual findings made by DOL, including findings based on dose reconstructions performed by HHS regarding the likelihood that cancer was caused by occupational exposure to radiation, while relevant to a panel's assessment, are not binding on a Physician Panel. A

[1] The Fernald II Workers' Settlement Fund was established to settle a class action lawsuit by the employees of National Lead of Ohio (NLO), which operated the Feed Materials Production Center (Fernald) DOE facility from 1951 to 1985. A component of this settlement fund is an Expert Panel Review to determine the work relatedness of an illness claimed by an NLO employee as resulting from exposure to radioactive material or other toxins. The Expert Panel consists of three Occupational/Environmental Health physicians who have the option of interviewing a claimant, but rarely need such an interview to make a determination, relying in most cases on existing written records.

[2] Ibid.

Physician Panel would be expected to explain the extent to which it based its determination on the findings of any agency in its report to the Program Office.

Proposed section 852.11(c)(4) in the NOPR required a Physician Panel, if explicitly requested by the Program Office, to provide the Program Office with a finding as to whether a specific criterion in a State Agreement has been satisfied. Three commenters asserted that Physician Panels should not be called upon to interpret State law. Another stated that State workers' compensation systems recognize and accept physicians' findings as to causality, and do not rely on physicians to make findings as to compensability.

DOE agrees that the role of the Physician Panel is to make a determination as to the relationship between a claimed illness and exposures to a toxic substance at a DOE facility. Accordingly, the Physician Panel will not be required to provide a specific interpretation of a non-medical provision of a State workers' compensation system. However, if a State Agreement provides for a Physician Panel to make a determination concerning a medical issue in addition to causation and specifies the medical criteria to be applied, then panels will make such determinations in appropriate cases. For example, a State Agreement could set forth the State criteria for determining the extent of disability or impairment and provide for the Physician Panels to make determinations on these medical issues. However, the panel determinations with respect to such issues will not affect whether a "positive" or "favorable" determination is rendered for an applicant with all its attendant consequences under this program. Whether a positive or favorable determination is rendered is to be based solely on the standard and criteria set forth in section 852.8.

*U. When Must a Physician Panel Issue Its Determination?*

Section 852.13 (proposed as section 852.12) requires a Physician Panel to submit its determination to the Program Office within 30 working days of receiving the application materials, unless granted an extension by the Program Office, which then sets the new deadline. New section 852.13(b) further stipulates that, when a Physician Panel requests additional information or a consultation necessary to the panel's deliberations, the deadline for panel determination is extended to 15 working days after receipt of the requested information or the consultant's recommendations.

A commenter stated that the rule should define the "applicant's material" and describe the Physician Panel's obligation if the "applicant's material" is deemed incomplete or otherwise inadequate for consideration.

Because section 852.4 allows some discretion on the part of the applicant and the employer as to what materials are submitted, and because there will be a wide variation in the type and amount of information available from other sources, it is not possible to define precisely what the application materials will consist of, beyond the materials that the applicant is required to submit, as outlined in section 852.4. In those instances where the Physician Panel deems the application materials to be insufficient, the Physician Panel's obligations are defined in section 852.10, which requires the Physician Panel to request any additional information needed. New section 852.13 further requires a Physician Panel to issue a determination in a timely fashion after receiving additional requested information or a consultation with a specialist.

*V. What Precautions Must Each Physician Panel Member and Each Specialist Take in Order To Keep an Applicant's Personal and Medical Information Confidential?*

Because records for review by the Physician Panels and by medical specialists consulted at the request of these panels contain confidential, personal, and medical information, section 852.14 (proposed as section 852.13) is included to provide safeguards that Physician Panels and specialists must follow to preserve the confidentiality of this information. Physician Panel members and specialists are required to comply with all provisions of the Privacy Act of 1974 applicable to worker advocacy records, including maintaining paper records in locked cabinets and desks. Release of information to a third party is also barred, unless such release is authorized by the applicant.

*W. What Actions Must a Physician Panel Member Take if a Member of the Panel Has a Potential Conflict of Interest in Relation to a Specific Application Submitted to the Panel?*

In order to ensure objectivity and fairness, section 852.15 (proposed as section 852.14) requires each panel member to report to the Program Office any real or perceived conflict of interest with regard to a particular application to the Program Office, and to cease reviewing the application pending instruction by the Program Office. The Program Office will then take appropriate actions to remedy the situation, which generally will mean referring the application to a different Physician Panel. At least two Physician Panels will be designated to review applications submitted by employees of each DOE facility.

A commenter suggested that the proposed section 852.14 did not go far enough in addressing potential conflicts of interest, and called for public disclosure of potential conflicts of interest. It is DOE's position that, in addition to the reporting requirements of section 852.15, adequate safeguards have been taken to avoid potential conflicts of interest because, among other things, the selection of Physician Panel members will be performed by HHS independently of DOE.

*X. When May the Program Office Ask a Physician Panel To Reexamine an Application That Has Undergone Prior Physician Panel Review?*

Section 852.16 (proposed as section 852.15) provides that the Program Office may refer a case for reexamination to the same panel or to a different panel, after the original panel has made a determination if: there is significant evidence contrary to the panel determination; the Program Office obtains new information the consideration of which would be reasonably likely to result in a different determination; the Program Office becomes aware of a real or potential conflict of interest on the part of a member of the original panel in relation to the application under review; or reexamination is necessary to ensure consistency among panels.

Several commenters felt that the Program Office's review powers were too broad in the NOPR. DOE agrees that a Physician Panel determination should be accorded deference and DOE generally anticipates accepting a Physician Panel determination in favor of an applicant. The statute does, however, specifically contemplate review and discretion by the Program Office in determining whether to accept such a determination, in that the statute specifies that the Program Office shall accept such a finding unless there is "significant evidence to the contrary." In the final rule, the discretion of the Program Office to ask a Physician Panel to reexamine an application has been delineated to balance these competing considerations.

*Y. Must the Program Office Accept the Determination of a Physician Panel?*

Unless a reexamination is requested pursuant to section 852.16, section 852.17 (proposed as section 852.16) requires the Program Office to accept a Physician Panel's determination, except where the Program Office determines there is significant evidence contrary to the panel determination. The Program Office must notify the applicant and the employer, in a timely fashion, of its acceptance or rejection of a Physician Panel determination.

Proposed section 852.16 required only the prompt notification of the applicant of a determination. In the final rule, notification is extended to the relevant DOE contractor employers because of the potential impact of the Program Office's determination on those parties.

*Z. Is There an Appeals Process?*

Section 852.18 (proposed as section 852.17) provides that an applicant may request DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. An applicant may not, however, appeal to OHA a Program Office decision to submit an application for reexamination pursuant to section 852.16.

An applicant must file a notice of appeal with OHA on or before 30 days from the date of a letter from the Program Office notifying the applicant of a decision appealable under this section. OHA will consider appeals in accordance with its procedures set forth in 10 CFR Part 1003. A decision by OHA constitutes DOE's final determination with respect to an application.

A commenter agreed that an applicant should have a right to appeal a determination not to submit the application to the Physician Panel, but expressed concern about the independence of OHA. OHA is an office within DOE. However, apart from being within the same agency, it is administratively and functionally independent of the Program Office. Although a decision by OHA constitutes DOE's final determination with respect to an application, it is not the final remedy for an applicant. Regardless of DOE's final determination on a claim, an applicant may still file a claim with the applicable State workers' compensation program.

*AA. What Is the Effect of the Acceptance by the Program Office of a Determination by a Physician Panel in Favor of an Applicant?*

Section 852.19 (proposed as section 852.18) sets forth the effect of acceptance by the Program Office of a determination by a Physician Panel in an applicant's favor. In the event the Program Office accepts such a determination by a Physician Panel, the Program Office must assist the applicant in filing a claim with the relevant State's workers' compensation system and cannot contest the claim or any award made regarding the health condition that was the subject of the Physician Panel determination in the applicant's favor.

There were many comments regarding proposed section 852.18. Commenters expressed concerns about what actions DOE will take in order to ensure that claims based upon positive Physician Panel determination will not be contested by its contractors. Section 852.19 requires the Program Office to advise the cognizant Secretarial Officer to recommend to the relevant Contracting Officer that, to the extent permitted by law, the DOE contractor be directed not to contest the claim or award. Furthermore, any cost of contesting the claim or award is not an allowable cost under a DOE contract.

All workers' compensation costs incurred as a result of an award on a claim based on the health condition that was the subject of a Physician Panel determination in favor of an applicant are allowable, reimbursable contract costs to the fullest extent permitted under a contract. This final provision of section 852.19 was added in final rulemaking in order to ensure that a DOE contractor who incurs additional workers' compensation award costs as a result of the rule is able to recover such costs from DOE.

Part D only provides that DOE may direct its contractors not to contest a determination by a Physician Panel. It neither affects nor authorizes DOE to give directives to persons who are not DOE contractors. Thus, it will not affect persons who have no privity of contract with DOE, such as insurers. Likewise, it will not affect persons who lease DOE facilities for commercial purposes. While leases may be considered contracts, they typically have no provisions that would permit DOE to direct a lessee not to contest a workers' compensation claim or that would require DOE to reimburse the lessee for a workers' compensation claim. In addition, DOE may direct its contractors not to contest a determination by a Physician Panel only to the extent permitted by law. Thus, DOE cannot direct a contractor to take action that would violate the contractor's obligations under a State workers' compensation system or other legal obligations such as a contractual obligation to an insurer.

Part D further provides that, in the case of a Physician Panel determination in an applicant's favor that has been accepted by the Program Office, DOE must assist an applicant in filing a claim under the appropriate State workers' compensation system. DOE notes that there is nothing in Part D of the Act requiring an applicant to file a claim after the Program Office accepts a positive Physician Panel determination. The applicant is responsible for evaluating the merits of filing a claim. If an applicant elects to seek relief under a State workers' compensation Program, Part D places an obligation upon DOE to assist the applicant in filing a claim. This assistance will include the provision of the determination and other information developed by a Physician Panel. It will not include representation or other such assistance after the filing of a claim with a State workers' compensation system.

A commenter stated that even when causation has been established, there is still a disability determination that needs to be made under the State workers' compensation system. DOE believes that all such determinations should be made in the normal course of the operation of State workers' compensation statutes and administrative procedures. A commenter was concerned that costs associated with a disability determination would not be allowable. DOE has concluded that the disallowance of costs associated with contesting a claim that has been the subject of a Physician Panel determination in an applicant's favor pertains to all costs of supporting arguments or activities with the intent or effect of delaying or defeating a claimant's ability to recover State workers' compensation benefits for the health condition for which the applicant has received a final favorable Physician Panel determination. This obviously applies not only to "contesting" claims before the relevant State workers' compensation authority, but also to "contesting" such claims on appeal or in any other administrative or judicial forum. Subsequent employer costs are allowable to the extent that, and if consistent with the contractor's contract with DOE, under the applicable State workers' compensation statutes, it is customary for the employer to take an

active role in settling issues related to the claim, such as the extent of injury, allocation of liability among multiple employers, or calculation of actual benefits, but only to the extent such activities do not have the intent or effect of delaying or defeating a claimant's ability to recover workers' compensation benefits. If a State Agreement provides for a Physician Panel to determine a State-specific medical issue such as the degree of disability or impairment, DOE may direct a contractor not to contest that determination in a State proceeding and may not reimburse costs incurred in contesting such a determination.

A commenter noted that this program will result in increased workers' compensation premiums to its contractors, and that additional workers' compensation claims will affect a contractor's State experience rating as a result of its workers' compensation experience. To the extent premium increases do occur or experience ratings are adversely affected, those effects are the necessary results of the Program established by Congress under Part D.

*BB. General Comments on the NOPR*

A number of workers, former workers, their survivors and representatives had general comments on the NOPR without specific reference to a particular section. A number of commenters stated that the affected workers had endured exposure to many hazards, and deserved a program of real assistance. Two commenters noted the patriotism of these workers. A number of commenters felt that the rule, as proposed, was not assisting sick workers, as intended by the Act.

In this notice of final rulemaking, DOE has carefully considered the major issues emerging from the comments on the NOPR, and believes that the final rule has addressed those issues. DOE believes that the final rule goes as far as the Act authorizes DOE to go in providing assistance.

A commenter expressed concern about the status of applications for Physician Panel review already received under this Act. The commenter wanted to know if these filings are null and void, pending negotiation of the State Agreements. DOE will retain and act on these filings when the administrative machinery is in place to process them. Under the Act, the promulgation of this rule is the necessary first step in that endeavor. The establishment of State Agreements can now begin. That in turn will allow DOE to begin processing these claims.

A commenter asked for clarification on how DOE will respond to cases where State has already considered and denied a workers' compensation claim for the same or related health condition that will be the basis for the applicants claim under the Part D program. The Program Office will process these claims in the same manner as other claims. It must be noted, however, that the Act does not change the normal operation of any State workers' compensation system, and does not create any new grounds for re-opening any decision already rendered under State law.

## III. Regulatory Review and Procedural Requirements

*A. Review Under Executive Order 12866*

Today's regulatory action has been determined to be "a significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

*B. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The rule would provide guidelines for the operation and determinations of Physician Panels established to provide expert opinion to DOE on the cause of a worker's illness or death. It would not impose costs or burdens on any small business or other small entity. DOE, therefore, certifies that the rule will not have a significant economic impact on a substantial number of small entities.

*C. Review Under the Paperwork Reduction Act*

The rule provides that an individual may submit an application for review and assistance to the Program Office that contains information relating to the individual's employment by a DOE contractor, the nature of the illness or death, and the relationship between the illness or death and the individual's employment at a DOE facility. The application is required for DOE to determine whether reasonable evidence exists for submitting the individual's application to a Physician Panel.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by OMB. DOE submitted the proposed collection of information in the rule to OMB, simultaneously with the publication of the NOPR for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has approved the collection of information in the rule and assigned it control number 1910.

*D. Review Under the National Environmental Policy Act*

DOE has concluded that promulgation of the rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule deals only with Physician Panel procedures, and, therefore, is covered under the Categorical Exclusion for rulemakings that are strictly procedural in paragraph A6 of Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

*E. Review Under Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on Agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have "federalism implications." Policies that have federalism implications are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government." On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The scope of the rule is limited to defining how a Physician Panel established under the Act will determine whether the illness

or death that is the subject of an application for assistance in filing a claim under a State's workers' compensation system arose out of and in the course of employment by DOE and exposure to a toxic substance at a DOE facility. Referral of an application to a Physician Panel can occur only by agreement with the applicable State. The rule would leave to the State the determination of benefits. Thus, the rule would not preempt State workers' compensation law. No further action is required by Executive Order 13132.

*F. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Federal Agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear, legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear, legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

*G. Review Under the Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal Agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any single year. The Act also requires a Federal Agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed "significant intergovernmental mandate," and it requires an Agency to develop a plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirement that might significantly or uniquely affect small governments. The rule published today does not contain any Federal mandate, so these requirements do not apply.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal Agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. The rulemaking would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has not prepared a Family Policymaking Assessment.

*I. Review Under Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA, as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits energy supply, distribution, and use.

Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*J. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

**List of Subjects in 10 CFR Part 852**

Administrative practice and procedure, Government contracts, Hazardous substances, Workers' compensation.

Issued in Washington, DC, on August 7, 2002.

**Beverly A. Cook,**

*Assistant Secretary for Environment, Safety and Health.*

For the reasons stated in the preamble, DOE hereby amends Chapter III of title 10 of the Code of Federal Regulations by adding part 852 to read as follows:

## PART 852—GUIDELINES FOR PHYSICIAN PANEL DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKERS' COMPENSATION BENEFITS

Sec.

852.1 What is the purpose and scope of this part?
852.2 What are the definitions of terms used in this part?
852.3 How does an individual obtain and submit an application for review and assistance?
852.4 What information and materials does an individual submit as a part of the application for review and assistance?
852.5 What information and materials may an employer submit in response to a submission of an application to a Physician Panel?
852.6 Which applications are submitted to a Physician Panel?
852.7 What provisions are set forth in State Agreements?
852.8 How does a Physician Panel determine whether an illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility?
852.9 What materials must a Physician Panel review prior to making a determination?
852.10 How may a Physician Panel obtain additional information or a consultation that it needs to make a determination?
852.11 How is a Physician Panel to carry out its deliberations and arrive at a determination?
852.12 How must a Physician Panel issue its determination?
852.13 When must a Physician Panel issue its determination?
852.14 What precautions must each Physician Panel member and each specialist take in order to keep an applicant's personal and medical information confidential?
852.15 What actions must a Physician Panel member take if that member has a

potential conflict of interest in relation to a specific application?
852.16 When may the Program Office ask a Physician Panel to reexamine an application that has undergone prior Physician Panel review?
852.17 Must the Program Office accept the determination of a Physician Panel?
852.18 Is there an appeals process?
852.19 What is the effect of the acceptance by the Program Office of a determination by a Physician Panel in favor of an applicant?

**Authority:** 42 U.S.C. 7384, *et seq.*; 42 U.S.C. 2201 and 7101, *et seq.*; 50 U.S.C. 2401 *et seq.*

**§ 852.1 What is the purpose and scope of this part?**

(a) This part implements Part D of the Act by establishing the procedures under which:

(1) An individual may obtain and submit an application to the Program Office for review and assistance;

(2) The Program Office processes and submits eligible applications to a Physician Panel;

(3) Physician Panels determine whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor and through exposure to a toxic substance at a DOE facility;

(4) The Program Office processes a determination by a Physician Panel; and,

(5) Appeals may be undertaken.

(b) This part covers applications filed by or on behalf of a DOE contractor employee, or a deceased employee's estate or survivor, with respect to an illness or death of a DOE contractor employee that may have been caused by exposure to a toxic substance during the course of employment at a DOE facility.

(c) All actions under this part must be pursuant to the relevant State Agreement and consistent with its terms and conditions.

**§ 852.2 What are the definitions of terms used in this part?**

*Act* means the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384 *et seq.*

*Applicant* means an individual seeking assistance from the Program Office in filing a claim with the relevant State workers' compensation system, including but not limited to, a living DOE contractor employee, the estate of a deceased DOE contractor employee, or any survivor of a deceased DOE contractor employee who is eligible to apply for a death benefit or a survivor's benefit under the State workers' compensation system for which the applicant is seeking assistance in filing a claim.

*DOE* means the U.S. Department of Energy, and its predecessor agencies, including the Manhattan Engineering District, the Atomic Energy Commission, and the Energy Research and Development Administration.

*DOE contractor employee* means any of the following:

(a) An individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months.

(b) An individual who is or was employed at a DOE facility by

(i) An entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or

(ii) A contractor or subcontractor that provided services, including construction and maintenance, at the facility.

*DOE facility* means any building, structure or premise, including the grounds upon which such building, structure, or premise is located:

(a) In which operations are, or have been, conducted by, or on behalf of DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and

(b) With regard to which DOE has or had

(i) A proprietary interest; or

(ii) Entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.

*Physician panel* means a group of three physicians appointed by the Secretary of Health and Human Services, pursuant to Part D of the Act, to evaluate potential claims of DOE contractor employees under the appropriate State workers' compensation system.

*Program office* means the Office of Worker Advocacy within DOE's Office of Environment, Safety and Health, or any other DOE office subsequently assigned to perform the functions of the Secretary of Energy under Part D of the Act.

*State agreement* means an agreement negotiated between DOE and a State that sets forth the terms and conditions for dealing with an application for assistance under Part D of the Act in filing a claim with the State's workers' compensation system.

*Toxic substance* means any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature.

**§ 852.3 How does an individual obtain and submit an application for review and assistance?**

(a) An individual obtains an application for review and assistance:

(1) In person from the Program Office, from any of the Resources Centers listed in Appendix A to this section, or from any DOE-sponsored Former Worker Program project;

(2) Through a written request mailed to Assistant Secretary, Office of Environment, Safety and Health, Office of Worker Advocacy, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. or to any other address that DOE may subsequently publish by notice in the **Federal Register**;

(3) Through telephone request to 1–877–447–9756 or to any other telephone number that DOE may subsequently publish by notice in the **Federal Register**; or

(4) In printable format, from the Program Office's Web site at *http://tis.eh.doe.gov/advocacy/* or from any other Web site that DOE may subsequently publish by notice in the **Federal Register**.

(b) An individual submits an application for review and assistance—

(1) In person to the Program Office, to any Resource Center, or to any DOE-sponsored Former Worker Program project.

(2) By mail to the Program Office at the address identified in paragraph (a)(2) of this section, or to any other address that DOE may subsequently publish by notice in the **Federal Register**.

**§ 852.4 What information and materials does an individual submit as a part of the application for review and assistance?**

(a) As a part of the application for review and assistance, an individual must submit, in writing:

(1) Any application forms required by the Program Office.

(2) The name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while the employee was employed at a DOE facility and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based.

(3) A signed medical release, authorizing non-DOE sources of medical information to provide the Program Office with any diagnosis, medical opinion and medical records documenting the diagnosis or opinion

that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while the employee was employed at a DOE facility.

(4) To the extent practicable and appropriate, an occupational history obtained by a physician, an occupational health professional, or a DOE-sponsored Former Worker Program. (If such an occupational history is not reasonably available and is deemed by the Program Office to be needed for the fair adjudication of the claim, then the Program Office will assist the applicant in obtaining this history.)

(5) Any other information or materials deemed by the Program Office to be necessary to provide reasonable evidence that the employee has or had an illness that may have arisen from exposure to a toxic substance while employed at a DOE facility.

(b) The applicant may also submit directly to the Program Office any other information or materials providing evidence that the employee has or had an illness that may have resulted from exposure to a toxic substance during the course of employment at a DOE facility.

(c) The applicant must sign an affidavit attesting to the authenticity and completeness of any information or materials submitted to the Program Office, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals.

**§ 852.5 What information and materials may an employer submit in response to a submission of an application to a Physician Panel?**

(a) Upon receipt of an application and the Program Office's determination that the application meets the requirements of § 852.4, the Program Office must notify each of the applicant's relevant DOE contractor employers in writing of:

(1) The existence of the application;

(2) The name of the employee;

(3) The diagnosis claimed; and

(4) The likely date of onset or date of diagnosis, if known.

(b) The employer has 15 working days from receipt of this notification to submit to the Program Office any information deemed by the employer to be relevant to either the Program Office's determination of whether to refer an application to a Physician Panel, or to adjudication of the application by a Physician Panel.

(c) The employer must sign an affidavit attesting to the authenticity and completeness of any information provided to the Program Office under this section, or provide the Program Office with other evidence of authenticity of submitted materials, such as certification of submitted copies of originals.

**§ 852.6 Which applications are submitted to a Physician Panel?**

(a) The Program Office must submit an application and any information submitted under § 852.5 of this part to a Physician Panel if there is reasonable evidence to make an initial determination that:

(1) The application was filed by or on behalf of a DOE contractor employee or a deceased DOE contractor employee's estate or survivor;

(2) The illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance; and,

(3) The illness or death of the DOE contractor employee may have been related to employment at a DOE facility.

(b) The Program Office must promptly notify the applicant in writing of an initial determination under this section.

**§ 852.7 What provisions are set forth in State Agreements?**

DOE may not execute a State Agreement that does not contain the following provisions:

(a) A statement that an application is submitted to a Physician Panel only if the application satisfies the criteria in § 852.6 of this part:

(1) The application was filed by or on behalf of a DOE contractor employee or a deceased DOE contractor employee's estate or survivor;

(2) The illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance; and

(3) The illness or death of the DOE contractor employee may have been related to employment at a DOE facility.

(b) An agreement that a Physician Panel must apply the standards set forth in § 852.8 of this part when making a determination that an illness or death arose from exposure to a toxic substance during the course of employment at a DOE facility;

(c) An agreement that the Program Office must provide assistance to only those applicants with a positive determination from the Physician Panel; and

(d) An agreement that a positive determination by the Physician Panel has no effect on the scope of State workers' compensation proceedings, the conditions for compensation, or the rights and obligations of the participants in the proceeding; provided that consistent with Part D of the Act such a determination will prevent DOE and may prevent a DOE contractor from contesting an applicant's workers' compensation claim.

**§ 852.8 How does a Physician Panel determine whether an illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility?**

A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

**§ 852.9 What materials must a Physician Panel review prior to making a determination?**

The Physician Panel must review all records relating to the application that are provided by the Program Office, including but not limited to:

(a) Medical records;

(b) Employment records;

(c) Exposure records;

(d) Occupational history;

(e) Workers' compensation records;

(f) Medical literature or reports;

(g) Any other records or evidence pertaining to the applicant's request for assistance;

(h) A medical examiner's report, coroner's report, or death certificate for any application submitted by an estate or survivor of a deceased worker; and

(i) Information submitted as a part of such a claim or developed by the Department of Labor (DOL) or by the Department of Health and Human Services (HHS) in the course of processing a claim for the applicant, including, where applicable, estimates of an applicant's cumulative radiation dose and the calculated probability that this dose was responsible for a cancer that is the subject of the claim, for any application submitted by an applicant also applying to DOL for benefits available under the Act.

**§ 852.10 How may a Physician Panel obtain additional information or a consultation that it needs to make a determination?**

If, after reviewing all materials provided by the Program Office, a Physician Panel finds that it needs additional information or consultation with a specialist in order to make a determination, it must request this information or consultation through the Program Office. A Physician Panel may request:

(a) A recorded interview under oath with the applicant, by an individual designated by the Program Office, if the Physician Panel believes only the applicant can provide the necessary information.

(b) That the applicant provide additional medical information;

(c) Additional relevant information under the control of DOE or its contractors;

(d) Consultation with designated specialists in fields relevant to its deliberations;

(e) Specific articles or reports, or assistance searching the medical or scientific literature; or

(f) Other needed information or materials.

**§ 852.11 How is a Physician Panel to carry out its deliberations and arrive at a determination?**

(a) Each panel member reviews all materials relating to the application.

(b) All panel members meet in conference, in person, or by teleconference in order to discuss the application and arrive at a determination agreed to by a majority of the members of the Physician Panel.

**§ 852.12 How must a Physician Panel issue its determination?**

A Physician Panel must submit its determination under § 852.8 and the findings that provide the basis for its determination to the Program Office. The determination and the findings must be in writing and signed by all panel members. The findings must include:

(a) Each illness or cause of death that is the subject of the application.

(b) For each illness or cause of death listed under paragraph (a) of this section:

(1) Diagnosis;

(2) Approximate date of onset;

(3) Date of death, if applicable;

(4) Whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility;

(5) The basis for the determination under paragraph (b)(4) of this section;

(6) A determination concerning any other medical issue identified in the relevant State Agreement; and

(7) The basis for the determination under paragraph (b)(6) of this section.

(c) The Physician Panel must provide the Program Office with:

(1) Any evidence to the contrary of the panel's determination, and why the panel finds this evidence is not persuasive.

(2) A listing of information and materials reviewed by the panel in making its determination, including:

(i) Information and materials provided by the Program Office; and,

(ii) Information and materials obtained by the panel, including consultations with specialists, scientific articles, and the record of any interview with an applicant.

(3) Any other information the panel concludes that the Program Office should have in order to understand the panel's deliberations and determination.

**§ 852.13 When must a Physician Panel issue its determination?**

(a) A Physician Panel must submit its determination and findings to the Program Office within 30 working days of the time that panel members have received the complete application for review from the Program Office.

(b) The Program Office may extend the deadline for a panel determination under the following circumstances:

(1) The Physician Panel indicates to the Program Office that it needs additional information or a consultation in order to carry out its deliberations, as provided for in § 852.10. In this case, the panel's determination is due 15 working days after receipt of the additional information (or notice from the Program Office that the requested information is unavailable), or 15 working days after receiving the consultant's recommendations, whichever is applicable; or

(2) The Physician Panel has requested and the Program Office has granted an extension.

(c) If an extension is granted pursuant to section 852.13(b)(2), the Program Office will specify the new deadline.

**§ 852.14 What precautions must each Physician Panel member and each specialist take in order to keep an applicant's personal and medical information confidential?**

In order to maintain the confidentiality of an applicant's personal and medical information, each Physician Panel member and each specialist consulted at the request of a Physician Panel must take the following precautions:

(a) Maintain the confidentiality of applicant records, keep them in a secure, locked location, and, upon completion of panel deliberations, follow the instructions of the Program Office with regard to the disposal or temporary retention of these records;

(b) Conduct all case reviews and conferences in private, in such a fashion as to prevent the disclosure of personal applicant information to any individual who has not been authorized to access this information;

(c) Release no information to a third party, unless authorized to do so in writing by the applicant; and

(d) Adhere to the provisions of the Privacy Act of 1974 regarding Worker Advocacy Records.

**§ 852.15 What actions must a Physician Panel member take if that member has a potential conflict of interest in relation to a specific application?**

(a) If a panel member has a past or present relationship with an applicant, an applicant's employer, or an interested third party that may affect the panel member's ability to objectively review the application, or that may create the appearance of a conflict of interest, then that panel member must immediately:

(1) Cease review of the application; and

(2) Notify the Program Office and await further instruction from the Office.

(b) The Program Office must then take such action as is necessary to assure an objective review of the application.

**§ 852.16 When may the Program Office ask a Physician Panel to reexamine an application that has undergone prior Physician Panel review?**

The Program Office may direct the original Physician Panel or a different Physician Panel to reexamine an application that has undergone prior Physician Panel review if:

(a) There is significant evidence contrary to the panel determination;

(b) The Program Office obtains new information the consideration of which would be reasonably likely to result in a different determination;

(c) The Program Office becomes aware of a real or potential conflict of interest of a member of the original panel in relation to the application under review; or

(d) Reexamination is necessary to ensure consistency among panels.

**§ 852.17 Must the Program Office accept the determination of a Physician Panel?**

(a) Subject to the ability of the Program Office to direct a reexamination pursuant to § 852.16, the Program Office must accept the determination by the Physician Panel unless the Program Office determines there is significant evidence contrary to the panel determination.

(b) The Program Office must promptly notify an applicant and the relevant DOE contractor(s) of its acceptance or rejection of a determination by a Physician Panel.

**§ 852.18 Is there an appeals process?**

(a) An applicant may request DOE's Office of Hearings and Appeals (OHA) to review:

(1) A decision by the Program Office not to submit an application to a Physician Panel;

(2) A negative determination by a Physician Panel that is accepted by the Program Office; and

(3) A final decision by the Program Office not to accept a determination in the applicant's favor by a Physician Panel.

(b) An applicant must file a notice of appeal with OHA on or before 30 days from the date of a letter from the Program Office notifying the applicant of a determination appealable under this section.

(c) An appeal under this section is subject to the procedures of OHA in 10 CFR Part 1003.

(d) A decision by OHA constitutes DOE's final determination with respect to an application.

**§ 852.19 What is the effect of the acceptance by the Program Office of a determination by a Physician Panel in favor of an applicant?**

In the event the Program Office accepts a determination by a Physician Panel in favor of an applicant:

(a) The Program Office must assist the applicant in filing a claim with the relevant State's workers' compensation system by providing the determination and other information provided to the Program Office by a Physician Panel pursuant to § 852.12 of this part;

(b) The Program Office may not contest the determination;

(c) The Program Office must advise the cognizant DOE Secretarial Officer to recommend to the Contracting Officer (CO) for a DOE contractor that, to the extent permitted by law, the CO direct the contractor not to contest an applicant's workers' compensation claim or award in any administrative or judicial forum with respect to the same health condition for which the applicant received a favorable final Physician Panel determination;

(d) Any costs of contesting a claim or award identified in paragraph (c) of this section—that is, any costs of supporting arguments or activities with the intent or effect of delaying or defeating such a claim or award—are not allowable costs under a DOE contract; and,

(e) All workers' compensation costs incurred as a result of a workers' compensation award on a claim based on the same health condition that was the subject of a positive Physician Panel determination are allowable, reimbursable contract costs to the full extent permitted under the DOE contractor's contract with DOE.

[FR Doc. 02–20459 Filed 8–13–02; 8:45 am]
BILLING CODE 6450–01–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 23

**[Docket No. CE172, Special Condition 23–125–SC]**

### Special Conditions; GROB–WERKE, Burkhurt Grob e.k., Unternehmensbereich Luft-und Raumfahrt, Model G120A Airplane; Protection of Systems From High Intensity Radiated Fields (HIRF): Correction

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; correction.

**SUMMARY:** The FAA published a document in the **Federal Register** on February 5, 2002, concerning final special conditions on the GROB–WERKE, Burkhurt Grob e.k., Unternehmensbereich Luft-und Raumfahrt, Model G120A airplane. There was an inadvertent error in the special condition number in the document. This document contains a correction to the special condition number for the final special conditions.

**DATES:** The effective date of these corrected special conditions is January 29, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ervin Dvorak, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4123.

**SUPPLEMENTARY INFORMATION:**

#### Need for Correction

The FAA published a document on February 5, 2002 (67 FR 5196) that issued final special conditions. In the document heading, a special condition number appears that had already been issued for another set of special conditions with a different docket number. This document corrects that error.

#### Correction of Publication

Accordingly, the special condition number, which appears in the heading of Docket No. CE172, is revised from 23–110–SC to 23–125–SC.

Issued in Kansas City, Missouri on July 25, 2002.

**James E. Jackson,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 02–20628 Filed 8–13–02; 8:45 am]
BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 23

**[Docket No. CE170, Special Condition 23–124–SC]**

### Special Conditions; Byerly Aviation, Twin Commander Models 690, 690A, 690B, 690C, 690D, 695, 695A, and 695B; Protection of Systems From High Intensity Radiated Fields (HIRF): Correction

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; correction.

**SUMMARY:** The FAA published a document in the **Federal Register** on October 5, 2001, concerning final special conditions on the Byerly Aviation Twin Commander Models 690, 690A, 690B, 690C, 690D, 695, 695A, and 695B airplane. There was an inadvertent error in the special condition number in the document. This document contains a correction to the special condition number for the final special conditions.

**DATES:** The effective date of these corrected special conditions is September 17, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ervin Dvorak, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4123.

**SUPPLEMENTARY INFORMATION:**

#### Need for Correction

The FAA published a document on October 5, 2001 (66 FR 50819) that issued final special conditions. In the document heading, a special condition number appears that had already been issued for another set of special conditions with a different docket number. This document corrects that error.

#### Correction of Publication

Accordingly, the special condition number, which appears in the heading of Docket No. CE170, is revised from 23–109–SC to 23–124–SC.

# Headquarters Policy Flash

**FLASH 2002-28**

DATE: August 27, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Electronic DEAR Update**

SUMMARY: The Electronic DEAR has been updated to include the following final or interim final rules:

- Administrative and Technical Amendments, March 28, 2002, 67 FR 14869;
- National Industrial Security Program, March 28, 2002, 67 FR 14873; and,
- Patent Regulations — Management and Operating Contracts, July 25, 2002, 67 FR 48568

**FLASH 2002-28**
**August 27, 2002**

The Hill Air Force Base FAR Site has been updated as well.

The URLs are:

http://professionals.pr.doe.gov

and

http://FARSITE.HILL.AF.MIL

For further questions related to this subject matter, please contact Richard Langston at (202) 586-8247 or via e-mail at Richard.Langston@hq.doe.gov

Gwendolyn S. Cowan, Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-29**

DATE: September 9, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter (AL) 2000-10R**

SUMMARY: Acquisition Letter (AL) 2000-10 contained a FAR Class Deviation which excludes the Service Contract Act for certain commercial item subcontracts. The Class Deviation was implemented pursuant to the Secretary of Labor's temporary exemption at 65 FR 45903. A revision, AL 2000-10R, was issued August 16, 2001, to extend this class deviation through July 26, 2002, or until the policy is addressed in the FAR.

GSA

GSA Administrator

AUG 16 2002

CIVILIAN AGENCY ACQUISITION COUNCIL LETTER 2002-02

MEMORANDUM FOR CIVILIAN AGENCIES OTHER THAN NASA

FROM: AL MATERA
CHAIRMAN
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation from the Federal Acquisition Regulation (FAR) 12.504, 22.1003-4, and 52.212-5, concerning the applicability of the Service Contract Act (SCA) to subcontracts for the acquisition of commercial services.

This memorandum serves as consultation for the extension of the class deviation issued pursuant to CAAC letter 2001-02 dated July 26, 2001.

On July 26, 2000, the Federal Acquisition Regulation (FAR) and Department of Labor (DoL) regulations were amended concerning the Service Contract Act (SCA) and subcontracts for commercial services. The effective date of the FAR amendment is August 25, 2000 (see 65 FR 46068) and it is applicable to solicitations issued on or after August 25, 2000.

Section 8003(b) of the Federal Acquisition Streamlining Act (FASA) required that the FAR include a list of provisions of law that are inapplicable to subcontracts for commercial items. In implementing this section of FASA, the SCA was included on the list of laws inapplicable to commercial subcontracts (60 FR 48231, September 18, 1995). Subsequent to the publication of that original FAR rule, the FAR Council, in consultation with the Department of Labor (DoL), has concluded that it is not in the best interest of the Government to retain the SCA on the list of laws that are inapplicable to all subcontracts for commercial items.

The FAR Council concluded that a blanket exemption of all subcontracts for commercial items may not adequately serve the Administration's policy of supporting exemptions of the SCA only where they do not undermine the purposes for which the SCA was enacted. The FAR Council agreed that any exemption from the coverage of the SCA for subcontracts for the acquisition of commercial items or components should be accomplished under the Secretary of Labor's authority under the SCA. As a result, the FAR Council has reconsidered this issue and has removed the SCA from the list of laws inapplicable to subcontracts for commercial items and the FAR was amended accordingly (see 65 FR 46068).

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
Telephone: (202) 501-0800
Fax: (202) 219-1243
www.gsa.gov

Pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), the DoL issued a temporary exemption from coverage for certain subcontracts for commercial services (a final rule). On the same day, DoL also issued a proposed rule proposing a similar exemption for both prime contracts and subcontracts. The exemption for certain subcontracts was determined to be necessary and proper in the public interest to avoid the serious impairment of government business, and is in accord with the remedial purpose of the SCA to protect prevailing labor wages.

The temporary exemption does not apply to all commercial subcontracts that may have been exempt under the FAR prior to August 25, 2000, nor does it apply to any prime contracts. The exemption is limited solely to those subcontracts that (1) were or would have been exempt under the previous FAR and (2) would be exempt under the DoL proposed rule if that rule becomes final in its current form. The DoL exemption will be in effect for one year or until final action is taken on the proposed rule, whichever occurs first. The DoL notes that it intends to proceed expeditiously with this rulemaking and anticipates that a final rule, after review of all of the comments, will be issued within six months.

Accordingly, pending a change to the FAR, civilian agencies are encouraged to authorize a class deviation immediately in accordance with FAR 1.404(a) from the requirements of FAR 12.504, 22.1003-4, and 52.212-5 consistent with the changes stated above and the Department of Labor's final rule referenced above and effective on August 26, 2000. Pending a change to the FAR, civilian agencies may use this language as the basis for their deviations. The FAR will be amended following promulgation of a DoL final rule. This class deviation shall remain in effect until July 26, 2003, or upon issuance of an appropriate FAR change, which ever occurs first. Enclosure 1 is a sample class deviation with model coverage. This letter serves as evidence of consultation with the Chairman of the Civilian Agency Acquisition Council, as provided in 1.404.

Enclosure

Enclosure 1

TO: Agency Head or Designee

SUBJECT: Request for Class Deviation from FAR 12.504 and 52.212-5.

In accordance with Federal Acquisition Regulation (FAR) 1.404, your approval is requested to deviate from the current FAR 12.504(c)(4), 22.1003-4 and 52.212-5(c)(1).

The FAR was revised at 12.504 (a)(7) and 52.212-5(e)(5) to remove the Service Contract Act from the list of laws inapplicable to subcontracts for commercial services. The FAR rule was published July 26, 2000. The effective date is August 25, 2000 (see 65 FR 46068). The rule is applicable to solicitations issued on or after the rule's effective date (see 65 FR 46053 and FAR 1.108(d)).

On the same day, the Department of Labor (DoL) (1) pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), issued a final rule which recognizes a temporary exemption from SCA coverage for certain subcontracts for commercial services; and (2) issued a proposed rule which proposes a similar exemption for both prime contracts and subcontracts.

The temporary exemption does not apply to all commercial subcontracts that may have been exempt under the now withdrawn FAR rule nor does it apply to any prime contracts. The exemption is limited solely to those subcontracts that (1) were or would have been exempt under the now withdrawn FAR rule and (2) would be exempt under the DoL proposed rule if that rule becomes final in its current form. The exemption will be in effect for one year or until final action is taken on the proposed rule, whichever occurs first.

This deviation is requested so that (Agency) as an agency may implement the Department of Labor's final rule of July 26, 2000, Service Contract Act; Labor Standards for Federal Service Contracts, which concerns the issuance of the temporary exemption referenced above. The exemption is considered necessary to prevent the disruption that could be caused by such changes, including the possible disruption of services if the current subcontractor does not agree to continue the subcontract services under the requirements of SCA. This class deviation shall remain in effect until July 26, 2003 or upon the effective date of a pertinent FAR change, whichever occurs first. This request has been coordinated with the Chairperson of the Civilian Agency Acquisition Council.

APPROVED: (Agency Head or Designee)
Name, Title

## PART 12—ACQUISITIONS OF COMMERCIAL ITEMS

* * * * *

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

* * * * *

(c) The applicability of the following laws has been modified in regards to subcontracts at any tier for the acquisition of commercial items or commercial components:

(1) * * *
(2) * * *
(3) * * *
[(4) 41 U.S.C. 351, Service Contract Act of 1965 (see 22.1003-4(c) and (d).]

* * * * *

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

* * * * *

22.1003-4 Administrative limitations, variations, tolerances, and exemptions.

* * * * *

[(c)(1) Through July 26, 2001, the Secretary of Labor has exempted subcontracts principally for the following commercial services from all provisions of the Act if the conditions at paragraph (c)(2) of this subsection are met: the maintenance, calibration, repair, and/or installation of information technology.

(2) The exemption at paragraph (c)(1) of this subsection applies if the following conditions are met:

(i) If the subcontract includes installation services, the installation services are not subject to the Davis-Bacon Act as provided in 29 CFR 4.116(c)(2).

(ii) The items of equipment are commercial items.

(iii) The subcontract services are furnished at prices that are, or are based on, established catalog or market prices for the maintenance, calibration, repair, and/or installation of such commercial items.

(iv) The subcontractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the subcontractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(v) The subcontractor certifies in the subcontract that the conditions in paragraphs (c)(2)(ii) through (iv) of this subsection have been met.

(vi) Prior to subcontract award, the contractor determines that this exemption applies to the subcontract. In making a judgment that the

exemption applies, the clause at 52.212-5(c)(1) requires the contractor to consider all factors and make an affirmative determination that the conditions in paragraphs (c)(2)(ii) through (iv) of this subsection have been met, and that the condition at paragraph (c)(2)(v) of this subsection will be met.

(3) If the Department of Labor determines that any of the above requirements for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable, and the contractor may be responsible for compliance with the Act, effective as of the date of contract award.

(d)(1) Through July 26, 2001, the Secretary of Labor has exempted subcontracts for the following commercial item services from all provisions of the Act if the conditions at paragraph (d)(2) of this subsection are met:

(i) Automated data processing (ADP) and telecommunications services, excluding ADP data entry services and ADP optical scanning services. This category includes the following:

(A) ADP facility operation and maintenance services provided at the subcontractor's facility.

(B) ADP telecommunications and transmission services.

(C) ADP teleprocessing and timesharing services.

(D) ADP systems analysis services.

(E) Information and data broadcasting or data distribution services.

(F) ADP backup and security services.

(G) ADP data conversion services.

(H) Computer aided design/computer aided manufacturing services.

(I) Digitizing services (including cartographic and geographic information).

(J) Telecommunications network management services.

(K) Automated news services.

(L) Data services or other information services (e.g., buying data, the electronic equivalent of books, periodicals, newspapers, etc.).

(M) Data storage on tapes, compact disks, etc.

(ii) Automobile or other vehicle (e.g., aircraft) maintenance services (other than subcontracts to operate a Government motor pool or similar facility).

(iii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(iv) Lodging at hotels/motels and contracts with hotels/motels for conferences, including lodging and meals, that are part of the subcontract for the conference.

(v) Maintenance services for all types of specialized building or facility equipment, such as elevators, escalators, temperature control systems, security systems, smoke and/or heat detection equipment.

(vi) Maintenance, calibration, repair, or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment.

(vii) Transportation of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

(viii) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(ix) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes.

(2) The exemption for the services in paragraph (d)(1) of this subsection apply if the following conditions are met:

(i) The services under the subcontract are commercial.

(ii) The subcontract will be awarded on a sole-source basis or the subcontractor will be selected for award based on other factors in addition to price. In such cases, price must be equal to or less important than the combination of other nonprice or cost factors in selecting the subcontractor.

(iii) The subcontract services are furnished at prices that are, or are based on, established catalog or market prices.

(iv) All of the service employees who will perform the services under the subcontract spend only a small portion of their time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government subcontract.

(v) The subcontractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the subcontract as the subcontractor uses for these employees and for equivalent employees servicing commercial customers.

(vi) The contractor determines in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the above requirements. If the services are currently being performed under a contract or subcontract, the contractor is required by the clause at 52.212-5(c)(1) to consider the practices of the existing contractor or subcontractor in making a determination regarding the above requirements.

(vii) The subcontractor certifies in the subcontract that the conditions in paragraphs (d)(2)(i), and (d)(2)(iii) through (v) of this subsection apply to the subcontract. The contractor is required by the clause at 52.212-5(c)(1) to review available information concerning the subcontractor and the manner in which the subcontract will be performed. If the contractor has reason to doubt the validity of the certification, SCA stipulations must be included in the subcontract.

(viii) The subcontract are not subject to Section 4(c) of the Service Contract Act.

(3) If the Department of Labor determines that any of the above requirements for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable for that subcontract, and the contractor might be responsible for compliance with the Act, effective as of the date of contract award.]

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PART 52 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

* * * * *

(c) * * *

____(1) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.) [(Subcontracts for certain commercial services may be exempt from coverage if they meet the criteria in FAR 22.1003-4(c) or (d))]

* * * * *

# Headquarters Policy Flash

**FLASH 2002-30**

DATE: September 10, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circular (FAC) 2001-09**

SUMMARY: On August 30, 2002, FAC 2001-09 was published in the Federal Register at 67 FR 56116. Contracting personnel should review the details of each item in the full text of the FAC.

**FLASH 2002-30**
**(September 10, 2002)**

**Federal Acquisition Circular (FAC) 2001-09**

The following six items are in FAC 2001-09, which was published in the Federal Register on August 30, 2002, at 67 FR 56116. *The effective date of each item is listed in the summary provided.* The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

**1. Task-Order and Delivery -Order Contracts (FAR Case 1999-303)**

*Effective Date: September 30, 2002*

This final amends the FAR to further implement subsections of the National Defense Authorization Act for Fiscal Year 2000 related to task and delivery order contracting. This rule-

- ☞ Amends FAR Part 2, Definitions of Words and Terms, by adding definitions for Governmentwide Acquisition Contract (GWAC) and Multi-agency Contract (MAC) in order to differentiate and make clear the difference between the terms;

- ☞ Clarifies FAR Part 7, Acquisition Planning, to provide more emphasis on the capital planning requirements and ensure more deliberation by agency acquisition planners, including technical personnel, prior to placing orders under Federal Supply Schedule contracts, or Task order and Delivery order contracts awarded by another agency, e.g., GWAC or MAC.

- ☞ Revises FAR Part 8, Required Sources of Supply, Part 16, Types of Contracts, Part 17, Special Contracting Methods, and Part 52 Solicitation Provisions and Contract Clauses as it relates to the structure of orders and the consideration given to contract holders prior to placing an order. The rule-

    - Increases attention to modular contracting principles as described in FAR Part 39, Acquisition of Information Technology, in order to help agencies avoid unnecessarily large and inadequately defined orders;

- Facilitates information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the Government to award performance-based orders, and

- Revises existing documentation requirements to address tradeoff decisions as well as the issuance of sole-source orders as logical follow-ons to orders already issued under the contract.

**2. Temporary Emergency Procurement Authority (FAR Case 2002-003)**

*Effective Date: August 30, 2002*

The interim rule amends the FAR Part 2, Definition of Words and Terms, Part 12, Acquisition of Commercial Items, Part 13, Simplified Acquisition Procedures, Part 19 Small Business Programs, and Part 25, Foreign Acquisition, to increase the amount of the micro-purchase and simplified acquisition thresholds for procurements of supplies or services in fiscal year 2002 and 2003 for defense against terrorism or biological or chemical attack against the United States. This rule-

- ☞ Increases the micro-purchase threshold to $15,000 (except for construction subject to the Davis-Bacon Act);

- ☞ Raises the simplified acquisition threshold to $250,000 inside the United States and $500,000 outside the United States; and

- ☞ Treats biotechnology supplies and services acquisitions by or for the DOD as procurement of commercial items.

An increase in thresholds is directed to facilitate the defense against terrorism or biological or chemical attack against the United States, by or for the Department of Defense.

# Headquarters Policy Flash

**FLASH 2002-31**

DATE: September 24, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Use of FedBizOpps by DOE Contractors**

SUMMARY: Federal Acquisition Circular (FAC) 97-26 implemented the interim rule that designated the Federal Business Opportunities ("FedBizOpps") web site as the Governmentwide Point of Entry (GPE). Beginning October 1, 2001, the GPE must be utilized by all federal staff for publishing acquisition information as described in Federal Acquisition Regulation (FAR) 5.2, Synopsis of Proposed Contract Actions.

# Headquarters Policy Flash

**FLASH 2002-32**

DATE: October 2, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter (AL) 2002-07, Review of Management Contractor Purchasing Systems - Purchase Card Considerations**

SUMMARY: This Acquisition Letter is being issued to provide contracting officers guidance regarding their review of purchase card considerations when evaluating contractors purchasing systems.

It provides that contracting officers should:

- √ ensure that contractor systems, which authorize the use of purchase cards, provide adequate policies, procedures, and management controls to guard against fraud, waste, and abuse;
- √ ensure the incurrence of allowable cost; the absence of such may result in the disapproval of the contractor's purchasing system and, disallowance of associated costs;
- √ ensure that contractor purchase card policies, procedures and management controls are implemented by major facility management contracts; and
- √ ensure that they have access to their major facility management contractors list of authorized cardholders and their card use restrictions or limitations.

The AL also discusses DOE's expectations regarding an acceptable purchase card program and it describes the controls which should be in place and identifies program elements which are indicative of an effective management system. Among these elements are written delegations with limits for cardholders, maintenance of up to date lists of cardholders and their purchase limits, training of cardholders and approving officials, and limits on the number of cardholders an approving official must monitor.

This AL will be available online at www.pr.doe.gov. For questions related to this AL contact Richard Langston at (202) 586-8247, or via e-mail richard.langston@hq.doe.gov.

Gwendolyn S. Cowan, Director

cc:
PPAG Members

# Headquarters Policy Flash

**FLASH 2002-33**

DATE: October 2, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Applicability of FDP IV General Terms and Conditions and DOE Agency Specific Requirements**

SUMMARY: This Flash is to advise you that the Department of Energy (DOE) is continuing its participating in the Federal Demonstration Partnership (FDP). FDP IV began on October 1, 2002.

**FLASH 2002-33**
**October 2, 2002**

## 1. Location of FDP IV Terms and Conditions

The FDP IV General Terms and Conditions and the DOE FDP IV Agency Specific Requirements have been posted on the National Science Foundation (NSF) website at http://www.nsf.gov/home/grants/grants_fdp.htm. NSF hosts all the government requirements for FDP awards. The DOE Professionals Homepage also provides a link to the FDP Terms and Conditions.

## 2. Applicability of FDP IV Terms and Conditions

- **New and renewal grants.** The FDP IV General Terms and Conditions and the DOE FDP IV Agency Specific Requirements must be included in new and renewal grants to FDP IV institutions and emerging research institutions. A list of the FDP IV institutional members is attached. The Professionals Homepage will also provide a link to this list.

- **New and renewal cooperative agreements.** The FDP IV Terms and Conditions are not applicable to cooperative agreements.

- **Continuing awards with FDP III institutions.** Contracting Officers do not need to modify the FDP Terms and Conditions in existing awards to FDP III institutions, even if the institution has discontinued its participation in FDP IV. The current FDP Terms and Conditions may remain in effect until the award expires or is renewed.

For Questions related to this Flash, contact Trudy Wood at (202) 586-5625, or via e-mail at Trudy.Wood@hq.doe.gov.

Gwendolyn S. Cowan,
Director

Attachment

cc:
FAC Members

ATTACHMENT

## FDP IV Institutional Members:

1. Brown University
2. California Institute of Technology
3. Case Western Reserve University
4. Colorado State University
5. Columbia University
6. Cornell University
7. Dana Farber Cancer Institute
8. Dartmouth College
9. Duke University
10. Emory University
11. Florida Atlantic University
12. Florida International University
13. Florida State University
14. Fred Hutchinson Cancer Research Center
15. Georgetown University
16. Georgia Institute of Technology
17. Harvard University
18. Indiana University
19. Johns Hopkins University
20. Kent State University
21. Massachusetts General Hospital
22. Massachusetts Institute of Technology
23. Medical University of South Carolina
24. New Mexico State University
25. North Carolina State University
26. Northeastern University
27. Northwestern University
28. Oregon Health and Science University
29. Pennsylvania State University
30. Purdue University
31. Research Foundation for the State University of New York -Systemwide

    SUNY - Albany
    SUNY - Binghamton
    SUNY - College at Brockport
    SUNY - Health Science Center - Brooklyn
    SUNY- Buffalo
    SUNY - College at Buffalo
    SUNY - Stony Brook
    SUNY Upstate Medical University (Syracuse)
32. San Diego State University Foundation
33. Southwest Texas State University

34. St. Jude Children's Research Hospital
35. Texas A&M Research Foundation
36. Texas A&M University
37. Texas Agricultural Experiment Station
38. Texas Engineering Experiment Station
39. Texas Tech University
40. Tulane University
41. University of Arizona
42. University of Arkansas for Medical Sciences
43. University of Arkansas, Little Rock
44. University of California, Los Angeles
45. University of California-Systemwide
    - University of California at Berkeley
    - University of California at Davis
    - University of California at Irvine
    - University of California at Los Angeles
    - University of California at Merced
    - University of California at Riverside
    - University of California at San Diego
    - University of California at Santa Barbara
    - University of California at San Francisco
    - University of California at Santa Cruz
46. University of Chicago
47. University of Cincinnati
48. University of Florida
49. University of Georgia, Athens
50. University of Hawaii
51. University of Houston
52. University of Illinois, Chicago
53. University of Illinois, Urbana-Champaign
54. University of Kansas/KU Center for Research
55. University of Maryland, College Park
56. University of Massachusetts, Amherst
57. University of Massachusetts, Boston
58. University of Massachusetts, Lowell
59. University of Massachusetts, Medical School
60. University of Miami
61. University of Michigan
62. University of Minnesota
63. University of Missouri, Columbia
64. University of Nebraska-Systemwide
    - University of Nebraska at Lincoln
    - University of Nebraska at Kearney
    - University of Nebraska at Omaha
    - University of Nebraska Medical Center
65. University of Nevada, Las Vegas
66. University of North Carolina, Chapel Hill
67. University of North Carolina, Wilmington

68. University of North Florida
69. University of North Texas
70. University of North Texas Health Science Center
71. University of Notre Dame
72. University of Oklahoma
73. University of Pennsylvania
74. University of Rochester
75. University of South Florida
76. University of Southern California
77. University of Texas Health Science Center at Houston
78. University of Texas Health Science Center at San Antonio
79. University of Texas Medical Branch
80. University of Texas, Austin
81. University of Texas, Arlington
82. University of Texas, Dallas
83. University of Virginia
84. University of Washington
85. University of West Florida
86. University of Wisconsin, Madison
87. Washington State University
88. Washington University
89. Wayne State University
90. Yale University

## FDP IV Emerging Research Institutions

Rhode Island College
Bradley University

# Headquarters Policy Flash

**FLASH 2002-34**

DATE: October 7, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Updates of the FAR and DEAR clause matrix**

SUMMARY: This Flash is issued to advise of the new updates to the Federal Acquisition Regulation (FAR) and the Department of Energy (DEAR) clause matrix.

**FLASH 2002-34**
**October 7, 2002**

The Department of Energy's Management and Operating (M&O) FAR clause matrix has been updated through the latest Federal Acquisition Circular, FAC 2001-09 effective September 30, 2002 and updates to the DEAR clause matrix reflects the most recent DEAR changes that were published in July 2002 of the Federal Register.

Both clause matrices can be found online at www.pr.doe.gov. Questions concerning the matrices should be addressed to Stephen Zvolensky at (202) 586-5936 or via e-mail at stephen.zvolensky@pr.doe.gov.

Gwendolyn S. Cowan
Director

cc:
PPAG Members

**Clause Matrix for Department Of Energy**
**Management and Operating Contracts**
**Part I – FAR Clauses**
**(Thru FAC 09 and DEAR Final Rule dated July 28, 2002**

**(10/01/2002)**

K **KEY:**

R = Required
A = Required when applicable
O = Optional

M&O = Management and Operating contract
UCF = Uniform Contract Format

General instruction: Set forth below are clauses prescribed in FAR Part 52 (identified in the FAR Matrix for use in CR R&D, CR SVC, or CR CON contracts) which are to be used in DOE M&O contracts.

This listing does not include solicitation provisions.

| FAR Clause Number Title | Secondary DEAR Clause Citation | M&O For Profit | M&O Non-Profit | UCF | Prescribed In | FAR Prescription/Notes |
|---|---|---|---|---|---|---|
| 52.202-1 Definitions | 952.202-1 | R | R | I | 2.201 | Insert the clause at 52.202-1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold. If the contract is for personal services, construction, architect-engineer services, or dismantling, demolition, or removal of improvements, use the clause with its Alternate I. The contracting officer may include additional definitions, provided they are consistent with the clause and the FAR.<br><br>Note: DEAR 952.202-1 alters FAR clause 52.202-1. |
| 203-3 ratuities | | R | R | I | 3.202 | The contracting officer shall insert the clause at 52.203-3, Gratuities, in solicitations and contracts with a value exceeding the simplified acquisition threshold, except those for personal services and those between military departments or defense agencies and foreign governments that do not obligate any funds appropriated to the Department of Defense. |
| 52.203-5 Covenant Against Contingent Fees | | R | R | I | 3.404 | The contracting officer shall insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see FAR Parts 2 and 12). |
| 52.203-6 Restrictions on Subcontractor Sales to the Government | | R | R | I | 3.503-2 | The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I. |
| 52.203-7 Anti-Kickback Procedures | | R | R | I | 3.502-3 | The contracting officer shall insert the clause at 52.203-7, Anti-Kickback Procedures, in solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see FAR Part 12). |
| 203-8 cellation, Rescission, and covery of Funds for Illegal or Improper Activity | | R | R | I | 3.104-9(a) | The contracting officer shall insert the clause at 52.203-8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity, in solicitations and contracts with a value exceeding the simplified acquisition threshold. |

| FAR Clause Number Title | Secondary DEAR Clause Citation | M&O For Profit | M&O Non-Profit | UCF | Prescribed In | FAR Prescription/Notes |
|---|---|---|---|---|---|---|
| ..203-10 Price or Fee Adjustment for Illegal or Improper Activity | | R | R | I | 3.104-9(b) | The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, in solicitations and contracts with a value exceeding the simplified acquisition threshold. |
| 52.203-12 Limitation on Payments to Influence Certain Federal Transactions | | R | R | I | 3.808(b) | The clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, shall be included in solicitations and contracts expected to exceed $100,000. |
| 52.204-1 Approval of Contract | | A | A | I | 4.103 | The contracting officer shall insert the clause at 52.204-1, Approval of Contract, in solicitations and contracts if required by agency procedures. |
| 52.204-4 Printed or Copied Double-Sided on Recycled Paper | | A | A | I | 4.304 | The contracting officer shall insert the clause at 52.204-4, Printed or Copied Double-Sided on Recycled Paper, in solicitations and contracts that exceed the simplified acquisition threshold. |
| 52.207-3 Right of First Refusal of Employment | | A | A | I | 7.305(c) | The contracting officer shall insert the clause at 52.207-3, Right of First Refusal of Employment, in all solicitations which may result in a conversion from in-house performance to contract performance of work currently being performed by the Government and in contracts that result from the solicitations, whether or not a cost comparison is conducted. The 10-day period in the clause may be varied by the contracting officer up to a period of 90 days. |
| :07-5 ,tion to Purchase Equipment | | A | A | I | 7.404 | The contracting officer shall insert a clause substantially the same as the clause in 52.207-5, Option to Purchase Equipment, in solicitations and contracts involving a lease with option to purchase. |
| 52.208-8 Helium Requirement Forecast and Required Sources for Helium | | A | A | I | 8.505 | The contracting officer shall insert the clause at 52.208-8, Helium Requirement Forecast and Required Sources for Helium, in solicitations and contracts if it is anticipated that performance of the contract involves a major helium requirement. |
| 52.208-9 Contractor Use of Mandatory Sources of Supply | | A | A | I | 8.003 | The contracting officer shall insert the clause at 52.208-9, Contractor Use of Mandatory Sources of Supply, in solicitations and contracts which require a contractor to purchase supply items for Government use that are available from the Committee for Purchase from People Who Are Blind or Severely Disabled. The contracting officer shall identify in the contract schedule the items which must be purchased from a mandatory source and the specific source. |
| 52.209-1 Qualification Requirements | | A | A | I | 9.206-2 | The contracting officer shall insert the clause at 52.209-1, Qualification Requirements, in solicitations and contracts when the acquisition is subject to a qualification requirement. |
| 52.209-6 Protecting the Government's 'erest When Subcontracting 'h Contractors Debarred, ,pended, or Proposed for Debarment | | R | R | I | 9.409(b) | The contracting officer shall insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in solicitations and contracts where the contract value exceeds $25,000. |

| FAR Clause Number Title | Secondary DEAR Clause Citation | M&O For Profit | M&O Non-Profit | UCF | Prescribed In | FAR Prescription/Notes |
|---|---|---|---|---|---|---|
| ..211-5<br>Material Requirements | | A | A | I | 11.302(a) | Except when acquiring commercial items, the contracting officer shall insert the clause at 52.211-5, Material Requirements, in solicitations and contracts for supplies. |
| 52.211-8<br>Time of Delivery<br>Alternate I<br>Alternate II<br>Alternate III | | O<br><br><br>O<br>O<br>O | O<br><br><br>O<br>O<br>O | F | 11.404(a)(2)<br><br><br>11.404(a)(2)<br>11.404(a)(2)<br>11.404(a)(2) | The contracting officer may insert in solicitations and contracts other than those for construction and architect-engineering, a clause substantially the same as the clause at 52.211-8, Time of Delivery, if the Government requires delivery by a particular time and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III. |
| 52.211-9<br>Desired and Required Time of Delivery<br>Alternate I<br>Alternate II<br>Alternate III | | O<br><br>O<br>O<br>O | O<br><br>O<br>O<br>O | F | 11.404(a)(3)<br><br>11.404(a)(3)<br>11.404(a)(3)<br>11.404(a)(3) | The contracting officer may insert in solicitations and contracts other than those for construction and architect-engineering, a clause substantially the same as the clause at 52.211-9, Desired and Required Time of Delivery, if the Government desires delivery by a certain time but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III. |
| 52.211-12<br>Liquidated Damages–Construction | | O | O | F | 11.503(b) | The contracting officer may insert the clause at 52.211-12, Liquidated Damages--Construction, in solicitations and contracts for construction, other than cost-plus-fixed-fee, when the contracting officer determines that liquidated damages are appropriate (see 11.501(a)).<br><br>If the contract specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work. |
| 52.211-13<br>Time Extensions | | A | A | F | 11.503(c) | The contracting officer shall use the clause at 52.211-13, Time Extensions, in solicitations and contracts for construction that use the clause at 52.211-12, Liquidated Damages - Construction, when that clause has been revised as provided in 11.503(b). |
| 52.215-8<br>'er of Precedence–Uniform<br>tract Format | | A | A | I | 15.209(h) | The contracting officer shall insert the clause at 52.215-8, Order of Precedence--Uniform Contract Format, in solicitations and contracts using the format at 15.204 (the UCF). |

| FAR Clause Number Title | Secondary DEAR Clause Citation | M&O For Profit | M&O Non-Profit | UCF | Prescribed In | FAR Prescription/Notes |
|---|---|---|---|---|---|---|
| .215-12<br>Subcontractor Cost or Pricing Data | | A | A | I | 15.408(d) | The contracting officer shall insert the clause at 52.215-12, Subcontractor Cost or Pricing Data, in solicitations and contracts when the clause at 52.215-10 is included. |
| 52.215-13<br>Subcontractor Cost or Pricing Data-Modifications | | A | A | I | 15.408(e) | The contracting officer shall insert the clause at 52.215-13, Subcontractor Cost or Pricing Data-- Modifications, in solicitations and contracts when the clause at 52.215-11 is included. |
| 52.215-14<br>Integrity of Unit Prices<br>Alternate I | | A<br>A | A<br>A | I | 15.408(f)(1)<br>15.408(f)(2) | The contracting officer shall insert the clause at 52.215-14, Integrity of Unit Prices, in solicitations and contracts except for- (i) Acquisitions at or below the simplified acquisition threshold; (ii) Construction or architect-engineer services under Part 36; (iii) Utility services under Part 41; (iv) Service contracts where supplies are not required; (v) Acquisitions of commercial items; and (vi) Contracts for petroleum products.<br><br>The contracting officer shall insert the clause with its Alternate I when contracting without adequate price competition or when prescribed by agency regulations. |
| 52.216-10<br>Incentive Fee | | A | A | I | 16.307(d) | The contracting officer shall insert the clause at 52.216-10, Incentive Fee, in solicitations and contracts when a cost-plus-incentive-fee contract (other than a facilities contract) is contemplated. |
| 52.216-11<br>·t Contract–No Fee<br>ıltemate I | | A<br>A | A<br>A | I | 16.307(e)(1)<br>16.307(e)(2) | The contracting officer shall insert the clause at 52.216-11, Cost Contract--No Fee, in solicitations and contracts when a cost-reimbursement contract is contemplated that provides no fee and is not a cost-sharing contract or a facilities contract.<br><br>The contracting officer shall insert the clause at 52.216-11, Cost Contract--No Fee, in solicitations and contracts when a cost-reimbursement contract is contemplated that provides no fee and is not a cost-sharing contract or a facilities contract. |
| 52.216-12<br>Cost Sharing Contract–No Fee<br>Alternate I | | A<br>A | A<br>A | I | 16.307(f)(1)<br>16.307(f)(2) | The contracting officer shall insert the clause at 52.216-12, Cost-Sharing Contract--No Fee, in solicitations and contracts when a cost-sharing contract (other than a facilities contract) is contemplated.<br><br>If a cost-sharing research and development contract with an educational institution or a nonprofit organization is contemplated, and if the contracting officer determines that withholding of a portion of allowable costs is not required, the contracting officer shall use the clause with its Alternate I. |
| 52.216-23<br>Execution and Commencement of Work | | A | A | I | 16.603-4(b)(1) | The contracting officer shall insert the clause at 52.216-23, Execution and Commencement of Work, in letter contracts, except that this clause may be omitted from letter contracts awarded on SF 26. |
| 52.216-24<br>Limitation of Government Liability | | A | A | I | 16.603-4(b)(2) | The contracting officer shall insert the clause at 52.216-24, Limitation of Government Liability, with dollar amounts completed in a manner consistent with 16.603-2(d) in letter contracts. |

| FAR Clause Number<br>Title | Secondary DEAR Clause Citation | M&O For Profit | M&O Non-Profit | UCF | Prescribed In | FAR Prescription/Notes |
|---|---|---|---|---|---|---|
| .216-25<br>Contract Definitization<br>Alternate I | | A<br><br>A | A<br><br>A | I | 16.603-4(b)(3)<br><br>16.603-4(b)(3) | The contracting officer shall insert the clause at 52.216-25, Contract Definitization, with its paragraph (b) completed in a manner consistent with 16.603-2(c), in letter contracts. If, at the time of entering into the letter contract, the contracting officer knows that the definitive contract will be based on adequate price competition or will otherwise meet the criteria of 15.403-1 for not requiring submission of cost or pricing data, the words "and cost or pricing data supporting its proposal" may be deleted from paragraph (a) of the clause.<br><br>If the letter contract is being awarded on the basis of price competition, the contracting officer shall use the clause with its Alternate I. |
| 52.216-26<br>Payments of Allowable Costs Before Definitization | | A | A | I | 16.603-4(c) | For letter contracts, the contracting officer shall also insert the clause at 52.216-26, Payments of Allowable Costs Before Definitization, in solicitations and contracts if a cost-reimbursement definitive contract is contemplated, unless the acquisition involves conversion, alteration, or repair of ships. |
| 52.217-9<br>Option to Extend the Term of the Contract | 970.1706-2 | A | A | I | 17.208(g)<br>970.1706-2 | Insert a clause substantially the same as the clause at 52.217-9, Option to Extend the Term of the Contract, in solicitations and contracts when the inclusion of an option is appropriate (see FAR 17.200 and 17.202) and it is necessary to<br>include in the contract any or all of the following:<br><br>(1) A requirement that the Government must give the contractor a preliminary written notice of its intent to extend the<br>contract.<br><br>(2) A statement that an extension of the contract includes an extension of the option.<br><br>(3) A specified limitation on the total duration of the contract. |
| 52.219-3<br>Notice of Total HUBZone Set-Aside | | A | A | I | 19.1308(a) | The contracting officer shall insert the clause at 52.219-3, Notice of Total HUBZone Set-Aside, in solicitations and contracts for acquisitions that are set aside for HUBZone small business concerns under 19.1305 or 19.1306. |
| 52.219-4<br>Notice of Price Evaluation Preference for HUBZone Small Business Concerns | | A | A | I | 19.308(b) | The contracting officer shall insert the clause at 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition. The clause shall not be used in acquisitions that do not exceed the simplified acquisition threshold. |
| 52.219-6<br>Notice of Total Small Business Set-Aside<br>Alternate I | | A<br><br>A | A<br><br>A | I | 19.508(c)<br><br>19.508(c) | The contracting officer shall insert the clause at 52.219-6, Notice of Total Small Business Set-Aside, in solicitations and contracts involving total small business set-asides.<br><br>The clause at 52.219-6 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f)(4) and (5)). |

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| .219-7<br>Notice of Partial Small Business Set-Aside<br>Alternate I | | A<br><br>A | A<br><br>A | I | 19.508(d)<br><br>19.508(d) | The contracting officer shall insert the clause at 52.219-7, Notice of Partial Small Business Set-Aside, in solicitations and contracts involving partial small business set-asides.<br><br>The clause at 52.219-7 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f)(4) and (5)). |
| 52.219-8<br>Utilization of Small Business Concerns | | R | R | I | 19.708(a) | The contracting officer shall insert the clause at 52.219-8, Utilization of Small Business Concerns, in solicitations and contracts when the contract amount is expected to be over the simplified acquisition threshold unless -- (1) A personal services contract is contemplated (see 37.104); or (2) The contract, together with all its subcontracts, is to be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. |
| 52.219-9<br>Small Business Subcontracting Plan<br><br>Alternate II | | R<br><br>A | R<br><br>A | I | 19.708(b)(1)<br><br>19.708(b)(1) | The contracting officer shall, when contracting by negotiation, insert the clause at 52.219-9, Small Business Subcontracting Plan, in solicitations and contracts that offer subcontracting possibilities, are expected to exceed $500,000 ($1,000,000 for construction of any public facility), and are required to include the clause at 52.219-8, Utilization of Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program. When contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its Alternate I. When contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.705-2(d), the contracting officer shall use the clause with its Alternate II. |
| 52.219-10<br>Incentive Subcontracting Program | | O | O | I | 19.708(c)(1) | The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program, when a subcontracting plan is required (see 19.702), and inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, and women-owned small business concerns, and is commensurate with the efficient and economical performance of the contract; unless the conditions in paragraph (c)(3) of this section are applicable. The contracting officer may vary the terms of the clause as specified in paragraph (c)(2) of this section. |
| 52.219-16<br>Liquidated Damages–Subcontracting Plan | | R | R | I | 19.708(b)(2) | The contracting officer shall insert the clause at 52.219-16, Liquidated Damages--Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, or the clause with its Alternate I or II. |
| 52.219-25<br>Small Disadvantaged Business Participation Program -<br>advantaged Status and<br>orting | | A | A | I | 19.1204(b) | The contracting officer shall insert the clause at 52.219-25, Small Disadvantaged Business Participation Program - Disadvantaged Status and Reporting, in solicitations and contracts that consider the extent of participation of SDB concerns in performance of the contract. |

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| .222-1 Notice to the Government of Labor Disputes | | A | A | I | 22.103-5(a) | The contracting officer shall insert the clause at 52.222-1, Notice to the Government of Labor Disputes, in solicitations and contracts that involve programs or requirements that have been designated under 22.101-1(e). |
| 52.222-3 Convict Labor | | R | R | I | 22.202 | The contracting officer shall insert the clause at 52.222-3, Convict Labor, in solicitations and contracts above the micro-purchase threshold, when the contract is to be performed in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands; unless -- (a) The contract will be subject to the Walsh-Healey Public Contracts Act (see Subpart 22.6), which contains a separate prohibition against the employment of convict labor; (b) The supplies or services are to be purchased from Federal Prison Industries, Inc. (see Subpart 8.6); or (c) The acquisition involves the purchase, from any State prison, of finished supplies that may be secured in the open market or from existing stocks, as distinguished from supplies requiring special fabrication. |
| 52.222-4 Contract Work Hours and Safety Standards Act–Overtime Compensation | | A | A | I | 22.305 | The contracting officer shall insert the clause at 52.222-4, Contract Work Hours and Safety Standards Act--Overtime Compensation, in solicitations and contracts (including, for this purpose, basic ordering agreements) when the contract may require or involve the employment of laborers or mechanics. However, the contracting officer shall not include the clause in solicitations and contracts if it is contemplated that the contract will be in one of the following categories: (a) Contracts at or below the simplified acquisition threshold. (b) Contracts for supplies, materials, or articles ordinarily available in the open market. (c) Contracts for transportation by land, air, or water, or for the transmission of intelligence. (d) Contracts to be performed solely within a foreign country or within a territory under United States jurisdiction other than a State, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331), American Samoa, Guam, Wake Island, and Johnston Island. (e) Contracts requiring work to be done solely in accordance with the Walsh-Healey Public Contracts Act (see Subpart 22.6). (f) Contracts (or portions of contracts) for supplies in connection with which any required services are merely incidental to the contract and do not require substantial employment of laborers or mechanics. (g) Contracts for commercial items (see Parts 2 and 12). (h) Any other contracts exempt under regulations of the Secretary of Labor (29 CFR 5.15). |
| 52.222-6 Davis-Bacon Act | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-7 Withholding of Funds | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| :22-8 ayrolls and Basic Records | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |

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| ..222-9 Apprentices and Trainees | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-10 Compliance with Copeland Act Requirements | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-11 Subcontracts (Labor Standards) | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-12 Contract Termination–Debarment | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-13 Compliance with Davis-Bacon and Related Act Regulations | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-14 Disputes Concerning Labor Standards | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| 52.222-15 Certification of Eligibility | | A | A | I | 22.407(a) | The contracting officer shall insert the clause in solicitations and contracts in excess of $2,000 for construction within the United States. |
| '22-16 proval of Wage Rates | | A | A | I | 22.407(b) | The contracting officer shall insert the clause at 52.222-16, Approval of Wage Rates, in solicitations and contracts in excess of $2,000 for cost-reimbursement construction to be performed within the United States, except for contracts with a State or political subdivision thereof. |
| 52.222-17 Labor Standards for Construction Work–Facilities Contracts | | A | A | I | 22.407(d) | The contracting officer shall insert the clause at 52.222-17, Labor Standards for Construction Work - - Facilities Contracts, in solicitations and contracts, if a facilities contract (see 45.301) may require covered construction work (see 22.402(b)) to be performed in the United States. |
| 52.222-20 Walsh-Healey Public Contracts Act | | A | A | I | 22.610 | The contracting officer shall insert the clause at 52.222-20, Walsh-Healey Public Contracts Act, in solicitations and contracts covered by the Act (see 22.603, 22.604, and 22.605). |
| 52.222-21 Prohibition of Segregated Facilities | | A | A | I | 22.810(a)(1) | When a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, the contracting officer shall insert the clause at 52.222-21, Prohibition of Segregated Facilities, in solicitations and contracts. |
| 52.222-26 Equal Opportunity Alternate I | | A | A | I | 22.810(e) | The contracting officer shall insert the clause at 52.222-26, Equal Opportunity, in solicitations and contracts (see 22.802) unless the contract is exempt from all of the requirements of E.O. 11246 (see 22.807(a)).<br><br>If the contract is exempt from one or more, but not all, of the requirements of E.O. 11246, the contracting officer shall use the clause with its Alternate I. |

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| ..222-27<br>Affirmative Action Compliance Requirements for Construction | | A | A | I | 22.810(f) | The contracting officer shall insert the clause at 52.222-27, Affirmative Action Compliance Requirements for Construction, in solicitations and contracts for construction that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be in excess of $10,000. |
| 52.222-29<br>Notification of Visa Denial | | A | A | I | 22.810(h) | The contracting officer shall insert the clause at 52.222-29, Notification of Visa Denial, in contracts that will include the clause at 52.222-26, Equal Opportunity, if the contractor is required to perform in or on behalf of a foreign country. |
| 52.222.35<br>Affirmative Action for Disabled and Vietnam Era Veterans<br>Alternate I | | A | A | I | 22.1310(a)(1) | Insert the clause at 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, in solicitations and contracts if the expected value is $25,000 or more, except when-<br>(i) Work is performed outside the United States by employees recruited outside the United States; or<br>(ii) The Deputy Assistant Secretary of Labor has waived, in accordance with 22.1305(a) or the head of the agency has waived, in accordance with 22.1305(b) all of the terms of the clause.<br><br>(2) If the Deputy Assistant Secretary of Labor or the head of the agency waives one or more (but not all) of the terms of the clause, use the basic clause with its Alternate I. |
| '22-36<br>.rmative Action for Workers with Disabilities<br>Alternate I | | A<br><br>A | A<br><br>A | I | 22.1408(a)<br><br>22.1408(b) | The contracting officer shall insert the clause at 52.222-36, Affirmative Action for Workers with Disabilities, in solicitations and contracts that exceed $10,000 or are expected to exceed $10,000, except when -- (1) Work is to be performed outside the United States by employees recruited outside the United States (for the purpose of this subpart, "United States" includes the several states, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island); or (2) The agency head has waived, in accordance with 22.1403(a) or 22.1403(b) all the terms of the clause.<br><br>If the agency head waives one or more (but not all) of the terms of the clause in accordance with 22.1403(a) or 22.1403(b), use the basic clause with its Alternate I. |
| 52.222-37<br>Employment Reports on Disabled Veterans and Veterans of the Vietnam Era | | A | A | I | 22.1310(b) | Insert the clause at 52.22237, Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, in solicitations and contracts containing the clause at 52.22235, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans. |
| 52.222-38<br>Compliance with Veterans' Employment Reporting Requirements | | A | A | I | 22.1310(c) | Insert the provision at 52.22238, Compliance with Veterans' Employment Reporting Requirements, in solicitations when it is anticipated the contract award will exceed the simplified acquisition threshold and the contract is not for acquisition of commercial items. |

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| ..223-3<br>Hazardous Material Identification and Material Safety Data<br>Alternate I | | A<br><br>A | A<br><br>A | I | 23.303(a)<br><br>23.303(b) | The contracting officer shall insert the clause at 52.223-3, Hazardous Material Identification and Material Safety Data, in solicitations and contracts if the contract will require the delivery of hazardous materials as defined in 23.301.<br><br>If the contract is awarded by an agency other than the Department of Defense, the contracting officer shall use the clause at 52.223-3 with its Alternate I. |
| 52.223-5<br>Pollution Prevention and Right-to-know Information | | A | A | I | 23.1005 | The contracting officer shall insert the clause at 52.223-5, Pollution Prevention and Right-to-Know Information, in all solicitations and contracts that provide for performance, in whole or in part, on a Federal facility. |
| 52.223-6<br>Drug-Free Workplace | | A | A | I | 23.505 | Contracting officers shall insert the clause at 52.223-6, Drug-Free Workplace, except as noted below, in solicitations and contracts -- (1) Of any dollar value if the contract is expected to be awarded to an individual; or (2) Expected to exceed the simplified acquisition threshold if the contract is expected to be awarded to other than an individual.<br><br>Contracting officers shall not insert the clause at 52.223-6, Drug-Free Workplace, in solicitations and contracts, if -- (1) The resultant contract is to be performed entirely outside of the United States, its territories, and its possessions; (2) The resultant contract is for law enforcement agencies, and the head of the law enforcement agency or designee involved determines that application of the requirements of this subpart would be inappropriate in connection with the law enforcement agency's undercover operations; or (3) Inclusion of these requirements would be inconsistent with the international obligations of the United States or with the laws and regulations of a foreign country.<br><br>The clause at 52.223-6 shall be omitted if the clause at DEAR 970.5223-4 is used. |
| 52.223-7<br>Notice of Radioactive Materials | | A | A | I | 23.602 | The contracting officer shall insert the clause at 52.223-7, Notice of Radioactive Materials, in solicitations and contracts for supplies which are, or which contain -- (a) radioactive material requiring specific licensing under regulations issued pursuant to the Atomic Energy Act of 1954; or (b) radioactive material not requiring specific licensing in which the specific activity is greater than 0.002 microcuries per gram or the activity per item equals or exceeds 0.01 microcuries. Such supplies include, but are not limited to, aircraft, ammunition, missiles, vehicles, electronic tubes, instrument panel gauges, compasses and identification markers. |
| 52.223-9<br>Estimate of Percentage of Recovered Material Content for EPA-Designated Products | | A | A | I | 23.406(b) | The contracting officer shall insert the clause at 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products, in contracts exceeding $100,000 that include the provision at 52.223-4. If technical personnel advise that estimates can be verified, use the clause with its Alternate I. |

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| ..223-10 Waste Reduction Program | | A | A | I | 23.705 | The contracting officer shall insert the clause at 52.223-10, Waste Reduction Program, in all solicitations and contracts for contractor operation of Government-owned or -leased facilities and all solicitations and contracts for support services at Government-owned or -operated facilities. |
| 52.223-11 Ozone-Depleting Substances | | A | A | I | 23.804(a) | Except for contracts to be performed outside the United States, its possessions, and Puerto Rico, the contracting officer shall insert the clause at 52.223-11, Ozone-Depleting Substances, in solicitations and contracts for ozone-depleting substances or for supplies that may contain or be manufactured with ozone-depleting substances. |
| 52.223-12 Refrigeration Equipment and Air Conditioners | | A | A | I | 23.804(b) | Except for contracts to be performed outside the United States, its possessions, and Puerto Rico, the contracting officer shall insert the clause at 52.223-12, Refrigeration Equipment and Air Conditioners, in solicitations and contracts for services when the contract includes the maintenance, repair, or disposal of any equipment or appliance using ozone-depleting substances as a refrigerant, such as air conditioners, including motor vehicles, refrigerators, chillers, or freezers. |
| 52.223-14 Toxic Chemical Release Reporting | | A | A | I | 23.907(b) | Except for acquisitions of commercial items as defined in Part 2, the contracting officer shall insert the clause at 52.223-14, Toxic Chemical Release Reporting, in the resulting contract, when the solicitation contains the provision at 52.223-13, Certification of Toxic Chemical Release Reporting, and if the contract is expected to exceed $100,000 (including all options). |
| 52.224-1 Privacy Act Notification | | A | A | I | 24.104(a) | When the design, development, or operation of a system of records on individuals is required to accomplish an agency function, the contracting officer shall insert the clause at 52.224-1, Privacy Act Notification. |
| 52.224-2 Privacy Act | | A | A | I | 24.104(b) | When the design, development, or operation of a system of records on individuals is required to accomplish an agency function, the contracting officer shall insert the clause at 52.224-2, Privacy Act. |
| 52.225-1 Buy American Act-Supplies. | | A | A | I | 25.1101(a)(1) | Insert the clause at 52.225-1, Buy American Act-Supplies, in solicitations and contracts with a value exceeding $2,500 but not exceeding $25,000; and in solicitations and contracts with a value exceeding $25,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if-<br>(i) The solicitation is restricted to domestic end products in accordance with Subpart 6.3;<br>(ii) The acquisition is for supplies for use within the United States and an exception to the Buy American Act applies (*e.g.*, nonavailability or public interest); or<br>(iii) The acquisition is for supplies for use outside the United States. |

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| .225-9 Buy American Act-Construction Materials | | A | A | I | 25.1102(a) | Insert the clause at 52.225-9, Buy American Act-Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than $6,806,000.<br><br>(1) List in paragraph (b)(2) of the clause all foreign construction material excepted from the requirements of the Buy American Act.<br>(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(3)(i) of the clause. |
| 52.225-13 Restrictions on Certain Foreign Purchases | | R | R | I | 25.1103(a) | Insert the clause at 52.225-13, Restrictions on Certain Foreign Purchases, in solicitations and contracts with a value exceeding $2,500, unless an exception applies (see 25.701(a)(2)). |
| 52.225-14 Inconsistency Between English Version and Translation of Contract | | A | A | I | 25.1103(b) | Insert the clause at 52.225-14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts if anticipating translation into another language. |
| 52.226-1 Utilization of Indian Organizations and Indian-Owned Economic Enterprises | | A | A | I | 26.104(b) | Contracting officers in civilian agencies may insert the clause at 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises, in solicitations and contracts if -- (1) In the opinion of the contracting officer, subcontracting possibilities exist for Indian organizations or Indian-owned economic enterprises; and (2) Funds are available for any increased costs as described in paragraph (c)(2) of the clause at 52.226-1. |
| 227-10 Filing of Patent Applications–Classified Subject Matter | | A | A | I | 27.207-2 | The contracting officer shall insert the clause at 52.227-10, Filing of Patent Applications--Classified Subject Matter, in all classified solicitations and contracts and in all solicitations and contracts where the nature of the work or classified subject matter involved in the work reasonably might be expected to result in a patent application containing classified subject matter. |
| 52.227-23 Rights to Proposal Data | | R | R | I | 27.409(s)<br>970.2702-5 | Contracting officers must include the clause at 52.227-23, Rights to Proposal Data, in all solicitations and contracts for the management and operation of DOE sites and facilities. |
| 52.228-2 Additional Bond Security | | A | A | I | 28.106-4(a) | The contracting officer shall insert the clause at 52.228-2, Additional Bond Security, in solicitations and contracts when bonds are required. |
| 52.228-3 Workers' Compensation Insurance (Defense Base Act) | | A | A | I | 28.309(a) | The contracting officer shall insert the clause at 52.228-3, Workers' Compensation Insurance (Defense Base Act), in solicitations and contracts when the Defense Base Act applies (see 28.305) and -- (1) The contract will be a public-work contract performed outside the United States; or (2) The contract will be approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195) and is not excluded by 28.305(b)(2). |
| 52.228-4 kers' Compensation and -Hazard Insurance Overseas | | A | A | I | 28.309(b) | The contracting officer shall insert the clause at 52.228-4, Worker's Compensation and War-Hazard Insurance Overseas, in solicitations and contracts when the contract will be a public-work contract performed outside the United States and the Secretary of Labor waives the applicability of the Defense Base Act (see 28.305(d)). |

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| 228-11 Pledges of Assets | | A | A | I | 28.203-6 | Insert the clause at 52.228-11 in solicitations and contracts which require the submission of bid guarantees, performance, or payment bonds. |
| 52.228-12 Prospective Subcontractor Requests for Bonds | | A | A | I | 28.106-4(b) | In accordance with Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355, the contracting officer shall insert the clause at 52.228-12, Prospective Subcontractor Requests for Bonds, in solicitations and contracts with respect to which a payment bond will be furnished pursuant to the Miller Act (see 28.102-1), except for contracts for the acquisition of commercial items as defined in Subpart 2.1. |
| 52.228-13 Alternative Payment Protections | | A | A | I | 28.102-3(b) | Insert the clause at 52.228-13, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds $25,000 but does not exceed $100,000. Complete the clause by specifying the payment protections selected (see 28.102-1(b)(1)) and the deadline for submission. |
| 52.228-14 Irrevocable Letter of Credit | | A | A | I | 28.204-4 | Insert the clause at 52.228-14, Irrevocable Letter of Credit, in solicitations and contracts for services, supplies, or construction, when a bid guarantee, or performance bonds, or performance and payment bonds are required. |
| 52.228-15 Performance and Payment Bonds–Construction | | A | A | I | 28.102-3(a) | The contracting officer shall insert a clause substantially the same as the clause at 52.228-15, Performance and Payment Bonds--Construction, in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed $100,000. The penal amount of the performance bonds may be decreased in accordance with 28.102-2(a). Where the provision at 52.228-1 is not included in the solicitation, the contracting officer shall set a period of time for return of executed bonds. |
| 52.228-16 Performance and Payment Bonds–Other Than Construction<br>Alternate I | | A<br>A | A<br>A | I | 28.103-4<br>28.103-4 | The contracting officer shall insert a clause substantially the same as the clause at 52.228-16, Performance and Payment Bonds--Other than Construction, in solicitations and contracts that contain a requirement for both payment and performance bonds. The contracting officer shall determine the amount of each bond for insertion in the clause. The amount shall be adequate to protect the interest of the Government. The contracting officer shall also set a period of time (normally 10 days) for return of executed bonds.<br><br>Alternate I shall be used when only performance bonds are required. |
| 52.229-2 North Carolina State and Local Sales and Use Tax<br>Alternate I | | A<br>A | A<br>A | I | 29.401-2<br>29.401-2 | The contracting officer shall insert the clause at 52.229-2, North Carolina State and Local Sales and Use Tax, in solicitations and contracts for construction to be performed in North Carolina.<br><br>If the requirement is for vessel repair to be performed in North Carolina, the clause shall be used with its Alternate I. |

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| ..229-8 Taxes–Foreign Cost-Reimbursement Contracts | | | | I | 29.402-2(a) | The contracting officer shall insert the clause at 52.229-8, Taxes--Foreign Cost-Reimbursement Contracts, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract is to be performed wholly or partly in a foreign country, unless it is contemplated that the contract will be with a foreign government. |
| 52.229-10 New Mexico Gross Receipts Compensating Tax | 970.2904-1(a) | A | A | I | 29.401-6(b) 970.2904-1(a) | The contracting officer shall insert the clause at 52.229-10, State of New Mexico Gross Receipts and Compensating Tax, in solicitations and contracts issued by the agencies identified in paragraph (c) of this subsection when all three of the following conditions exist: (1) The contractor will be performing a cost-reimbursement contract. (2) The contract directs or authorizes the contractor to acquire tangible personal property as a direct cost under a contract and title to such property passes directly to and vests in the United States upon delivery of the property by the vendor. (3) The contract will be for services to be performed in whole or in part within the State of New Mexico.<br><br>DEAR 970.2904-1(a) alters the FAR clause. |
| 52.230-2 Cost Accounting Standards | | A | A | I | 30.201-4(a) | Cost accounting standards. (1) The contracting officer shall insert the clause at FAR 52.230-2, Cost Accounting Standards, in negotiated contracts, unless the contract is exempted (see 48 CFR 9903.201-1 (FAR Appendix)), the contract is subject to modified coverage (see 48 CFR 9903.201-2 (FAR Appendix)), or the clause at FAR 52.230-4 is used. |
| 52.230-3 Disclosure and Consistency of Cost Accounting Practices | | A | A | I | 30.201-4(b)(1) | The contracting officer shall insert the clause at FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices, in negotiated contracts when the contract amount is over $500,000, but less than $25 million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (see 48 CFR 9903.201-2 (FAR Appendix)), unless the clause at FAR 52.230-4 is used. |
| 52.230-4 Consistency in Cost Accounting Practices | | A | A | I | 30.201-4(c) | The contracting officer shall insert the clause at FAR 52.230-4, Consistency in Cost Accounting Practices, in negotiated contracts that are exempt from CAS requirements solely on the basis of the fact that the contract is to be awarded to a United Kingdom contractor and is to be performed substantially in the United Kingdom (see 48 CFR 9903.201-1(b)(12) (FAR Appendix)). |
| 52.230-5 Cost Accounting Standards–Educational Institution | | - | A | I | 30.201-4(e) | The contracting officer shall insert the clause at FAR 52.230-5, Cost Accounting Standards--Educational Institution, in negotiated contracts awarded to educational institutions, unless the contract is exempted (see 48 CFR 9903.201-1 (FAR Appendix)), the contract is to be performed by an FFRDC (see 48 CFR 9903.201-2(c)(5) (FAR Appendix)), or the provision at 48 CFR 9903.201-2(c)(6) (FAR Appendix) applies. |
| 230-6 .ministration of Cost Accounting Standards | | A | A | I | 30.201-4(d) | The contracting officer shall insert the clause at FAR 52.230-6, Administration of Cost Accounting Standards, in contracts containing any of the clauses prescribed in paragraphs (a), (b), or (e) of subsection 30.201-4. |

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| 52.232-17 Interest | | A | - | I | 32.617(a) and (b) | The contracting officer shall insert the clause at 52.232-17, Interest, in solicitations and contracts, unless it is contemplated that the contract will be in one or more of the following categories: (1) Contracts at or below the simplified acquisition threshold. (2) Contracts with Government agencies. (3) Contracts with a State or local government or instrumentality. (4) Contracts with a foreign government or instrumentality. (5) Contracts without any provision for profit or fee with a nonprofit organization. (6) Contracts described in Subpart 5.5, Paid Advertisements. (7) Any other exceptions authorized under agency procedures.<br><br>The contracting officer may insert the clause at 52.232-17, Interest, in solicitations and contracts when it is contemplated that the contract will be in any of the categories specified above. |
| 52.232-18 Availability of Funds | | A | A | I | 32.705-1(a) | The contracting officer shall insert the clause at 52.232-18, Availability of Funds, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contracting action is to be initiated before the funds are available. |
| 52.232-19 Availability of Funds for Next Fiscal Year | | A | A | I | 32.705-1(b) | The contracting officer shall insert the clause at 52.232-19, Availability of Funds for the Next Fiscal Year, in solicitations and contracts if a one-year indefinite-quantity or requirements contract for services is contemplated and the contract – (1) Is funded by annual appropriations; and (2) Is to extend beyond the initial fiscal year (see 32.703-2(b)). |
| 52.232-23 Assignment of Claims<br>Alternate I | | A<br>A | A<br>A | I | 32.806(a)(1)<br>32.806(a)(2) | The contracting officer shall insert the clause at 52.232-23, Assignment of Claims, in solicitations and contracts expected to exceed the micro-purchase threshold, unless the contract will prohibit the assignment of claims (see 32.803(b)).<br><br>If a no-setoff commitment has been authorized (see FAR 32.803 (d)), the contracting officer shall use the clause with its Alternate I. |
| 52.232-24 Prohibition of Assignment of Claims | | A | A | I | 32.806(b) | The contracting officer shall insert the clause at 52.232-24, Prohibition of Assignment of Claims, in solicitations and contracts for which a determination has been made under agency regulations that the prohibition of assignment of claims is in the Government's interest. |
| 52.232-33 Payment by Electronic Funds Transfer - Central Contractor Registration | | A | A | I | 32.1110(a)(1) | The contracting officer shall insert the clause at 52.232-33, Payment by Electronic Funds Transfer - Central Contractor Registration, in all solicitations and contracts if the payment office uses the Central Contractor Registration (CCR) database as its source of EFT information. The contracting officer also shall insert this clause if the payment office does not currently have the ability to make payment by EFT, but will use the CCR as its source of EFT information when it begins making payments by EFT. |

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| 232-34<br>Payment by Electronic Funds Transfer - Other than Central Contractor Registration | | A | A | I | 32.1110(a)(2) | The contracting officer shall insert the clause at 52.232-34, Payment by Electronic Funds Transfer - Other than Central Contractor Registration, in all other solicitations and contracts. The contracting officer also shall insert this clause if the payment office does not have the ability to make payment by EFT, but will use a source other than the CCR database for EFT information when it begins making payments by EFT. |
| 52.232-35<br>Designation of Office for Government Receipt of Electronic Funds Transfer Information | | A | A | I | 32.1110(c) | If EFT information is to be submitted to other than the payment office in accordance with agency procedures, the contracting officer shall insert in solicitations and contracts the clause at 52.232-35 Designation of Office for Government Receipt of Electronic Funds Transfer Information, or a clause substantially the same as52.232-35 that clearly informs the contractor where to send the EFT information. |
| 52.232-36<br>Payment by Third Party | | A | A | I | 32.1110(d) | If a payment under a written contract will be made by a charge to a Government account with a third party such as a Government-wide commercial purchase card, then the contracting officer shall insert the clause at 52.232-36, Payment by a Third Party, in solicitations and contracts. |
| 52.232-37<br>Multiple Payment Arrangements | | A | A | I | 32.1110(e) | If the contract or agreement provides for the use of delivery orders, and provides that the ordering office designate the method of payment for individual orders, the contracting officer shall insert, in the solicitation and contract or agreement, the clause at 52.232-37, Multiple Payment Arrangements, and, to the extent they are applicable the clauses at—<br>(1) 52.232-33, Payment by Electronic Funds Transfer—Central Contractor Registration;<br>(2) 52.232-34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration; and<br>(3) 52.232-36, Payment by Third Party. |
| 52.233-1<br>Disputes<br>Alternate I | | R<br>A | R<br>A | I | 33.215<br>33.215 | The contracting officer shall insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply.<br><br>If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I. |
| 52.233-3<br>Protest after Award<br>Alternate I | | R<br>R | R<br>R | I | 33.106(b)<br>33.106(b) | The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts.<br><br>If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I. |
| 52.234-1<br>Industrial Resources Developed Under Defense Production Act Title III | | A | A | I | 34.104 | Insert the clause at 52.234-1, Industrial Resources Developed under Title III, Defense Production Act, in all contracts for major systems and items of supply. |

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| 236-8 Other Contracts | 970.3605-1 | A | A | I | 36.508 970.3605-1 | The contracting officer shall insert the clause at 52.236-8, Other Contracts, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below the simplified acquisition threshold. |
| 52.236-18 Work Oversight in Cost-Reimbursement Construction Contracts | | A | A | I | 36.518 | The contracting officer shall insert the clause at 52.236-18, Work Oversight in Cost-Reimbursement Construction Contracts, in solicitations and contracts when a cost-reimbursement construction contract is contemplated. |
| 52.237-2 Protection of Government Buildings, Equipment, and Vegetation | | A | A | I | 37.110(b) | The contracting officer shall insert the clause at 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in solicitations and contracts for services to be performed on Government installations, unless a construction contract is contemplated. |
| 52.237-3 Continuity of Services | | O | O | I | 37.110(c) | The contracting officer may insert the clause at 52.237-3, Continuity of Services, in solicitations and contracts for services, when -- (1) The services under the contract are considered vital to the Government and must be continued without interruption and when, upon contract expiration, a successor, either the Government or another contractor, may continue them; and (2) The Government anticipates difficulties during the transition from one contractor to another or to the Government. Examples of instances where use of the clause may be appropriate are services in remote locations or services requiring personnel with special security clearances. |
| 52.239-1 Privacy or Security Safeguards | | A | A | I | 39.107 | The contracting officer shall insert a clause substantially the same as the clause at 52.239-1, Privacy or Security Safeguards, in solicitations and contracts for information technology which require security of information technology, and/or are for the design, development, or operation of a system of records using commercial information technology services or support services. |
| 52.242-1 Notice of Intent to Disallow Costs | | R | R | I | 42.802 | The contracting officer shall insert the clause at 52.242-1, Notice of Intent to Disallow Costs, in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated. |
| 52.242-2 Production Progress Reports | | A | A | I | 42.1107(a) | The contracting officer shall insert the clause at 52.242-2, Production Progress Reports, in solicitations and contracts when production progress reporting is required; unless a facilities contract, a construction contract, or a Federal Supply Schedule contract is contemplated. |

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| .242-3<br>Penalties for Unallowable Costs | | A | A | I | 42.709-6 | Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over $500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR. |
| 52.242-10<br>F.o.b. Origin-Government Bills of Lading or Prepaid Postage | | A | A | I | 42.1404-2(a) | The contracting officer shall insert the clause at 52.242-10, F.o.b. Origin--Government Bills of Lading or Prepaid Postage, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or prepaid postage. |
| 52.242-11<br>F.o.b. Origin-Government Bills of Lading or Indicia Mail | | A | A | I | 42.1404-2(b) | The contracting officer shall insert the clause at 52.242-11, F.o.b. Origin--Government Bills of Lading or Indicia Mail, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or indicia mail, if indicia mail has been authorized by the U.S. Postal Service. |
| 52.242-12<br>Report of Shipment (REPSHIP) | | A | A | I | 42.1406-2 | The contracting officer shall insert the clause at 52.242-12, Report of Shipment (REPSHIP), in solicitations and contracts when advance notice of shipment is required for safety or security reasons, or where carload or truckload shipments will be made to DoD installations or, as required, to civilian agency facilities. |
| 242-13<br>ankruptcy | | R | R | I | 42.903 | The contracting officer shall insert the clause at 52.242-13, Bankruptcy, in all solicitations and contracts exceeding the simplified acquisition threshold. |
| 52.242-15<br>Stop-Work Order<br>Alternate I | | O<br>O | O<br>O | F | 42.1305(b)(1)<br>42.1305(b)(2) | The contracting officer may, when contracting by negotiation, insert the clause at 52.242-15, Stop-Work Order, in solicitations and contracts for supplies, services, or research and development.<br><br>If a cost-reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I. |
| 52.243-6<br>Change Order Accounting | | O | O | I | 43.205(f) | The contracting officer may insert a clause, substantially the same as the clause at 52.243-6, Change Order Accounting, in solicitations and contracts for supply and research and development contracts of significant technical complexity, if numerous changes are anticipated. The clause may be included in solicitations and contracts for construction if deemed appropriate by the contracting officer. |
| 52.243-7<br>Notification of Changes | | O | O | I | 43.107 | The contracting officer may insert a clause substantially the same as the clause at 52.243-7, Notification of Changes, in solicitations and contracts. The clause is available for use primarily in negotiated research and development or supply contracts for the acquisition of major weapon systems or principal subsystems. If the contract amount is expected to be less than $1,000,000, the clause shall not be used, unless the contracting officer anticipates that situations will arise that may result in a contractor alleging that the Government has effected changes other than those identified as such in writing and signed by the contracting officer. |

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| 44-5 Competition in Subcontracting | | A | A | I | 44.204(c) | The contracting officer shall, when contracting by negotiation, insert the clause at 52.244-5, Competition in Subcontracting, in solicitations and contracts when the contract amount is expected to exceed the simplified acquisition threshold, unless -- (1) A firm-fixed-price contract, awarded on the basis of adequate price competition or whose prices are set by law or regulation, is contemplated; or (2) A time-and-materials, labor-hour, or architect-engineer contract is contemplated. |
| 52.244-6 Subcontracts for Commercial Items | | R | R | I | 44.403 | The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items and Commercial Components, in solicitations and contracts for supplies or services other than commercial items. |
| 52.246-3 Inspection of Supplies-Cost-Reimbursement | | A | A | E | 46.303 | The contracting officer shall insert the clause at 52.246-3, Inspection of Supplies--Cost Reimbursement, in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a cost-reimbursement contract is contemplated. |
| 52.246.5 Inspection of Services-Cost-Reimbursement | | A | A | E | 46.305 | The contracting officer shall insert the clause at 52.246-5, Inspection of Services--Cost Reimbursement, in solicitations and contracts for services, or supplies that involve the furnishing of services, when a cost-reimbursement contract is contemplated. |
| 52.246-8 ection of Research and elopment-Cost mbursement<br>Alternate I | | A<br>A | A<br>A | E | 46.308<br>46.308 | The contracting officer shall insert the clause at 52.246-8, Inspection of Research and Development-- Cost Reimbursement, in solicitations and contracts for research and development when (a) the primary objective of the contract is the delivery of end items other than designs, drawings, or reports, and (b) a cost-reimbursement contract is contemplated; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate.<br><br>If it is contemplated that the contract will be on a no-fee basis, the contracting officer shall use the clause with its Alternate I. |
| 52.246-9 Inspection of Research and Development (Short Form) | | A | A | E | 46.309 | The contracting officer shall insert the clause at 52.246-9, Inspection of Research and Development (Short Form), in solicitations and contracts for research and development when the clause at 52.246-7 or the clause at 52.246-8 is not used. |
| 52.246-11 Higher-Level Contract Quality Requirement (Government Specification) | | A | A | E | 46.311 | The contracting officer shall insert the clause at 52.246-11, Higher-Level Contract Quality Requirement (Government Specification), in solicitations and contracts when the inclusion of a higher-level contract quality requirement is appropriate (see 46.202-4). |

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| 246-12 Inspection of Construction | | A | A | E | 46.312 | The contracting officer shall insert the clause at 52.246-12, Inspection of Construction, in solicitations and contracts for construction when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold, and its use is in the Government's interest. |
| 52.246-15 Certificate of Conformance | | A | A | E | 46.315 | The contracting officer shall insert the clause at 52.246-15, Certificate of Conformance, in solicitations and contracts for supplies or services when the conditions in 46.504 apply. |
| 52.246-23 Limitation of Liability | | A | A | I | 46.805(a)(1) and (3) | Insert the clause at 52.246-23, Limitation of Liability, in solicitations and contracts requiring delivery of end items that are not high-value items when the contract amount is expected to be in excess of the simplified acquisition threshold and the contract is subject to the requirements of subpart 46.8, as indicated in 46.801. |
| 52.246-24 Limitation of Liability-High Value Items<br>Alternate I | | A<br>A | A<br>A | I | 46.805(a)(2)<br>46.805(a)(3) | Insert the clause at 52.246-24, Limitation of Liability-High Value Items, in solicitations and contracts requiring delivery of high-value items when the contract amount is expected to be in excess of the simplified acquisition threshold and the contract is subject to the requirements of subpart 46.8, as indicated in 46.801.<br><br>In contracts requiring delivery of both high-value items and other end items, insert both clauses at 52.246-23 and 52.246-24, Alternate I of the clause at 52.246-24, and identify clearly in the contract schedule the line items designated as high-value items. |
| 52.246-25 Limitation of Liability-Services | | A | A | I | 46.805(a)(4) | Insert the clause at 52.246-25, Limitation of in solicitations and contracts In contracts requiring the performance of services when the contract amount is expected to be in excess of the simplified acquisition threshold and the contract is subject to the requirements of subpart 46.8, as indicated in 46.801. |
| 52.247-1 Commercial Bill of Lading Notations | | A | A | I | 47.104-4(a)/(b) | The contracting officer, in order to ensure the application of section 10721 rates, shall insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts when the contracts will be -- (1) Cost-reimbursement contracts, including those that may involve the movement of household goods (see 47.104-3(b)); or (2) Fixed-price f.o.b. origin contracts (other than contracts at or below the simplified acquisition threshold) (see 47.104-2(b) and 47.104-3).<br><br>The contracting officer may insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts made at or below the simplified acquisition threshold when it is contemplated that the delivery terms will be f.o.b. origin. |

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| ..247-63<br>Preference for U.S.-Flag Air Carriers | | R | R | I | 47.405 | The contracting officer shall insert the clause at 52.247-63, Preference for U.S.-Flag Air Carriers, in solicitations and contracts whenever it is possible that U.S. Government-financed international air transportation of personnel (and their personal effects) or property will occur in the performance of the contract. This clause does not apply to contracts awarded using the simplified acquisition procedures in Part 13 or contracts for commercial items (see Part 12). |
| 52.247-64<br>Preference for Privately Owned U.S.-Flag Commercial Vessels<br>Alternate I<br>Alternate II | | A<br><br>A<br>A | A<br><br>A<br>A | I | 47.507(a)<br><br>47.507(b)<br>47.507(c) | The contracting officer shall insert the clause at 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a)(3), 47.503(a), and 47.504.)<br><br>If an applicable statute requires, or if it has been determined under agency procedures, that the supplies to be furnished under contracts shall be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.502(a)(1) and 47.503(b)), use the basic clause with its Alternate I.<br><br>If an applicable statute requires, or it has been determined under agency procedures, that supplies, materials, or equipment to be shipped under construction contracts shall be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.505), use the basic clause with its Alternate II. |
| '47-67<br>mission of Commercial ransportation Bills to the General Services Administration for Audit | | A | A | I | 47.104-4(c) | The contracting officer shall insert the clause at 52.247-67, Submission of Commercial Transportation Bills to the General Services Administration for Audit, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract or a first-tier cost-reimbursement subcontract thereunder will authorize reimbursement of transportation as a direct charge to the contract or subcontract. |

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| ..248-1<br>Value Engineering<br>Alternate I<br>Alternate II<br>Alternate III | | A<br><br><br>A<br>A<br>A | A<br><br><br>A<br>A<br>A | I | 48.201(a)/(b)<br><br><br>48.201(c)<br>48.201(d)<br>48.201(e) | The contracting officer shall insert a value engineering clause in solicitations and contracts when the contract amount is expected to be $100,000 or more, except as specified in subparagraphs (a)(1) through (5) and in paragraph (f) below. A value engineering clause may be included in contracts of lesser value if the contracting officer sees a potential for significant savings. Unless the chief of the contracting office authorizes its inclusion, the contracting officer shall not include a value engineering clause in solicitations and contracts -- (1) For research and development other than full-scale development; (2) For engineering services from not-for-profit or nonprofit organizations; (3) For personal services (see Subpart 37.1); (4) Providing for product or component improvement, unless the value engineering incentive application is restricted to areas not covered by provisions for product or component improvement; (5) For commercial products (see Part 11) that do not involve packaging specifications or other special requirements or specifications; or (6) When the agency head has exempted the contract (or a class of contracts) from the requirements of this Part 48.<br><br>To provide a value engineering incentive, the contracting officer shall insert the clause at 52.248-1, Value Engineering, in solicitations and contracts except as provided above (but see subparagraph (e) below).<br><br>If a mandatory value engineering effort is appropriate (i.e., if the contracting officer considers that substantial savings to the Government may result from a sustained value engineering effort of a specified level), the contracting officer shall use the clause with its Alternate I (but see subparagraph (e) below). The value engineering program requirement may be specified by the Government in the solicitation or, in the case of negotiated contracting, proposed by the contractor as part of its offer and included as a subject for negotiation. The program requirement shall be shown as a separately priced line item in the contract Schedule.<br><br>If both a value engineering incentive and a mandatory program requirement are appropriate, the contracting officer shall use the clause with its Alternate II (but see subparagraph (e) below). The contract shall restrict the value engineering program requirement to well-defined areas of performance designated by line item in the contract Schedule. Alternate II applies a value engineering program to the specified areas and a value engineering incentive to the remaining areas of the contract.<br><br>If the head of the contracting activity determines for a contract or class of contracts that the cost of computing and tracking collateral savings will exceed the benefits to be derived, the contracting officer shall use the clause with its– (1) Alternate III if a value engineering incentive is involved; (2) Alternate III and Alternate I if a value engineering program requirement is involved; or (3) Alternate III and Alternate II if both an incentive and a program requirement are involved. |

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| ..248-3<br>Value Engineering–Construction<br>Alternate I | | A<br><br>A | A<br><br>A | I | 48.202<br><br>48.202 | The contracting officer shall insert the clause at 52.248-3, Value Engineering--Construction, in construction solicitations and contracts when the contract amount is estimated to be $100,000 or more, unless an incentive contract is contemplated. The contracting officer may include the clause in contracts of lesser value if the contracting officer sees a potential for significant savings. The contracting officer shall not include the clause in incentive-type construction contracts.<br><br>If the head of the contracting activity determines that the cost of computing and tracking collateral savings for a contract will exceed the benefits to be derived, the contracting officer shall use the clause with its Alternate I. |
| 52.249-6<br>Termination (Cost Reimbursement) | 970.4905-1 | R | R | I | 49.503(a)(1)<br>970.4905-1 | The contracting officer shall include the clause at 52.249-6, Termination (Cost Reimbursement), as modified pursuant to 970.4905-1(b) (see below), in all cost-reimbursement management and operating contracts, regardless of whether the contract is for production, or research and development with an educational or nonprofit institution.<br><br>The contracting officer shall modify paragraph (i) of the clause to insert "as supplemented in subpart 970.31 of the Department of Energy Acquisition Regulation," after the phrase, "part 31 of the Federal Acquisition Regulation." |
| 52.249-14<br>Excusable Delays | | A | A | I | 49.505(d) | The contracting officer shall insert the clause at 52.249-14, Excusable Delays, in solicitations and contracts for supplies, services, construction, and research and development on a fee basis, when a cost-reimbursement contract is contemplated. The contracting officer shall also insert the clause in time-and- material contracts, labor-hour contracts, consolidated facilities contracts, and facilities acquisition contracts. |
| 52.250-1<br>Indemnification Under Public Law 85-804<br>Alternate I | 970.5004-1 | A | A | I | 50.403-3<br>970.5004-1 | The contracting officer shall insert the clause at 52.250-1, Indemnification Under Public Law 85-804, in contracts whenever the approving official determines that the contractor shall be indemnified against unusually hazardous or nuclear risks (also see 50.403-2(c)).<br><br>When use of the clause at 52.250-1, Indemnification Under Public Law 85-804, is appropriate, the contracting officer may substitute the words "Obligation of funds" for the words "Limitation of Cost or Limitation of Funds."<br><br>In cost-reimbursement contracts, the contracting officer shall use the clause with its Alternate I. |
| 52.251-1<br>Government Supply Sources<br>Alternate I | | A<br><br>A | A<br><br>A | I | 51.107 | The contracting officer shall insert the clause at 52.251-1, Government Supply Sources, in solicitations and contracts when the contracting officer may authorize the contractor to acquire supplies or services from a Government supply source.<br><br>If a facilities contract is contemplated, the contracting officer shall use the clause with its Alternate I. |

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| ...251-2 Interagency Fleet Management System Vehicles and Related Services | | A | A | I | 51.205 | The contracting officer shall insert the clause at 52.251-2, Interagency Fleet Management System (IFMS) Vehicles and Related Services, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contracting officer may authorize the contractor to use interagency fleet management system (IFMS) vehicles and related services. |
| 52.252-2 Clauses Incorporated by Reference | | A | A | I | 52.107(b) | The contracting officer shall insert the clause at 52.252-2, Clauses Incorporated by Reference, in solicitations and contracts in order to incorporate clauses by reference. |
| 52.252-4 Alterations in Contract | | A | A | I | 52.107(d) | The contracting officer shall insert the clause at 52.252-4, Alterations in Contract, in solicitations and contracts in order to revise or supplement, as necessary, other parts of the contract, or parts of the solicitations that apply to the contract phase, except for any clause authorized for use with a deviation. |
| 52.252-6 Authorized Deviations in Clauses | | A | A | I | 52.107(f) | The contracting officer shall insert the clause at 52.252-6, Authorized Deviations in Clauses, in solicitations and contracts that include any FAR or supplemental clause with an authorized deviation. Whenever any FAR or supplemental clause is used with an authorized deviation, the contracting officer shall identify it by the same number, title, and date assigned to the clause when it is used without deviation, include regulation name for any supplemental clause, except that the contracting officer shall insert "(DEVIATION)" after the date of the clause. |
| 52.253-1 Computer Generated Forms | | A | A | I | 53.111 | Contracting officers shall insert the clause at 52.253-1, Computer Generated Forms, in solicitations and contracts that require the contractor to submit data on Standard or Optional Forms prescribed by this regulation; and, unless prohibited by agency regulations, forms prescribed by agency supplements. |

**Clause Matrix for Department Of Energy**
**Management and Operating Contracts**
**Part II -- DEAR Clauses (Parts 952 and 970)**
**(Thru DEAR Final Rule dated 7/28/2002)**
**(10/04/2002)**

**KEY:**

R = Required
A = Required when applicable
O = Optional

M&O = Management and Operating contract
UCF = Uniform Contract Format

General instruction: Set forth below are clauses prescribed in DEAR Parts 952 and 970 to be used in addition to the FAR Part 52 contract clauses set forth in Part I. Prior to incorporating a clause identified below, the clause prescription and the "FAR/DEAR Clause Secondary Citation" should be reviewed.

This listing does not include solicitation provisions.

| DEAR Clause Number Title | FAR/DEAR 952 Secondary Clause Citation | Prescribed In | M&O For Profit | M&O Non-Profit | UCF | DEAR Prescription/Notes |
|---|---|---|---|---|---|---|
| 952.202-1 Definitions | FAR 52.202-1 | 902.200 | R | R | I | As prescribed by 48 CFR Subpart 2.2, insert the clause at 48 CFR 52.202-1, Definitions, but modify the clause to limit the definition at paragraph (a) to encompass only the Secretary, Deputy Secretary, or Under Secretary of the Department of Energy, and the Chairman, Federal Energy Regulatory Commission.<br><br>The contracting officer shall also add a paragraph at the end of the clause that defines "DOE" as meaning the United States Department of Energy and "FERC" as meaning the Federal Energy Regulatory Commission. Additional definitions may be included, provided they are consistent with the clause, the Federal Acquisition Regulation and this Department of Energy Acquisition Regulation. |
| 952.203-70 Whistleblower Protection for Contractor Employees | | 903.971 | A | A | I | The contracting officer shall insert the clause at 952.203-70, Whistleblower Protection for Contractor Employees, in contracts that involve work to be done on behalf of DOE directly related to activities at DOE-owned or leased sites. |
| 952.204-2 Security | | 904.404(d)(1) | A | A | I | The contracting officer shall insert the clause at 952.204-2 in all contracts which involve access to classified information, nuclear material, or access authorizations. |
| 952.204-70 Classification/Declassification | | 904.404(d)(2) | A | A | I | The contracting officer shall insert the clause at 952.204-70 in all contracts which involve access to classified information, nuclear material, or access authorizations. |
| 952.204-71 Sensitive Foreign Nations Controls | | 904.404(d)(3) | A | A | I | The contracting officer shall insert the clause at 952.204-71 in unclassified research contracts which may involve making unclassified information about nuclear technology available to certain sensitive foreign nations. The contractor shall be provided at the time of award the listing of nations included in DOE 1240.2, (see current version) Attachment 3, and any subsequent changes. (The attachment referred to in the clause shall set forth the applicable requirements of the DOE regulations on dissemination of unclassified published and unpublished technical information to foreign nations.) |

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| 204-72 Disclosure of Information | | 904.404(d)(4) | - | A | I | This clause should be used in place of the clauses entitled "Security" and "Classification" in contracts with educational institutions for research work performed in their own institute facilities that are not likely to produce classified information. |
| 952.204-74 Foreign Ownership, Control, or Influence Over Contractor | | 904.7005(b) | R | R | I | The contracting officer shall insert the clause at 952.204-74 in all management and operating contracts. ***(NOTE: See Acquisition Letter 99-03 for the current clause language. The clause is currently being updated in a formal rulemaking.)*** |
| 952.204-75 Public Affairs | | 904.7201 | A | A | I | The contracting officer shall insert the clause at 952.204-75 in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities. |
| 952.208-7 Tagging of Leased Vehicles | | 908.1104(e) | A | A | I | The clause at 48 CFR 952.208-7, Tagging of Leased Vehicles, shall be inserted whenever a vehicle(s) is to be leased over 60 days, except for those vehicles exempted by (FPMR) 41 CFR 101-38.6. |
| 952.209-72 Organizational Conflicts of Interest | | 970.0905<br>----------<br>909.507-2 (a)(1) | A | A | I | Management and operating contracts shall contain an organizational conflict of interest clause substantially similar to the clause at 48 CFR 952.209-72, Organizational Conflicts of Interest, and which is appropriate to the statement of work of the individual contract. In addition, the contracting officer shall assure that the clause contains appropriate restraints on intra-corporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates. Such restraints shall include personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The contracting officer is responsible for ensuring that M&O contractors adopt policies and procedures in the award of subcontracts that will meet the Department's need to safeguard against a biased work product and an unfair competitive advantage. To this end, the organizational conflicts of interest clause in management and operating contracts shall include Alternate I.<br>----------<br>The contracting officer shall insert the clause at 48 CFR 952.209-72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services expected to exceed the simplified acquisition threshold.Note: Contracting officers may make appropriate modifications where necessary to address the potential for organizational conflicts of interest in individual contracts. Contracting officers shall determine the appropriate term of the bar of paragraph (b)(1)(i) of the clause at 48 CFR 952.209-72 and enter that term in the blank provided. In the usual case of a contract for advisory and assistance services a period of three, four, or five years is appropriate; however, in individual cases the contracting officer may insert a term of greater or lesser duration. |
| 952.211-71 Priorities and Allocations (Atomic Energy) | | 911.604(b) | A | A | I | The contracting officer shall insert the clause at 952.211-71, Priorities and Allocations (Atomic Energy), in contracts that are placed in support of authorized DOE atomic energy programs. |

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| 215-70 y Personnel | | 915.408-70 | A | A | I | The contracting officer (after deleting "under the clause at 48 CFR 970.5203-3, Contractor's Organization" from paragraph (a) if not a management and operating contract) shall insert the clause at 952.215-70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel. |
| 952.217-70 Acquisition of Real Property | | 917.7403 | A | A | I | The clause at 48 CFR 952.217-70 shall be included in contracts or modifications where contractor acquisitions are expected to be made. |
| 952.223-72 Radiation Protection and Nuclear Criticality | | 970.2303-2(b) | A | A | I | The clause set forth in 952.223-72, Radiation Protection and Nuclear Criticality, shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with States under section 274 of the Atomic Energy Act). |
| 952.223-75 Preservation of Individual Occupational Radiation Exposure Records | | 952.223-75 | A | A | I | The contracting officer shall insert this clause in contracts containing 952.223-71, Integration of environment, safety, and health into work planning and execution, or 952.223-72, Radiation protection and nuclear criticality. |
| 952.224-70 erwork Reduction Act | | 952.224-70 | A | A | I | The contracting officer shall insert the clause at 952.224-70 if it is anticipated that information collection from 10 or more persons will be necessary under the contract. |
| 952.225-70 Subcontracting for Nuclear Hot Cell Services | | 925.7004 | A | A | I | The contracting officer shall insert the clause at 952.225-70 in solicitations and contracts involving nuclear hot cell services. This clause does not flow down to second-tier subcontracts. |
| 952.226-71 Utilization of Energy Policy Act Target Entities | | 926.7007(b) | A | A | I | The contracting officer shall insert this clause in contracts containing 952.223-71, Integration of environment, safety, and health into work planning and execution, or 952.223-72, Radiation protection and nuclear criticality. |
| 952.226-72 Energy Policy Act Subcontracting Goals and Reporting Requirements | | 926.7007(c) | A | A | I | The contracting officer shall insert the clause at 952.226-72, Energy Policy Act Subcontracting Goals and Reporting Requirements, in contracts for Energy Policy Act requirements with an award value in excess of $500,000 ($1,000,000 in the case of construction).<br><br>Note: The clause requires the incorporation of percentage goals by the contracting officer. |
| 952.226-74 Displaced Employee Hiring Preference | | 926.7104 | A | A | I | The contracting officer shall insert the clause at 952.226-72, Energy Policy Act Subcontracting Goals and Reporting Requirements, in contracts for Energy Policy Act requirements with an award value in excess of $500,000 ($1,000,000 in the case of construction). |

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| 227-9 ..und of Royalties | | 927.206-2 | A | A | I | The contracting officer shall insert the clause at 952.227-9 in solicitations and contracts for experimental, research, developmental, or demonstration work or other solicitations and contracts in which the contracting officer believes royalties will have to be paid by the contractor or a subcontractor of any tier. |
| 952.231-70 Date of Incurrence of Cost | | 931.205-32(a) | A | A | I | To the extent practical, known expenditures of precontract costs under DOE contracts should be governed by establishing advance understandings as contemplated by FAR 31.109. Contracts that include authorized precontract costs shall include the "Date of Incurrence of Cost" clause specified at 952.231-70. |
| 952.236-71 Inspection in Architect-Engineer contracts | | 936.609-3 | A | A | E | In addition to the clause at FAR 52.236-24, the contracting officer shall insert the clause at 952.236-71 in architect-engineer contracts. |
| 952.237-70 Collective Bargaining Agreements–Protective Services | | 937.7040 | A | A | I | The contracting officer shall insert the clause at 952.237-70 in all protective services solicitations and contracts involving DOE-owned facilities requiring continuity of services for public safety and national defense reasons. See also, 922.103-5, Contract clauses, which prescribes use of the clause at FAR 52.222-1, Notice to the Government of Labor Disputes. |
| 2.242-70 nical Direction | | 942.270-2 | O | O | I | The clause at 952.242-70, or a clause substantially the same, may be inserted in solicitations and contracts when a designated Contracting Officer's Representative will issue technical direction to the contractor under the contract. |
| 952.247-70 Foreign Travel | | 947.7002 | A | A | I | When foreign travel may be required under the contract, the contracting officer shall insert the clause at 48 CFR 952.247-70, Foreign Travel. |
| 952.250-70 Nuclear Hazards Indemnity Agreement | | 970.5070-3 (a) | A | A | I | The clause at 48 CFR 952.250-70, Nuclear Hazards Indemnity Agreement, shall be included in all management and operating contracts involving the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned, facility for use by DOE or its contractors. The clause at 48 CFR 952.250-70 also shall be included in any management and operating contract for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.<br><br>Note: The clause at 48 CFR 952.250-70 shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170 c. or k. of the Act for activities to be performed under the contract. |
| 952.251-70 Contractor Employee Travel Discounts | | 951.7002 | A | A | I | The contracting officer shall insert the clause at 952.251-70, Contractor employee travel discounts, in all cost-reimbursable solicitations and contracts when significant costs for rail travel, car rental, or lodging will be required to perform the contract. The contracting officer may furnish the contractor with appropriate identification letters. |

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| 5203-1 ..nagement controls | | 970.0370-2(a) 970.3270(a)(4) | R | R | I | The contracting officer shall insert the clause at 970.5203-1, Management Controls, in all management and operating contracts. |
| 970.5203-2 Performance improvement and collaboration | | 970.0370-2(b) | R | R | I | The contracting officer shall insert the clause at 970.5203-2, Performance Improvement and Collaboration, in all management and operating contracts. |
| 970.5203-3 Contractor's organization | | 970.0371-9 | R | R | I | The contracting officer shall insert the clause at 970.5203-3, Contractor's Organization, in all management and operating contracts. The approval authority of the Secretary of Energy required in paragraph (c) may not be delegated. In paragraph (a) the words "and managerial personnel (see 48 CFR 970.5245-1(j))" may be inserted after "(see 48 CFR 952.215-70)". |
| 970.5204-1 Counterintelligence | | 970.0404-4(a) | A | A | I | The contracting officer shall insert the clause at 970.5204-1, Counterintelligence, into all management and operating contracts and other contracts for the management of DOE-owned facilities which include the security and classification/declassification clauses.<br><br>Note: The contracting officer shall refer to 904.404 and 904.7103 for the prescription of solicitation provisions and contract clauses relating to safeguarding classified information and foreign ownership, control, or influence over contractors. |
| 970.5204-2 Laws, regulations, and DOE ·ctives | | 970.0470-2 | R | R | I | The contracting officer shall insert the clause at DEAR 970.5204-2, Laws, Regulations, and DOE Directives, in management and operating contracts. The contracting officer may modify the clause to indicate the location in the contract of List A, List B, or both. |
| 970.5204-3 Access to and ownership of records | | 970.0407-1-3 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5204-3, Access to and Ownership of Records, in management and operating contracts. |
| 970.5208-1 Printing | | 970.0808-3 | R | R | I | The contracting officer shall insert the clause at 970.5208-1, Printing, in all management and operating contracts. |
| 970.5215-1 Total Available Fee: Base fee amount and performance fee amount | | 970.1504-5(a) | A | A | I | (a) The contracting officer shall insert the clause at 48 CFR 970.5215-1, Total Available Fee: Base Fee Amount and Performance Fee Amount, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, that include cost-plus-award-fee arrangements.<br><br>(1) The contracting officer shall include the clause with its Alternate I when the award fee cycle consists of two or more evaluation periods.<br><br>(2) The contracting officer shall include the clause with its Alternate II when the award fee cycle consists of one evaluation period.<br><br>(3) The contracting officer shall include the clause with its Alternate III when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment.<br><br>(4) The contracting officer shall include the clause with its Alternate IV when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option. |

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| 5215-2 ..ake-or-Buy Plan | | 970.1504-5(b) | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5215-2, Make-or-Buy Plan, in management and operating contracts. The contracting officer may add a sentence at the end of paragraph (d) of the clause to identify where in the contract the make-or-buy plan is located. |
| 970.5215-3 Conditional payment of fee, profit, or incentives | | 970.1504-5(c) | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5215-3, Conditional Payment of Fee, Profit, or Incentives, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee.<br><br>The contracting officer shall include the clause with its Alternate I in contracts awarded on cost-plus-award-fee, multiple fee, or incentive fee basis which may include various types of fee and incentive arrangements. |
| 970.5215-4 Cost reduction | | 970.1504-5(d) | A | A | I | The contracting officer shall insert the clause at 48 CFR 970.5215-4, Cost Reduction, in management and operating contracts, and other contracts determined by the Procurement Executive, or designee, if cost savings programs are contemplated. |
| 970.5222-1 Collective bargaining agreements-management and operating contracts | | 970.2201-1-3 | R | R | I | In addition to the clause at 48 CFR 52.222-1, Notice to the Government of Labor Disputes, the contracting officer shall insert the clause at 970.5222-1, Collective Bargaining Agreements-Management and Operating Contracts, in all management and operating contracts. |
| 970.5222-2 Overtime management | | 970.2201-2-2 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5222-2, Overtime Management, in management and operating contracts. |
| .5223-1 ..egration of environment, safety, and health into work planning and execution | | 970.2303-2(a) | A | A | I | When work under management and operating contracts and subcontracts thereunder is to be performed at a facility where DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 48 CFR 970.5223-1, Integration of Environment, Safety and Health into Work Planning and Execution, shall be used in such contract or subcontract and made applicable to the work if conditions in paragraphs (a)(1) through (3) of this section, are satisfied:<br><br>(1) DOE work is segregated from the contractor's or subcontractor's other work;<br><br>(2) The operation is of sufficient size to support its own safety and health services; and<br><br>(3) The facility is government-owned, or leased by or for the account of the government. |
| 970.5223-2 Acquisition and use of environmentally preferable products and services | | 970.2304-2 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5223-2, Acquisition and Use of Environmentally Preferable Products and Services, in management and operating contracts. |
| 970.5223-4 Workplace Substance Abuse Programs at DOE sites | | 970.2305-4(b) | A | A | I | The contracting officer shall insert the clause at 970.5223-4, Workplace Substance Abuse Programs at DOE Sites, in contracts for the management and operation of DOE-owned or-controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended. |
| .5226-1 ..versity plan | | 970.2671-2 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5226-1, Diversity Plan, in all management and operating contracts. |

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| 5226-2 Workforce restructuring under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993. | | 970.2672-3 | A | A | I | The contracting officer shall insert the clause at 48 CFR 970.5226-2, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, in contracts for the management and operation of Department of Energy Defense Nuclear Facilities and, as appropriate, in other contracts that include site management responsibilities at a Department of Energy Defense Nuclear Facility. |
| 970.5226-3 Community commitment | | 970.2673-2 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5226-3, Community Commitment, in all management and operating contracts. |
| 970.5227-1 Rights in data-facilities | | 970.2704-3(a) | A | A | I | The contracting officer shall insert the clause at 48 CFR 970.5227-1, Rights in Data-Facilities, in management and operating contracts which do not contain the clause at 48 CFR 970.5227-2, Rights in Data-Technology Transfer.<br><br>The contracting officer shall include the clause with its Alternate I in contracts where access to Category C-24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors. |
| 970.5227-2 Rights in data-technology transfer | | 970.2704-3(b) | A | A | I | The contracting officer shall insert the clause at 970.5227-2, Rights in Data-Technology Transfer, in management and operating contracts which contain the clause at 970.5227-3, Technology Transfer Mission.<br><br>The contracting officer shall include the clause with its Alternate I in contracts where access to Category C-24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors. |
| 5227-3 nology transfer mission | | 970.2770-4(a) | A | A | I | The contracting officer shall insert the clause at 970.5227-3, Technology Transfer Mission, in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract. |
| 970.5227-4 Authorization and consent | | 970.2702-1 | R | R | I | Contracting officers must use the clause at 970.5227-4, Authorization and Consent, instead of the clause at 48 CFR 52.227-1. |
| 970.5227-5 Notice and assistance regarding patent and copyright infringement | | 970.2702-2 | R | R | I | Contracting officers must use the clause at 970.5227-5, Notice and Assistance Regarding Patent and Copyright Infringement, instead of the clause at 48 CFR 52.227-2. |
| 970.5227-6 Patent indemnity-subcontracts | | 970.2702-3 | R | R | I | Contracting officers must use the clause at 970.5227-6, Patent Indemnity-Subcontracts to assure that subcontracts appropriately address patent indemnity. |
| 970.5227-7 Royalty information. | | 970.2702-4 | R | R | I | Contracting officers must use the solicitation provision at 970.5227-7, Royalty Information, and the clause at 970.5227-8, Refund of Royalties instead of the provision at 48 CFR 52.227-8 and the clause at 48 CFR 52.227-9, respectively. |
| 970.5227-8 Refund of royalties | | 970.2702-4 | R | R | I | Contracting officers must use the solicitation provision at 970.5227-7, Royalty Information, and the clause at 970.5227-8, Refund of Royalties instead of the provision at 48 CFR 52.227-8 and the clause at 48 CFR 52.227-9, respectively. |

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| 5227-10 Patent rights-management and operating contracts, nonprofit organization or small business firm contractor | | 970.2703-1(b)(2)<br><br>970.2703-2(g) | - | R | I | If the M&O contractor is a nonprofit organization or small business firm having technology transfer authority, the following clauses are inserted into the M&O contract: 970.5227-3 and 970.5227-10.<br><br>Alternate 1-Weapons Related Research or Production. If DOE grants technology transfer authority to a DOE facility, pursuant to Public Law 101-189, section 3133(d), and the DOE owned facility is involved in weapons related research and development, or production, then Alternate 1 of the patent rights clauses must be inserted into the M&O contract. Alternate 1 defines weapons related subject inventions and restricts the contractor's rights with respect to such inventions. |
| 970.5227-11 Patent rights-management and operating contracts, for-profit contractor, non-technology transfer | | 970.2703-1(b)(4) | A | - | I | If the M&O contract does not have a technology transfer mission and is to be performed by a for-profit, large business firm and does not have advance class waiver under 10 CFR part 784, the patent rights clause at 970.5227-11 is inserted into the M&O contract, and the Technology Transfer Mission clause is inapplicable. |
| 970.5227-12 Patent rights-management and operating contracts, for-profit contractor, advance class waiver | | 970.2703-1(b)(3)<br><br>970.2703-2(g) | A | - | I | If the M&O contract has technology transfer as a mission and is to be performed by a for-profit, large business firm that has been granted an advance class waiver, the following clauses are inserted into the M&O contract: 970.5227-3 and 970.5227-12. The terms of the clause at 970.5227-12 are subject to modification to conform to the terms of the class waiver.<br><br>Alternate 1-Weapons Related Research or Production. If DOE grants technology transfer authority to a DOE facility, pursuant to Public Law 101-189, section 3133(d), and the DOE owned facility is involved in weapons related research and development, or production, then Alternate 1 of the patent rights clauses must be inserted into the M&O contract. Alternate 1 defines weapons related subject inventions and restricts the contractor's rights with respect to such inventions. |
| 970.5228-1 Insurance-Litigation and claims | | 970.2803-2 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5228-1, Insurance-Litigation and Claims, in all management and operating contracts. Paragraphs (h)(3) and (j)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract. |
| 970.5229-1 State and local taxes | | 970.2904-1(b) | R | R | I | Pursuant to 48 CFR 29.401-6(b), the clause at 48 CFR 52.229-10, State of New Mexico Gross Receipts and Compensating Tax, is applicable to management and operating contracts that meet the three conditions stated. The contracting officer shall modify paragraph (b) of the clause to replace the phrase "Allowable Cost and Payment clause" with the phrase "Payments and advances." |
| 970.5231-4 Preexisting conditions | | 970.3170 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5231-4, Preexisting Conditions, in all management and operating contracts.<br><br>(a) The contracting officer shall include the clause with its Alternate I in contracts with incumbent management and operating contractors.<br><br>(b) The contracting officer shall include the clause with its Alternate II in contracts with management and operating contractors not previously working at that particular site or facility. |

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| 5232-1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud | | 970.3200-1-1 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5232-1, Reduction or suspension of contract payments, in management and operating contracts. |
| 970.5232-2 Payments and advances | | 970.3270(a)(1) | R | R | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-2, Payments and Advances, in all management and operating contracts:<br><br>(i) The contracting officer shall insert the basic clause with its Alternate I if a separate fixed-fee is provided for a separate item of work.<br><br>(ii) The contracting officer shall insert the basic clause with its Alternate II when total available fee provisions in the basic clause are used.<br><br>(iii) The contracting officer shall insert the basic clause with its Alternate III in management and operating contracts with integrated accounting systems.<br><br>(iv) The contracting officer shall insert the basic clause with its Alternate IV in management and operating contracts without integrated accounting systems. |
| 970.5232-3 Accounts, records, and inspection | | 970.3270(a)(2) | R | R | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-3, Accounts, records, and inspection , in all management and operating contracts.<br><br>(i) If the contract includes the clause at 48 CFR 52.215-11, Price Reduction for Defective Cost or Pricing Data, the contracting officer shall use the clause with its Alternate I.<br><br>(ii) If the contract is a cost-reimbursement contract involving an estimated cost exceeding $5 million and expected to run for more than 2 years, or any other cost-reimbursement contract determined by the Head of the Contracting Activity in which the contractor has an established internal audit organization, the contracting officer shall insert the clause with its Alternate II. |
| 970.5232-4 Obligation of funds | | 970.3270(a)(3) | R | R | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-4, Obligation of Funds, in all management and operating contracts.<br><br>Note: The contracting officer may use the clause with its Alternate I in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause. |
| 970.5232-5 Liability with respect to cost accounting standards | | 970.3270(a)(5) | R | R | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-5, Liability with respect to cost accounting standards, in all management and operating contracts. |
| 970.5232-6 Work for others funding authorization | | 970.3270(a)(6) | R | R | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-6, Work for others funding authorization, in all management and operating contracts. |

| DEAR Clause Number Title | FAR/DEAR 952 Secondary Clause Citation | Prescribed In | M&O For Profit | M&O Non-Profit | UCF | DEAR Prescription/Notes |
|---|---|---|---|---|---|---|
| 5232-7 ...nancial management system | | 970.3270(b)(1) | A | A | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-7, Financial management system, in all management and operating contracts with integrated accounting systems. |
| 970.5232-8 Integrated accounting | | 970.3270(b)(2) | A | A | I | The following DEAR clause is a standard financial management clause. The contracting officer shall insert the clause at 48 CFR 970.5232-8, Integrated accounting, in all management and operating contracts with integrated accounting systems. |
| 970.5235-1 Federally funded research and development center sponsoring agreement | | 970.3501-4 | A | A | I | The contracting officer shall insert the clause at 48 CFR 970.5235-1, Federally Funded Research and Development Center Sponsoring Agreement, in all solicitations and contracts for the management and operation of an FFRDC sponsored by the Department of Energy. |
| 970.5236-1 Government facility subcontract approval | | 970.3605-2 | A | A | I | The clause in 48 CFR 970.5236-1, Government Facility Subcontract Approval, shall be used in management and operating contracts when the contractor will not perform covered work with its own forces but may procure construction by subcontract. |
| 970.5237-2 Facilities management | | 970.3770-2 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5237-2, Facilities Management, in all management and operating contracts. |
| 970.5242-1 Penalties for unallowable costs | | 970.4207-03-70 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5242-1, Penalties for unallowable costs, in all management and operating solicitations and contracts. |
| .5243-1 nges | | 970.4302-1 | R | R | I | The contracting officer shall insert the clause at 48 CFR 970.5243-1, Changes, in all management and operating contracts. |
| 970.5244-1 Contractor purchasing system | | 970.4403 | R | R | I | The contracting officer shall insert the clause at 970.5244-1, Contractor Purchasing System, in all management and operating contracts. |
| 970.5245-1 Property | | 970.4501-1(a) | R | R | I | The contracting officer shall insert the clause at 970.5245-1, Property, in management and operating contracts.<br><br>Paragraph (f)(1)(i)(c) of the clause applies to a non-profit contractor only to the extent specifically provided in the individual contract. Specific managerial personnel may be listed in paragraph (j), provided their listing is consistent with the clause and the DEAR.<br><br>The contracting officer shall insert the basic clause with its Alternate I in contracts with nonprofit contractors |
| | | | | | | |

# Headquarters Policy Flash

**FLASH 2002-35**

DATE: November 8, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Revisions to Department of Energy (DOE) Acquisition Guide Chapter 71, Part 2, "Performance-Based Incentives and Related Approvals"**

SUMMARY: DOE Acquisition Guide, Chapter 71, Part 2. "Past Performance-Based Incentives and Related Approvals," provides guidance on review and approval of Performance-Based contracting actions, and identifies the associated responsibilities of Headquarters and Field elements.

**FLASH 2002-35**
**November 8, 2002**

As part of its continuing review of the Department's performance-based major site and facility management contracts, the Office of Inspector General has made recent recommendations (under IG Audit Report #CR-B-01-01, dated May 2001, and IG Audit Report #0510, dated July 2001) regarding the evaluation, analysis, and negotiation of fee and performance-based incentives.

Those recommendations have been incorporated into the Acquisition Guide. Specifically, the Guide has been amended to include among the duties of Heads of Contracting Activity (HCA), or for the National Nuclear Security Administration (NNSA) the HCA or designees, the responsibilities to:

- ensure, to the extent appropriate, that incentives are structured in a manner that will improve contractor performance;
- in accordance with procedures of the applicable Headquarters Program office or NNSA, ensure Headquarters Program office review, coordination and approval as appropriate, of performance-based incentives and Performance Evaluation and Measurement Plans or a similar document;
- ensure that the impact of year-to-year changes to operating conditions and/or performance metrics, to the extent appropriate, are evaluated, considered, and adequately supported through documentation in the negotiation of available fee; and
- establish documentation requirements sufficient to support the evaluation, and negotiation of and, to the extent applicable, changes to performance-based requirements, objectives, measures and incentives.

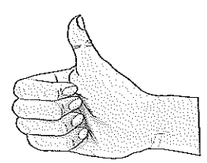
Questions concerning this Acquisition Guide Chapter should be addressed to Jim Tower at (202) 586-4294 or via e-mail at jim.tower@pr.doe.gov.

Gwendolyn S. Cowan
Director

cc: PPAG Members

Attachment

# Performance-Based Incentives and Related Approvals



*[Parts of this guidance were previously included in Acquisition Letters 95-04, 97-06 and 97-08]*

## ❒ Overview

This section provides guidance on review and approval of Performance-based contracting actions, and identifies the associated responsibilities of Headquarters and Field elements.

**National Nuclear Security Administration Guidance**

For purposes of the guidance contained herein, with respect to National Nuclear Security Administration (NNSA) Contracting Offices:

- "Head of Contracting Activity (HCA)" means the HCA or designee. For NNSA the HCA is the Deputy Director, Office of Procurement and Assistance Management (OPAM), NNSA,
- "Procurement Executive" means the Senior Procurement Executive who is the Director, OPAM, NNSA, and
- Substitute "OPAM, NNSA" for Office of Contract Management (OCM).

**The Office of Contract Management (OCM) (ME-62)**

This office reviews and approves the following types of actions:

- Fee and incentive structures for Performance-Based Management Contracts (PBMCs), Management and Integration (M&I) contracts, and other major site and facility management contracts.
- Acquisition plans, solicitations, and contracts for Department of Energy provatization projects funded by the Office of Environmental Management (EM).
- Requirements pertaining to HCA waiver requests from Headquarters performance-based incentive approvals.

**Requirements Organization**

- Identify contract requirements that may be suitable for performance-based contracting methods.
- Establish and maintain baseline information to be used to measure both contractor performance and contracting improvements resulting from the use of performance-based contracting methods.
- With regard to individual requirements:
  - ✓ Develop accurate and complete statements of work that, to the maximum extent practicable, define the Government's desired performance in terms of outcome, results or final work product.
  - ✓ Develop criteria and metrics that can be used to measure a contractor's performance in terms of quality, timeliness, and cost.
  - ✓ Ensure that requirements initiators and Contracting Officer Representatives receive appropriate training in developing performance-based statements of work and administering performance-based contracts.

**Contracting Organizations**

- Coordinate the submission of acquisition plans, solicitations, contracts, performance objectives and fee structures, and other appropriate documentation relevant to the analysis review and or approval requirements identified herein with the assigned points of contact within OCM at the earliest possible time.

- Act as advocates for, and assist in the development of, performance-based, results-oriented statements of work.

- Determine the acquisition method (i.e., sealed bids, competitive proposals) and develop the Invitation for Bids or the Request for Proposals.

- Review statements of work to ensure adequacy, including:

  - definition of the requirement in terms of outcome, results, or final work product

  - representative of the Government's minimum needs

  - sufficiently detailed to permit contract enforcement.

- Determine the appropriate contract type and ensure that solicitation provisions and contract clauses are compatible with the requirements and do not inhibit full and open competition.

- Provide technical guidance and support to requirements staff in such areas as the development of performance-based, results oriented work statements, acquisition approach, and development of evaluation and selection criteria.

## ❒ Background

The October 1997 Report to the Secretary of Energy entitled "Assessment Of The Use of Performance-Based Incentives In Performance Based Management and Management and Integration Contracts" identified areas where improvements were needed in the Department of Energy's processes and practices relating to the development and administration of performance-based objectives and associated incentives in PBMCs and M&I contracts.

The report concluded that:

✓ performance objectives and associated incentives were, in some cases, excessive in number, did not directly relate to the critical strategic or tactical objectives of the program or site, or represented areas not suited for the application of incentives

✓ the amount of fee allocated to a specific objective was not always reflective of the actual value or importance of the work; and,

✓ performance objectives were sometimes focused on process milestones or the development of internal systems rather than outcomes.

The report made a number of recommendations with the objective of strengthening the Department's activities in these areas, including:

(1) instituting a more structured management approach to the development of performance-based objectives, measures, and incentives; and

(2) strengthening the Department's framework of directives and instructional information on the use of PBIs. In this regard, the report recommended a strengthening of policies and guidance to be used in developing performance objectives and incentives.

Regarding administration of PBIs, the report recommended that each field office institute a structured process for the development of performance objectives and incentives, including the establishment a single authority to coordinate the development of performance objectives and related incentives.

The report also recommended that HCAs identify mechanisms, responsibilities, and authorities for ensuring that contractor performance against objectives is appropriately monitored and verified.

Additionally, the Secretary of Energy has directed that the Director, OPAM review and approve contract-specific performance measures and associated incentives under PBMCs and M&I contracts to ensure that they are appropriately structured and administered.

The Secretary also has directed that the Director, OPAM establish a process for the review and approval of solicitations and contracts for privatization projects funded by the EM.

## ❒ Guidance

**A. Review and approval of PBMC and M&I contract performance objectives and fee structures.**

(1) All performance objectives and associated fee mechanisms (to include performance-based incentives, award fee plans, and cost reduction/cost saving incentive programs) are submitted to OCM (ME-62), within OPAM for review and approval prior to commencement of negotiations with an offeror or, in the case of an existing contract, the incumbent contractor.

To the extent that an approved fee structure is substantially changed as a result of negotiations, funding, or program changes prior to its incorporation into the contract, it is resubmitted to OCM for final approval.

(2) HCAs are responsible for establishing a process internal to their organization to (a) assess all performance objectives, award fees, and specific incentives tied to discrete performance objectives to ensure that they are well-defined, rational, appropriately integrated prior to their negotiation and inclusion in the contract, and (b) ensure that mechanisms exist as part of contract administration for the validation of contractor performance against objectives.

(3) The Procurement Executive may waive these review and approval requirements upon an affirmative demonstration by the HCA that internal processes are adequate to ensure that the performance measures and associated fee structures are properly developed and administered.

**B. Review and approval of solicitations and contracts for EM-funded privatization projects.**

Acquisition plans, solicitations, and contracts for EM-funded privatization projects are submitted to OCM for review and approval. OCM will provide for the coordination of the review and approval process with other cognizant Headquarters organizations.

**C. Development and administration of performance-based incentives**

HCAs are to establish formal processes for the development and administration of performance-based requirements, objectives, measures and incentives used in performance-based award fee contracts.

At a minimum, such processes:

✓ ensure appropriate, timely, and integrated participation by key operations/field office program, technical, functional and procurement personnel in the identification of applicable DOE strategic, program, and site plan goals and objectives that should drive contract performance requirements;

✓ in accordance with procedures of the applicable Headquarters Program office or NNSA, ensure Headquarters Program office review, coordination and approval, as appropriate, of performance-based incentives and

Performance Evaluation and Measurement Plans or similar document;

- ✓ ensure, to the extent appropriate, that incentives are structured in a manner that will improve contractor performance;
- ✓ ensure that the impact of year-to-year changes to operating conditions and/or performance metrics, to the extent appropriate, are evaluated, considered, and adequately supported through documentation in the negotiation of available fee;
- ✓ identify key operations/field office organizational and individual roles and responsibilities pertaining to the identification and development of performance-based requirements, objectives, measures and incentives;
- ✓ ensure that a specific individual(s) or organizational components accountable for final selection and approval of contract-specific performance-based requirements, objectives, measures and incentives are designated;
- ✓ establish documentation requirements sufficient to support the selection, evaluation, and negotiation of, and to the extent applicable, changes to performance-based requirements, objectives, measures and incentives; and,
- ✓ identify, through a quality assurance surveillance plan for the contract, the critical contract administration functions, and the specific roles, responsibilities and authorities, needed to ensure that contractor performance against objectives is appropriately monitored and that performance accomplishments are adequately documented and verified.

**D. Administrative requirements for PBI waiver requests**

Performance objectives and associated incentives used in performance-based management contracts, management and integration contracts, and other major site and facility management contracts are to be submitted to the OCM for review and approval prior to commencement of negotiations with an offeror or incumbent contractor.

For NNSA contracts, performance objectives and associated incentives will be submitted to the Office of the Associate Administrator for Facilities and Operations, NNSA.

The Procurement Executive may waive the review and approval requirements upon demonstration by the HCA that internal processes are adequate to ensure that performance measures and associated incentives are properly developed and administered.

# Headquarters Policy Flash

**FLASH 2002-36**

DATE: November 19, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Updates of the Department of Energy (DOE) Acquisition Guide**

SUMMARY: Two new chapters have been added to the Acquisition Guide - Chapter 9 "Debarment and Suspension" as well as a subchapter Chapter 15 "Source Selection Practices".

## ■ Chapter 9 - Debarment and Suspension

This chapter has been added to the DOE Acquisition Guide to provide Guidance to contracting personnel on actions that may result in debarment or suspension.

Frequently, front line contracting personnel are the first to become aware of contracting irregularities that may require administrative action. Contracting personnel have the responsibility to notify the Debarring/ Suspending Official when they become aware of conduct that calls the contractor's present responsibility into question. This could include violation of contract or subcontract terms or willful failure to perform. While many debarment or suspension actions arise from referrals from the Inspector General, other debarment or suspension actions have resulted from failure to submit technical reports.

This chapter reminds contracting personnel to:

- remain vigilant in their administrative duties
- provides guidance on information to submit to the Debarring/Suspending Official.

Questions concerning this Acquisition Guide Chapter should be addressed to Cynthia Yee at (202) 586-1140 or via e-mail at cynthia.yee@hq.doe.gov

## ■ Chapter 15 - Source Selection Practices

This subchapter has been added to the DOE Acquisition Guide to provide guidance to contracting staff on conducting source selection.

In 1998, significant, and sometimes subtle, changes were made to long-standing policies, practices and procedures relating to competitive negotiation. These changes have placed an even greater responsibility and role on today's procurement professional to ensure that the integrity and fairness of a procurement is carried out and that the customer receives the best quality and services from the contract.

This subchapter provides a guide to a series of topics-focused dissertations on key areas of source selection. This guide does not present a road map of the source selection process, nor does it mandate activities or actions.

**FLASH 2002-36**
**November 19, 2002**

The intent of the guidance is to present useful "hands-on" information on key principles and practices that will enhance the effectiveness of the source selection process. *We believe that this information is not only beneficial to contracting professionals but also to others involved in source selection, such as Source Selection Officials, Source Evaluation Board Members, and Technical Evaluation Members. Accordingly, you are strongly encouraged to make this tool readily available to these groups.*

Questions concerning this Acquisition Guide Subchapter should be addressed to Richard Leotta at (202) 586-9073 or via e-mail at richard.leotta@pr.doe.gov.

Gwendolyn S. Cowan
Director

cc:
PPAG Members

# Debarment and Suspension

*[Reference: FAR 9.4; DEAR 909.4;]*

## ❑ Overview

This section provides guidance and instruction to Contracting personnel regarding debarment and suspension. As part of their responsibilities, Contracting Officers must take certain actions before awarding a contract and when they become aware of a contractor's conduct that could require administrative action. This section provides guidance on what specific actions are required.

## ❑ Background

***Guiding Principles***

- → Contracts are only awarded to offerors who demonstrate responsibility to perform.
- → Responsibility is a matter not only of capacity to perform, but also the trustworthiness of the offeror to perform.

FAR Subpart 9.4, Debarment, Suspension, and Ineligibility, prescribes and implements the policy that contracts will only be awarded to offerors who demonstrate responsibility to perform Government contracts and subcontracts. Responsibility is a matter not only of capacity to perform, but also the trustworthiness of the offeror to perform. While capacity to perform is largely a case specific situation, trustworthiness issues tend to have a more comprehensive impact on a broad range of contracts. For this reason, the Government has adopted policies and processes to preclude untrustworthy contractors from receiving Government contracts and subcontracts.

Debarment and suspension actions taken by one agency are recognized and effective for all Executive Branch agencies. Furthermore, debarment or suspension under procurement are also recognized as exclusions under nonprocurement, and vice versa. These exclusionary actions are taken to effectuate the Government's policy of contracting only with responsible contractors.

While in many agencies, the debarment and suspension function resides within the Office of General Counsel, at Department of Energy (DOE), the function is housed within the DOE Office of Procurement and Assistance Management as the decision to suspend or debar is considered a business decision, not a legal decision. The authority to debar or suspend a company at DOE is delegated to the Director, Office of Procurement and Assistance Management (ME-60). Support to the Director, Office of Procurement and Assistance Management, on matters related to debarment and suspension is provided by the Office of Management Systems and Services (ME-65). Neither the Head of the Contracting Activity nor the Contracting Officer has the authority to debar or suspend a company.

Contracting Officers therefore must provide the debarring and suspending official information to facilitate making appropriate decisions regarding debarment and suspension.

## Debarment/Suspension Responsibilities

FAR Subpart 9.4, Debarment, Suspension, and Ineligibility, describes the causes and effects of debarment and suspension on a contractor, and some of the responsibilities of Contracting Officers once a contractor or subcontractor has been debarred or suspended. These responsibilities include reviewing the General Services Administration List of Parties Excluded from Federal Procurement and Nonprocurement Programs before extending an award to an offeror or exercising an option under a contract, or reviewing an offeror's response to FAR clauses identifying criminal actions. Other government personnel have responsibilities before an exclusionary action is taken. For example, the Office of the Inspector General (IG) conducts investigations into allegations of criminal or civil misconduct.

Similarly, Contracting Officers have the responsibility to notify the Debarring/Suspending Official of conduct that may require administrative action. This includes providing relevant information concerning criminal or civil fraud actions involving the contractor or its personal agents, but also information related to a contractor's violation of the terms of a contract or subcontract so serious as to justify debarment, such as willful failure to perform a Government contract or subcontract, or a history of failure to perform, and or of unsatisfactory performance of one or more contracts or subcontracts. The following information should be provided to the Debarring/Suspending Official:

- Name and address of the company
- Contract Number
- Parties Involved
- Specific details of the matter

- The name and telephone number of the Contracting Officer with cognizance over the contract

Copies of relevant documents, such as letters to the company, should also be provided. Matters involving criminal misconduct should be referred to the IG.

Note that a referral for debarment/suspension to the debarring/suspending official does not necessarily result in the contractor's debarment or suspension. All matters are reviewed to determine if a cause for action exists and if there are any mitigating factors that may bear on the matter.

# Source Selection Practices

## Overview

Recent regulation changes have introduced greater flexibility and discretion into the source selection process. This section provides guidance to contracting staff on conducting source selection.

***Guiding Principles***

- √ Greater flexibility and discretion afforded by rule changes in source selection requires the contracting professional to be business managers as well as process managers.
- √ Contracting professionals need to continue to ensure that the fairness and integrity of the source selection process are rigorously maintained.

## Background

The last decade has seen significant change in many areas of procurement, particularly in the introduction of new tools and processes that help the procurement professional better meet the needs of demanding customers. The passage of the Federal Acquisition Reform Act in 1995 and the Federal Acquisition Streamlining Act in 1994, coupled with Government-wide and Department of Energy (DOE) contract reform efforts have not only changed traditional procurement processes but have also changed the role of the procurement professional. No longer are procurement professionals merely the keepers of what some view as an arcane process called Federal contracting.

One area that has received considerable attention in most all of the reform initiatives is source selection, as set forth in Part 15 of the Federal Acquisition Regulation (FAR).

In 1998, significant, and sometimes subtle, changes were made to long-standing policies, practices and procedures relating to competitive negotiation. These included the introduction of oral presentations, changes in the standards for determining competitive range, and new rules governing communications and the submission of best and final offers. These changes place an even greater responsibility on today's procurement professional to ensure that the integrity and fairness of a procurement is maintained and that the contract ultimately awarded delivers high-quality goods and services to the customer.

## General

In today's world, the procurement professional needs to be not only an expert in procurement laws, regulations and policies, but also an expert in business and market areas. The procurement professional is now an integral part of a team that manages all phases of the acquisition process, from requirements identification to contract close-out. This is reinforced in guiding principles for the Federal Acquisition System (see FAR 1.102).

This guide provides a series of topics-focused dissertations on key areas of source selection. The intent of the guide is to present DOE procurement professionals with useful "hands-on" information on key principles and practices that will enhance the effectiveness of the source selection process. The guide does not present a road map of the source selection process, nor does it mandate activities or actions. The source selection process is adequately set out in regulation and other instruction material. This guide should not be construed to convey any rights to third parties.

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# PART I. Draft Request For Proposal (DRFP)

**Background**

The Draft Request For Proposal (DRFP) is the initial, informal document(s) that communicates the Government's intentions/needs to industry and requests questions, comments, suggestions, and corrections that improve the final product. It is a communication tool used early in competitive acquisitions to promote a clearer understanding of the Government's requirements to industry and to obtain industry feedback on the planned acquisition. The DRFP need not include all of the sections of the Request For Proposal (RFP), but should contain as much as possible of the "business" sections necessary for industry to provide meaningful comments. As a minimum, the DRFP should include Section L (Instructions to Offerors) and Section M (Evaluation Criteria), and the Specification/Statement of Work.

No hard and fast rule exists as to when it is desirable to issue a DRFP; however, in the early stages of acquisition planning/procurement strategy development, the program officer(s), advisory (legal) staff and Contracting Officer/Contract Specialist are strongly encouraged to address the desirability of issuing a DRFP in advance of the final RFP. Likewise, no formal process for comment resolution presently exists. However, a methodology should be established to ensure implementation of beneficial comments in the final RFP as well as ensuring fair disposition of all comments.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 3.104-2 (General [Procurement Integrity]); FAR 15.201(Exchanges with Industry Before Receipt of Proposals); and FAR 5.101(b) (Methods of Disseminating Information)

**********

**Issues/Questions**

- ❒ When is it appropriate to issue a DRFP?
- ❒ What should a DRFP include?
- ❒ What are the requirements for publicizing a DRFP?
- ❒ What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?
- ❒ How should comments received in response to the DRFP be handled?

## Discussion Topics

**When is it appropriate to issue a Draft Request for Proposal (DRFP)?**

It is appropriate to use DRFP's whenever, in the Contracting Officer's (CO's) judgement, the acquisition will benefit significantly from early involvement from interested parties.
Considerations in determining the feasibility of issuing a DRFP in advance of an RFP for an acquisition include: complexity and dollar value, introduction of new business and/or technical requirements, timing and/or uncertainties as to the clarity of the proposed Statement of Work/Statement of Objective. DRFP's are not used for a noncompetitive procurement.

**What should a Draft Request for Proposal (DRFP) include?**

To the extent practicable, the DRFP should include all relevant parts of the solicitation, including the model contract, Statement of Work (SOW), technical requirements, instructions to offerors (Section L), and the evaluation criteria (Section M). The DRFP should identify the point of contact to whom comments should be directed, the preferred method by which contact may be established, i.e., via e-mail, facsimile, and the date by which all comments are due, etc. The DRFP should include a statement to the effect that "information presented in the DRFP is subject to change and that incurring expenses or beginning to formulate an approach in preparation for the acquisition based on information presented in the DRFP is solely at the potential offerors risk".

**What are the requirements for publicizing a DRFP?**

The Contracting Officer/Contract Specialist should publicize the DRFP in much the same manner as the final RFP would be publicized, using a variety of methods, such as posting announcements on the INTERNET using Federal Business Opportunities for Vendors (FBO for Vendors) at http://www.eps.gov/spg/, posting the DRFP on the DOE Industry Interactive Procurement System (IIPS) at http://e-center.doe.gov and those methods addressed at FAR 15.201(c) and FAR 5.101(b). Publication and response times for proposed contract actions at FAR 5.203 are not mandatory for DRFP's. The Contracting Officer should establish reasonable times for receipt of responses to DRFPs that reflect the nature of the product or service, the supply base, and the specifics of the individual procurement. Requirements shall be synopsized in accordance with FAR 5.203 prior to issuance of the solicitation. Alternatively, the notice of availability of a DRFP and a future date when the solicitation will be issued may be included in the same synopsis.

**What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?**

DRFP's provide an effective means to resolve potential contract issues and obtain feedback from prospective offerors in advance of issuing the final RFP. In certain cases, such information can lead to (1) significant cost savings and productivity enhancements; (2) reduce proposal preparation and evaluation time; (3) reduce the need for solicitation amendments and preclude other delays that disrupt timely completion of the acquisition; or (4) result in better proposals, end products and services.

The use of DRFP's can encourage potential sources to provide valuable comments on such matters as: (1) proposed customer requirements, including identification of requirements that are "cost drivers"; (2) proposed acquisition and evaluation strategy, including business and technical approaches; (3) contract methodology, including how best to elicit proposals based on current and emerging commercial practices, and contract type; (4) methods to reduce proposal and contract costs and explore technology advancements and contract incentives; and (5) revisions to performance, schedule or other contractual requirements. However, the one downside to using a DRFP is that the extra time allotted in the competitive process for a DRFP may not result in any substantive improvement to the final RFP.

**How should comments received in response to the DRFP be handled?**

The Contracting Officer/Contract Specialist, in conjunction with support from appropriate technical or other functional advisory staff as merited (i.e., cost price analysts, legal counsel, Small and Disadvantaged Business Specialist) should carefully review each question to: (1) determine whether the suggestion has merit and should be pursued; (2) develop a recommended course of action considering the impact to other processes and elements of the RFP or program; and (3) develop a proposed Government response. Care must also be taken to ensure that incorporating a comment into the RFP does not give and unfair competitive advantage to an offeror.

Though not mandatory, two suggested means by which the Contracting Officer/Contract Specialist may disseminate the government's response to industry are:

(1) A DRFP Amendment or letter may be prepared that formally responds to the comments received. This response may group similar questions together for a single response. The amendment or letter should not attribute comments to any particular offeror. The amendment or letter should include a clear statement as to the comment's disposition–i.e., accepted, rejected, deferred, etc.–along with an explanation as to why that action was taken. The response should be made publically available in the same manner as the DRFP.

(2) If the nature of the comment or the government response is complex, it may be beneficial for the government to convene a presolicitation conference to discuss the responses to the DRFP comments. Notice of the conference should be publically announced in a manner to ensure that all interested parties/potential offerors have an opportunity to respond/attend. Minutes of the conference should be maintained which include a written response to all of the DRFP comments received. Copies of these minutes should be publically distributed in the same manner as the DRFP, e.g., though posting on the website.

Regardless of which response method or combination of methods is used, it is critical that all potential offerors be treated fairly and given identical information so as not to provide a basis for a perception of unfair competitive advantage by any one offeror or group of offerors.

If a private conference is requested, the Contracting Officer/Contract Specialist must take special care to ensure that either: (1) no additional information is provided during the conference which would give the offeror an unfair competitive advantage; or (2) ensure that any new information provided during the conference is provided to all potential offerors.

# PART II. Preproposal Conferences

## Background

A preproposal conference is a technique to promote early exchange of information with industry after the solicitation is issued, and prior to receipt of proposals. The principal purpose of a preproposal conference is to provide for uniform interpretation and understanding of work statements, specifications, and other technical and administrative requirements by all prospective contractors responding to competitive solicitations.

Additionally, in conducting the preproposal conference, remember the following: (1) release information on a fair and equitable basis consistent with regulatory and legal restrictions; (2) establish clear ground rules for the conduct, timing, and documentation of preproposal conferences; (3) protect any proprietary information you may be given during this process; and (4) request legal counsel advice if any questions arise about any preproposal exchanges.

## Applicable statutes, procurement regulations, or small business regulations

FAR 3.104-2 (General [Procurement Integrity]); and FAR 15.201 (Exchanges with Industry Before Receipt of Proposals)

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## Issues/Questions

- ❒ When is it appropriate to conduct a preproposal conference?
- ❒ What should preproposal conferences accomplish?
- ❒ How should the preproposal conference be conducted?

# Discussion Topics

## When is it appropriate to conduct a preproposal conference?

It is appropriate to conduct a preproposal conference when issues exist which make a government and industry dialogue necessary. The following factors often drive a need to conduct a preproposal conference: (1) the complexity of the project; (2) the desirability of having prospective contractors visually examine Government owned facilities (Site visits are normally conducted in conjunction with preproposal conferences); (3) the need to disseminate additional background data; (4) exceptional demands on a contractor's capability; (5) unavoidable ambiguities in the statement of work; or (6) complications involving access to classified material.

**What should preproposal conference accomplish?**

The preproposal conference should accomplish the following: (1) outline principal features of the project, (2) fully describe all details of the work statement and specifications, (3) explain and clarify instructions for completing the proposal, (4) provide an opportunity for offerors to ask questions and receive answers, thus providing them with a better understanding of the government's requirements, and (5) stress the importance of significant elements of the solicitation.

**How should the preproposal conference be conducted?**

The Contracting Officer should publicize the arrangements for the conference in the solicitation.

Attendees should be advised that remarks and explanations made by government personnel do not qualify, change, or otherwise amend the terms of the solicitation, and that only a formal, written amendment to the solicitation is binding. A written record of the conference proceedings should be kept. This record of proceedings, including any new material provided at the conference and questions and answers addressed, should be provided to all potential offerors, regardless of whether they attend the conference.

Where possible, written questions should be requested in advance, and answers should be prepared in advance and delivered during the conference. Questions answered during the conference should be included in the record of conference proceedings.

As soon as possible after the preproposal conference, the Contracting Officer should ensure that all potential offerors receive the written record of the conference proceedings, including any new material provided, and any questions and answers addressed. If any of the terms and conditions or requirements of the solicitation were changed, a formal solicitation amendment should be issued.

Additionally, a site tour should be part of any preproposal conference if there is a site to tour.

**Alternatives or In Addition to a Preproposal Conference**

In addition to a preproposal conference, or in lieu thereof, the following approaches may also be used:

- Establish a reading room that contains public information regarding the requirement. A reading room is mandatory for any procurement. This can be accomplished either through a web-based electronic reading room, a walk-in reading room, or both.

- The Request for Proposal (RFP) should identify how questions regarding the RFP are to be submitted, and if a response to a question is appropriate, it should be conveyed to all potential offerors either by using the web, by letter, or by an amendment to the RFP when appropriate.

- One on one meetings can be held with potential offerors prior to submission of proposals with the express intent to receive feedback from potential offerors regarding the RFP. Based on these meetings, public information and exchanges should be provided to all parties by using the web, by letter, or by an amendment to the RFP when appropriate. Note: Care must be taken during these one on one meetings to not provide information that might give a potential offeror an unfair competitive advantage.

## Part III. Scoring Methodologies

### Background

The objective of an acquisition conducted under source selection procedures is to select the source or sources which represent the best value to the Government. Federal Acquisition Regulation (FAR) Part 15 discusses source selection processes and techniques, including tradeoff processes. The tradeoff process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. FAR 15.305 (a) Proposal Evaluation, states: "(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file."

The Source Selection Authority (SSA) is required to follow the evaluation criteria and relative weighting factors set forth in the solicitation. How the SSA achieves this objective is not prescribed by the Regulations. In fact, the FAR specifically states that the rating method need not be disclosed in the solicitation. GAO has repeatedly held that Rating Plans are internal documents, and that offerors are not entitled to enforce the provisions of a Rating Plan that were not included in the solicitation. Beyond the implications in the FAR that a rating method will be used, there is no known regulatory requirement for creation of a Proposal Scoring or Rating Plan. In theory, an SSA could review the proposals, identify the strengths and weaknesses of the proposals and based on his/her judgement, following the evaluation factors and weightings in the solicitation, reach a selection decision. This approach is simply not practical and SSA's normally employ the use of an advisory board, team or panel to evaluate the proposals. Scoring/Rating Plans have evolved as the structured means of communicating the relative standings of each offeror to the SSA. In the end however, the SSA must base the selection decision on the strengths, deficiencies, and weaknesses of the proposals submitted – not merely on the score derived through use of a Proposal Scoring or Rating Plan.

A Proposal Scoring or Rating Plan helps evaluators assess a proposal's merit with respect to the evaluation factors and significant subfactors in the solicitation. It uses a scale of words, colors, numbers, or other indicators to denote the degree to which proposals meet the standards for the non-cost evaluation factors. Some commonly used rating systems are adjectival, color coding, and numerical. What is key in using a rating system in proposal evaluations is not the method or combination of methods used, but rather the consistency with which the selected method is applied to all competing proposals and the adequacy of the narrative used to support the rating.

A traditional Scoring or Rating Plan is comprised of three basic elements: (1) evaluation factors and subfactors set forth in the solicitation; (2) a rating system (e.g., adjectival, color coding, numerical, or ordinal); and (3) evaluation standards or descriptions which explain the basis for assignment of the various rating system grades/scores.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 15.305 (Proposal Evaluation); FAR 15.505 (Preaward Debriefing of Offerors); and FAR 15.506 (Postaward Debriefing of Offerors)

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**Issues/Questions**

- ❒ What should be considered when developing evaluation standards?
- ❒ What are the most common type of rating systems?
- ❒ What does a sample rating scale look like?
- ❒ Does an evaluation need to include the identification of strengths and weaknesses?

## Discussion Topics

**What should be considered when developing evaluation standards?**

Evaluators must be able to determine the relative merit of each proposal with respect to the evaluation factors. Evaluation standards/descriptions provide guides to help evaluators measure how well a proposal addresses each evaluation factor and subfactor identified in the solicitation. (Standards must not introduce unstated evaluation criterion.) Standards permit the evaluation of proposals against a uniform objective baseline rather than against each other. The use of evaluation standards minimizes bias that can result from an initial direct comparison of proposals. Standards also promote consistency in the evaluation by ensuring that the evaluators evaluate each proposal against the same baseline. In developing standards for each evaluation factor and subfactor, you should consider the following:

- ☛ As you develop your evaluation factors, concurrently draft a standard for each factor and subfactor.
- ☛ Define the standard by a narrative description that specifies a target performance level that the proposal must achieve in order to meet the standard for the factor or subfactor consistent with the requirements of the solicitation.
- ☛ Describe guidelines for higher or lower ratings compared to the standard "target."

- Overly general standards should be avoided because they make consensus among evaluators more difficult to obtain and may obscure the differences between proposals. A standard should be worded so that mere inclusion of a topic in an offeror's proposal will not result in a determination that the proposal meets the standard.

- While it is sometimes easier to develop quantitative standards because of their definitive nature, qualitative standards are commonly used in source selections.

**What are the most common type of rating systems?**

**Common Rating Systems**

**Adjectival Ratings**

Adjectival ratings are a frequently used method of scoring or rating an offeror's proposal. Adjectives are used to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. Subsequent to, and consistent with, the narrative evaluation, an appropriate adjective rating may be given to each factor and sometimes to each significant subfactor. Adjectival systems may be employed independently or in connection with other rating systems.

**Color Coding**

This system uses colors to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. For instance, the colors blue, green, yellow, amber, and red may indicate excellent, good, satisfactory, marginal, or unsatisfactory degrees of merit, respectively.

Note: It should be noted that while the adjectival and color coding systems may be the most difficult to use; they may be the most effective. The reason for the difficulty in use results from having to derive a consensus rating when, for example, one element is weighted at 50% with a Good (Green) rating and one element is weighted at 40% with a Excellent (Blue) rating. Under these systems, there is not a simple process to aid the evaluators to reach the consensus rating. The evaluators must assess the collective impact of evaluation subfactors on each higher tier factor, and then assess the totality of the evaluation factors as they related to each other under the weighting methodology set forth in the solicitation. This complexity forces the evaluators to thoroughly understand the strengths and weaknesses of each individual proposal in relation to the evaluation criteria and standards in order to reach consensus. While it is critical that this understanding is reflected in the narrative of the evaluation, this depth of understanding aids in the writing of the competitive range and source evaluation report.

**Numerical**

This system assigns point scores (such as 0-10 or 0-100) to rate proposals. This rating system may appear to give more precise distinctions of merit; however, numerical systems can have drawbacks as their apparent precision may obscure the strengths and weaknesses that support the numbers. As opposed to the adjective and color coding systems, numeric systems can provide a false sense of mathematical precision which can be distorted depending upon the evaluation factors used and the standards therefore. For example, if a standard indicated there could be no weaknesses, a very minor weakness in a proposal would force assignment of the next lower level rating. This would potentially cause a significant mathematical difference in the proposals.

In any evaluation process, the source evaluation board should first identify the strengths and weaknesses involved with a proposal, and then assign the adjective, color or numeric ratings to the criteria. However, this is particularly important when using numeric system because it is too easy to fall into the trap of relying on the numeric rating as opposed to the actual merits or weaknesses of the proposal. Due to the potential pitfalls with the use of numeric ratings, some organizations do not permit the use of numerical rating systems.

It is strongly suggested that if a numerical system is used, the point system used should be a staggered numeric rating system (e.g., 1, 3, 5, 8 and 10) representing the various ratings and not use a full sequential scale (i.e., 0, 1, 2, 3 . . . 10) in the rating scheme where each. If the sequential system is used, it forces the evaluation team to differentiate the rating of each evaluation factor within a range of points (e.g., a satisfactory element of a proposal must receive either 4, 5 or 6 rating points) as opposed to the assignment of a standard 5 point rating for a satisfactory rating. The sequential system also can result in generating overall proposal ratings which are numerically close in the total rating which may disguise the proposal differences. Moreover, using a 1-100 scale often results in using "public school" types of grading levels, even if the rating plan provides differently - that is, an A proposal gets a 90-100, a B proposal gets 80-89, a C proposal gets 70-79, and so on. This results in over half of the rating scale [59 and below] effectively not being used. In our experience, using a 1-100 rating scale usually results in ratings being clustered in the 85 to 90 range and blurs the real distinctions between proposals. It also makes the cost-technical tradeoff more difficult, where the technical difference amounts to just a few percentage points.

**What does a sample rating scale look like?**

The following is a sample of a rating scale that could be used to evaluate technical and management factors and significant subfactors. A proposal need not have all of the characteristics of a rating category in order to receive that rating. The evaluators must use judgement to rate the proposal using one of the three systems: numeric, adjectives or colors.

Examples

Typical Ratings and Descriptors
Each rating must have a definition.
TECHNICAL MERIT ratings reflect the government's confidence in each offeror's ability, as demonstrated in its proposal, to perform the requirements stated in the RFP. Choose one method (e.g., numerical, adjectival, or color) to evaluate technical merit.

| NUMERICAL | ADJECTIVAL | COLOR | DEFINITION/STANDARDS |
|---|---|---|---|
| 10 | Excellent | Blue | Proposal demonstrates excellent understanding of requirements and approach that significantly exceeds performance or capability standards. Has exceptional strengths that will significantly benefit the Government. |
| 8 | Good | Green | Proposal demonstrates good understanding of requirements and approach that exceeds performance or capability standards. Has one or more strengths that will benefit the Government. |
| 5 | Satisfactory | Yellow | Proposal demonstrates acceptable understanding of requirements and approach that meets performance or capability standards. Acceptable solution. Few or no strengths. |
| 3 | Marginal | Amber | Proposal demonstrates shallow understanding of requirements and approach that only marginally meets performance or capability standards necessary for minimal but acceptable contract performance. |
| 0 | Unsatisfactory | Red | Fails to meet performance or capability standards. Requirements can only be met with major changes to the proposal. |

COST - NOT "RATED." Reflects the evaluated cost. RFP must describe method by which cost will be evaluated (e.g., how probable cost or life cycle cost will be evaluated.)

Alternate language for defining the Standards might be:

**Outstanding: <u>An outstanding proposal is characterized as follows:</u>**

- The proposed approach indicates an exceptionally thorough and comprehensive understanding of the program goals, resources, schedules, and other aspects essential to performance of the program.
- In terms of the specific factor (or significant subfactor), the proposal contains major strengths, exceptional features, or innovations that should substantially benefit the program.
- There are no weaknesses or deficiencies.

- The risk of unsuccessful contract performance is extremely low.

**Good: <u>A good proposal is characterized as follows:</u>**

- The proposed approach indicates a thorough understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.
- The proposal has major strengths and/or minor strengths which indicate the proposed approach will benefit the program.
- Weaknesses, if any, are minor and are more than offset by strengths.
- Risk of unsuccessful performance is very low.

**Satisfactory: <u>A satisfactory proposal is characterized as follows:</u>**

- The proposed approach indicates an adequate understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.
- There are few, if any, exceptional features to benefit the program.
- The risk of unsuccessful performance is low.

**Weaknesses are generally offset by strengths.**

**Marginal: <u>A marginal proposal is characterized as follows</u>:**

- The proposed approach indicates a superficial or vague understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.
- The proposal has weaknesses that are not offset by strengths.
- The risk of unsuccessful contract performance is moderate.

**Unsatisfactory: <u>An unsatisfactory proposal is characterized as follows:</u>**

- The proposed approach indicates a lack of understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.
- Numerous weaknesses and deficiencies exist.
- The risk of unsuccessful performance is high.

**Does an evaluation need to include the identification of strengths and weaknesses?**

**Strengths and Weaknesses**

Regardless of whether an adjectival, color, or numerical rating system is used, proposal evaluations must be supported with narrative statements which describe each strength and weakness associated with each aspect of a proposal in relation to the evaluation criteria. The identification of the specific strengths and weaknesses provides the SSA the information needed to make a reasonable and rational basis for the selection decision. The detailed information on strengths and weaknesses is also required by the contracting officials in order to provide the debriefings to unsuccessful offerors required by FAR 15.506(d), as well as contracting and legal personnel in order to defend any protests which might be filed with the agency or the General Accounting

# PART IV. Contracting Officer Role and Role of Counsel in the Acquisition Process

## Background

One important role of the contracting officer and counsel is to provide business, procurement and legal advise and guidance to the Source Selection Official and Source Evaluation Board Chair. Prior to the initiation of a procurement in a Federal Acquisition Regulations (FAR) Part 15 competitive procurement, the contracting officer and counsel should brief the source evaluation board or the technical evaluation committee (SEB/TEC) on the workings of the source selection process. The briefing should include an explanation of the evaluation process and pertinent documents, conflicts of interest, proposal security, and procurement integrity. The briefing should be designed to inform the evaluators of their responsibilities and provide guidance to the evaluators on how to review the proposals. If there are non-voting members on the SEB/TEC, the contracting officer should explain the limits of their involvement in the selection process. The contracting officer should also advise the SEB/TEC members of the planned schedule for the evaluations, including the time allotted for individual evaluations, consensus discussions, completion of a draft evaluation report, and the anticipated date for completion of the final report. If the solicitation included a requirement for oral presentations by the offerors, the contracting officer must explain the evaluation process for the oral presentations.

In any acquisition the contracting officer should involve the counsel to the greatest extent possible, and as early in the process as possible. The counsel should act as part of the team engaged in making this acquisition occur. At the latest, the counsel should be consulted while the Request for Proposals (RFP) is being drafted. By proceeding in this way, the contracting officer informs the counsel about the requirements of the acquisition, and anticipates problems which may arise in the award. Further, involving the counsel at the earliest part of the process so that he or she is fully informed regarding the program office's needs permits the counsel to suggest options available to accomplish those needs, which may result in changes to the RFP and model contract.

Time consuming activities associated with rework of the evaluation process can be avoided by taking the time for a thorough briefing prior to allowing the evaluators to open the proposals. The contracting officer leads the pre-evaluation briefing; however, the legal advisor to the SEB/TEC should attend and may take the lead for pieces of the briefing. For example, the contracting officer may ask the legal advisor to explain the procurement integrity or conflicts of interest provisions to the evaluators. Additionally, the counsel should be involved in reviewing solicitation strategy; reviewing the RFP (evaluation criteria, award criteria, applicable contract clauses) reviewing the rating plan; overseeing the evaluation; reviewing the competitive range determination (if any); overseeing the discussions (if any); and reviewing the selection, and the selection statement.

**Applicable statutes, procurement regulations, or small business regulations:**

FAR 3.104 (Procurement Integrity); FAR 15 (Contracting by Negotiation); DEAR 915 (Contracting by Negotiation); FAR Part 9.5 (Organizational and Consultant Conflicts of Interest) Department of Energy Acquisition Regulations (DEAR) 909.5 (Organizational and Consultant Conflicts of Interest); DEAR 952.209-72 (Organizational Conflicts of Interest); DEAR 970.0905 (Organizational Conflicts of Interest); and DEAR 903.104-10 (Violations or Possible Violations)

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**Issues/Questions**

- ❒ What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?
- ❒ What is the role of counsel in the procurement process?

## Discussion Topics

**What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?**

**Certification requirements for evaluators**

The briefing is a good opportunity to make sure that all evaluators have signed the required certifications. Prior to commencing evaluations, evaluators are required to complete confidentiality certificates, conflict of interest certificates, or other certifications established in the rating plan.

**Security of proposals**

The proposals and any other proprietary or source selection information need to be kept in locked cabinets or locked rooms. The SEB/TEC chairman should arrange for appropriate facilities for safeguarding the proposals and other source selection information prior to the receipt of the proposals. Copies of proposals and proprietary/source selection information should be numbered and tracked by the SEB/TEC chairman or other clearly designated member of the evaluation board (for example, the contracting officer). The contracting officer should inform the evaluators that proposals shall not be taken home. The evaluation and contents of proposals shall not be discussed outside the SEB/TEC with the exception of ex-officio members, procurement advisors, legal advisors, and other selection officials.

**Potential individual conflicts of interest**

Individual conflicts of interest need to be resolved prior to commencing evaluation. The evaluators need to be reminded to review all contractors, subcontractors, consultants, and teaming arrangements proposed under the procurement and report any potential conflicts of interest to the contracting officer, legal advisor, and the SEB/TEC chairman. Evaluators need to report any relatives employed by the proposing entities, friendships, financial interests, pension benefits, and prior employment. The existence of these relationships does not necessarily mean that a conflict of interest exists, but legal counsel will review the specifics of the situation to determine if a potential conflict exists. The evaluator will then be informed if any actions need to be taken to avoid the conflict of interest. Actions that may be taken include divestment of stock, reclusion from review of selected offerors, or removing the evaluator from the source evaluation process.

The evaluators need to be advised against the appearance of a conflict of interest. For example, evaluators should not have lunch or go golfing with offerors or prospective offerors, or engage in any other activity that could give the appearance of a conflict of interest. Evaluators should be encouraged to discuss any questions regarding the appearance of a conflict of interest with the contracting officer and legal advisor.

**Procurement Integrity Act**

The procurement integrity provisions of the Office of Federal Procurement Policy Act (OFPP Act) (41USC 423) (commonly referred to as the Procurement Integrity Act) address a variety of issues, but the two of most concern to evaluators are the prohibitions against employment discussions and the release of information regarding a procurement. The provisions of the Procurement Integrity Act are implemented in FAR Part 3.104. The contracting officer should inform the evaluators that civil and criminal penalties, and administrative remedies, may apply to conduct that violates the Procurement Integrity Act and related statutes and regulations. The procurement integrity piece of the briefing to evaluators can either be provided by the contracting officer or the legal advisor to the SEB/TEC.

**Employment prohibitions**

Evaluators should be instructed to consult with the legal advisor and the legal staff of the agency ethics office regarding any contact with an offeror regarding non-Federal employment as well as questions related to post employment restrictions. In general, evaluators need to be informed that they can't been involved in the source selection process and discuss potential employment with any offerors, including subcontractors and consultants, proposing under the solicitation. This includes submitting resumes to firms. Evaluators need to be told that if they are approached by a firm, they can't leave the door open for employment discussions and tell the firm that conversations about employment will resume after the evaluation is completed.

In fact, the FAR requires that if an agency official is contacted by a person who is an offeror under the solicitation that official must report that contact, in writing, to the official's supervisor and the agency ethics official. The FAR further states that the agency official must either reject the offer of employment or disqualify himself/herself from further participation in that procurement.

Evaluators should be advised that participation in a Federal agency procurement will result in some post-employment restrictions. Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641 and Subsection 27(d) of the OFPP Act and FAR 3.104-3(d). Former Government employees are prohibited from engaging in certain activities, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific activities in which the former employee participated personally or substantially while employed by the Government. Evaluators who have concerns about the post-employment restrictions should be instructed to discuss their situation with the legal staff within the agency responsible for interpreting post-employment restrictions prior to commencing evaluation of the proposals or becoming further involved with the procurement.

**Disclosure of proprietary or source selection information**

The second area of concern to evaluators is the disclosure of any proprietary or source selection information during the conduct of a procurement. The Procurement Integrity Act prohibits the disclosure of contractor bid or proposal information or source selection information prior to the award of a Federal contract. Evaluators should be informed that source selection information includes: 1) proposed costs or prices; 2) source selection plans; 3) technical evaluation plans; 4) technical evaluation of proposals; 5) cost or price evaluation of proposals; 6) competitive range determinations; 7) ranking of bids, proposals, or competitors; 8) reports and evaluations of source selection panels, boards, or advisory counsel; and 9) any other information marked source selection.

Evaluators should be reminded that they can only discuss contractor bid or proposal information or source selection information with individuals who are authorized, in accordance with applicable agency regulations or procedures, to receive such information. It is useful for evaluators to keep in mind what is public information and what is not. For example, information in the solicitation is public, but the rating plan is not. The weights assigned to the evaluation criteria are not public unless they are identified in the solicitation. Once a competitive range is established, even though the Government has written letters to offerors letting them know whether or not they are in the competitive range, that is not public information. Evaluators should be cautioned against holding any conversations with or answering any questions from offerors. All questions should be referred to the contracting officer.

If a potential violation of the Procurement Integrity Act is reported, the contracting officer is required to determine if there is any impact on the pending award or selection of the contractor.

FAR Part 3.104-7 identifies the procedures the contracting officer and agency are required to follow. Evaluators should be advised that the earlier a potential procurement integrity violation is reported, the greater is the contacting officer's ability to mitigate its effect on the procurement. For example, the contracting officer may be able to mitigate an unauthorized disclosure of information by making that information available to all offerors or by taking other appropriate action. Additionally, evaluators should be advised that if they are asked to prepare information related to solicitation or the evaluation that they cannot re-delegate the action to a contractor, even if the action appears to be clerical.

It is helpful to provide examples of procurement integrity violations in the briefing so that the evaluators can relate the procurement/legal jargon to real situations they may encounter. For example, in one case a SEB/TEC evaluator allegedly communicated to an offeror in the competitive range, in general terms, how it needed to revise its technical and price proposals in order to receive an award. The potential violation was reported by the offeror and the case was referred to the appropriate criminal investigative organization for further investigation. As another example, a senior level program official asked a support service contractor to assist in developing the statement of work and required labor mix for the re-compete of its own contract. After the violation was reported, the program official attempted to argue that the documents prepared by the support service contractor were only an outline and the information was significantly modified prior to release of the solicitation. This argument was not found to be convincing by the investigative organization.

**Evaluation process**

The contracting officer should provide an overview of the evaluation process and the steps to be followed. The evaluators should be instructed to review the pertinent documents prior to evaluating the proposals. Evaluators should review and become familiar with the source selection plan/rating plan, statement of work, evaluation scoring sheets, the evaluation criteria in sections L and M of the solicitation, and the established weights for each criterion and sub-criterion.

The proposals need to be individually evaluated by each SEB/TEC member. Evaluations shall be based on the evaluation criteria in the solicitation, and evaluators need to be cautioned against deviating from the evaluation criteria or substituting evaluation criteria.

The contracting officer should discuss the unique aspects of the past performance criteria, and how evaluation of past performance differs from the other criteria. Evaluation under this criterion relies on information provided by the offeror's previous customers.

Evaluators shall be instructed to develop strengths and weaknesses for each criteria that are sufficiently detailed to support the assigned score or adjectival rating. This does not mean that evaluators will assign individual scores or ratings.

This depends on the evaluation process established in the source selection plan/rating plan.

Commonly, individual evaluators develop individual strengths and weaknesses, and then the SEB/TEC meets to develop consensus strengths and weaknesses prior to assigning scores. This is the preferred method at the Department of Energy. Evaluators should also be encouraged to use the full range of adjectival ratings or scores.

Evaluators must be cautioned not to compare proposals against each other. Proposals shall be evaluated against the criteria and standards established in the solicitation. FAR Part 15 specifically states that competitive proposals shall be evaluated solely on the factors and sub-factors identified in the solicitation. Evaluators should be instructed that if the information sought does not exist where it is expected, that they should check if it exists elsewhere, such as in the introduction, on a diagram, or in the appendices.

The briefing should advise evaluators so be consistent during the evaluations, scoring, and developing of questions. The contracting officer should instruct the evaluators to discuss questionable issues as a group. Evaluators should be instructed to only credit or fault an offeror once for the same fact or idea unless the solicitation has a redundancy in the criteria. Similarly, evaluators need to evaluate the same fact or idea consistently. If something is noted as a weakness under one proposal, it must be designated as a weakness in other proposals with the same fact or idea.

**SEB/TEC report and documentation of evaluation**

FAR Part 15 states that the source selection records must include "a summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors." The consensus strengths and weaknesses by criterion are included in the SEB/TEC report. The contracting officer should advise the SEB/TEC that the report needs to be complete, accurate, and contain sufficient detail on strengths, weaknesses, deficiencies, and risks to demonstrate to an outside reviewer that the Government's evaluation was fair, reasonable, and unbiased. The evaluators should be informed that the reports prepared by the SEB/TEC must be clear, convincing and supportable, and may be reviewed by the General Accounting Office or a judge during a protest. Some contracting officers encourage evaluators to reference the pertinent part of the applicable evaluation criteria and the applicable page of the offeror's proposal for each strength or weakness. Evaluators should be told to avoid generalizations of a proposal's merits or problems, and instead state the facts that support the conclusions.

The contracting officer must instruct the evaluators to refrain from making personal notes in the proposals and on other documents that are retained. These documents may become part of the source selection record, and personal notes may be used during a protest to show inconsistencies. Evaluators must be advised to stamp all documents and worksheets with "Source Selection

Evaluators must be advised to stamp all documents and worksheets with "Source Selection Information - See FAR 2.101 and 3.104.

**What is the role of counsel in the procurement process?**

**Counsel Advisory Role**

In some applicable cases, the Assistant General Counsel for Procurement and Financial Assistance, GC-61 acts by advising the Office of Contract Management, ME-62 in relation to all the above actions when the acquisition has been selected for headquarters review. In those cases, GC-61 advises ME-62, in addition to the advice given to the SEB/TEC and Source Selection Official by the applicable field attorney. In this situation, each attorney has a different client: the field attorney advises the SEB/TEC, and the Headquarters attorney advises ME-62. In most cases, the advice is similar. Nothing prohibits field personnel from consulting the office of the Assistant General Counsel for Procurement and Financial Assistance at any time, but that office generally prefers that field personnel consult with the field counsel in the first instance, and that field consult contact GC-61 when necessary. Furthermore, both the field attorney and GC-61 are involved if there is a protest of any sort.

# PART V. Past Performance as an Evaluation Factor

## Background

The use of past performance as an evaluation factor adds a new aspect to the evaluation process. As required by Federal Acquisition Regulation (FAR) under Subpart 9.1, past performance was generally examined only in the context of a determination of responsibility. Contractors with a history of unsatisfactory performance were considered not responsible contractors. This type of determination generally involved a minimum of paperwork and time. Formal documentation is required is only required if the contractor is found to be nonresponsible.

Now past performance must also be examined through a comparative assessment during the evaluation process. The examination is of information regarding a contractor's actions and performance under previously awarded contracts. It is a review of deeds not words. The currency and relevance of information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This assessment is compared with the assessment of the past performance of the competing contractors to help determine which contractor is offering the best value.

Key to the successful use of past performance – and any factor– in the source selection process is the establishment of a clear relationship between the statement of work (SOW), Section L (instructions to offerors), and Section M (evaluation criteria). The factors chosen for evaluation must track back to the requirements in the SOW. They should be reasonable, logical, and coherent.

The use of past performance as an evaluation factor potentially increases the workload and paperwork related to the evaluation effort. The problem is that evaluating past performance requires gathering and evaluating additional information – information not found in proposals. The evaluation of past performance requires making inquires of third parties about contractor performance on other contracts and evaluating the responses.

Use of past performance as an evaluation factor is mandatory unless the contracting officer documents in the contract file why the evaluation of past performance is not appropriate. It is up to the contracting officer to document the reason that the use of past performance as an evaluation factor is inappropriate.

Using past performance as an evaluation factor depends on the significance of past performance as a discriminator. The purpose of an evaluation factor is to enhance the evaluator's ability to distinguish one proposal from another in terms of its relative worth or value to the government. An evaluation factor that does not help discriminate between proposals should not be used as an evaluation factor.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 8.404 (b) ( Using Schedules); FAR 15.101-2 (b) (Lowest Price Technically Acceptable Source Selection Process); FAR 15.102 (c) (Oral Presentations); FAR 15.202 (a) (Advisory Multi-Step Process); FAR 15.304 (Evaluation factors and significant subfactors); FAR 15.305 (Proposal evaluation); FAR 15.306 (Exchanges with offeror after receipt of proposals); FAR 16.505 (b) (Order under multiple award contract; and FAR 42.15 (Contractor Performance Information)

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**Issues/Questions**

- ❒ What past performance information should be requested?
- ❒ How should the solicitation aspects regarding past performance be structured?
- ❒ How much past performance information should be requested?
- ❒ How much weight should be placed on past performance information?
- ❒ When and what information can be discussed with offerors regarding past performance?

## Discussion Topics

**What past performance information should be requested?**

Information requested under section L should be focused on contracts for similar efforts that have been awarded and in place for at least three months. Similar efforts should be defined by the size, scope, complexity, contract type, etc...

Information concerning past performance by subcontractors should not be requested unless they are a major subcontractor.

It is important to ask for at least two references on each contract. In addition to ensuring that all aspects of the contractor's performance will be discussed, it also ensures that the anonymity of the references can be maintained. FAR 15.306(e)(4) prohibits release of the names of individuals providing reference information about an offeror's past performance.

**How should the solicitation aspects regarding past performance be structured?**

The solicitation should explain that past performance information that is not similar will be considered when a contractor has no past performance information from contracts for similar efforts.

Information from previously established companies and the key personnel from which newly formed companies and mergers are formed should be used to mitigate the newly formed company and merger not having past performance information. Additionally, if there is no Federal contract information, past performance information should be reviewed from other sources such as state and local government contracts and private sector contracts and subcontracts.

The RFP section M should identify if the information requested to mitigate a company not having relevant past performance information will be rated lower then relevant past performance information.

The RFP section M should indicate that newly formed companies, which cannot mitigate having no past performance information, shall not be given a rating of favorable or unfavorable. What constitutes a not being given a rating of favorable or unfavorable should be included in the rating plan.

The RFP section M should state that, if the government's attempts at gathering and verifying the offerors referenced past performance information fails, and the offeror has been notified and not been able to correct this problem, the offeror will be not be given a rating of favorable or unfavorable.

The RFP section M must stipulate the relative importance of past performance information.

If corporate experience and past performance are separate evaluation criteria do not ask for the same information under each of these criteria, in order to avoid the potential for double counting the same information. Do not confuse evaluation of past experience with evaluation of past performance.

Make certain that section L explains that offerors shall be defined as business arrangements, and each firm in the business relationship (i.e., joint venture, teaming partners, and major sucontractors) will be evaluated on its past performance.

Section L should include a statement that the government may use past performance information obtained from other than the sources identified by the offeror and that the information obtained will be used for both the responsibility determination and the best value decision.

Since past performance evaluation is essentially an informed judgmental decision of the government, in order for the government's decision to withstand scrutiny, the contract file should contain detailed documentation identifying that the past performance information has been appropriately analyzed and verified by the government.

Attempts at gathering and verifying information from the references on how the contractor performed is the responsibility of the government. Questionnaires followed up by telephone interviews have the most success in getting useful and timely responses from references.

Questionnaires that will be forwarded to reference checks should be provided in the RFP for informational purposes only. This allows offerors to know what is important to the government on this contract and helps offerors in their proposal decisions. The questionnaire should be listed as an attachment in Section J, and Section L should note that it will be used to collect past performance information.

The questionnaire should be short. No more than a page to a page and a half of questions should be asked.

Information that supports an entity's past performance, such as awards of excellence presented to the companies that will be performing the work, should be requested.

Avoid formula driven past performance decisions, as past performance is essentially a subjective best value decision.

**How much past performance information should be requested?**

Be prudent about the amount of past performance information that is requested. It should be a reasonable amount that does not cause excessive burdens for the contractor and the government. Additionally, FAR 42.1503(e) states that past performance information shall not be retained to provide source selection information for longer than three years after completion of the contract. Therefore, the information requested should not go beyond three years past completion of the contract.

**How much weight should be placed on past performance information?**

It is recommended that under the evaluation criteria of the RFP, past performance should be given a weighting of 25% or be equal to the most heavily weighted non-cost evaluation factors. However, if knowledge and information about the market place reveal that there is strong reason to believe that there are only a few capable offerors, there is substantially no discrimination among these potential offerors' past performance, the Source Selection Board should consider assigning a lesser weight for past performance. This type of situation is more likely to occur under requirements for complex scientific efforts.

Contractor successful performance of relevant past performance information should be rated higher than a contractor that has no past performance information.

For administrative requirements and the less complex scientific requirements, where there tends to be a greater market of capable offerors, past performance should be a very significant factor in the evaluation criterion.

Contracting activities should not downgrade a contractor for filing protests or claims or not agreeing to use alternative dispute resolution (ADR) techniques. Conversely, contracting activities should not rate a contractor positively for not having filed protests or not having made claims or agreeing to use ADR techniques. However, the quality of a contractor's performance that gave rise to the protest or claim may be considered. In other words, while performance must be considered, a contractor exercising it's rights may not.

**When and what information can be discussed with offerors regarding past performance?**

Past performance information is proprietary source selection information. Therefore, section L should explain that the government will only discuss past performance information directly with the prospective prime or sub-contractor that is being reviewed. If there is a problem with the past performance entities that have formed business arrangements with the prime contractor, such as subcontractors, joint ventures, and teaming partners, the prime contractor can only be informed that there is a problem with the entity under review. The details of the problem cannot be provided, unless the affected entity agrees.

The offeror should be asked to discuss any major problems encountered on the contracts listed and the corrective actions taken to resolve them.

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond).

The questions asked of the past performance points of contract should be the same. Inconsistency in questions can lead to the potential issue of unequal evaluation of offerors. However, if there is a concern raised based on the responses to questions, then it may be necessary to hold discussions to resolve the matter.

# PART VI. Oral Presentations

## Background

This topic is a digest of the 1996 Office of Federal Procurement Policy Guidelines For The Use Of Oral Presentations. This digest provides the most salient aspect of these Guidelines.

The use of oral presentations is a technique which provides offerors with an opportunity to present information through verbal means as a substitute for information traditionally provided in written form under the cover of the offeror's proposal. Oral presentations can be used as a substitute for written proposals or can be used to augment written proposals and may occur at any time during the acquisition process. Oral presentations are subject to the same restrictions as written information, regarding timing (Federal Acquisition Regulations (FAR) 15.208) and content (FAR 15.306). Its major use has been to permit evaluators to receive information as to the capability of the offeror – generally demonstrating its understanding of the work or describing how the work will be performed -- directly from the key members of the offeror's team that will actually perform the work. In a number of cases, the evaluators have conducted the oral presentation in the form of an interview, probing for additional information, posing sample tasks or using other techniques to test the ability of the offeror's team.

Certain types of written proposal information, particularly in the technical and management areas, are costly to prepare and time consuming to evaluate. In addition, oral presentations avoid the use of lengthy written marketing pitches and essays. The use of oral presentations allows for greater communication between the government personnel and the offerors' key personnel and often can be used as essentially a "job interview" of the proposed key personnel. Using oral presentations can have the effect of greatly reducing procurement acquisition lead time and costs associated with the source selection process. These advantages are realized by both government and industry.

A list of the advantages are as follows:

- Can save significant procurement lead time
- Can improve communication and the exchange of information between government and offerors
- Can reduce government costs
- Can reduce offerors' costs and increase competition
- Can make customers feel more involved in contract selection and award
- Can improve ability to select the most advantageous offer

There is not one best approach for using oral presentations. There are variations in the approach for oral presentations to be considered by the acquisition team when developing the oral presentation methodology. The acquisition team should consider the following when developing the oral presentation methodology:

1) media used to record the presentation;
2) restrictions on the extent and nature of material used in the presentation;
3) the Government participants; the offeror's presentation team; and, the amount of time permitted for the presentation.

Additional concerns to be considered are as follows:

1) The influence of presentation mannerisms, as distinguished from technical content, on the evaluators' decisions;
2) The failure to allow an effective exchange between evaluators and presenters; and

In some cases, the redundant effort involved in preparing the same material for both oral and written formats.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.102 (Oral Presentations); FAR 15.208 (Submission, Modification, Revision and Withdrawal of Proposals); FAR 15.306 (Exchanges With Offerors After Receipt of Proposals); FAR 15.307 (Proposal Revisions); and the Office of Federal Procurement Policy Guide For The Use Of Oral Presentations;

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**Issues/Questions**

- ❒ What instructions should be provided regarding oral presentations?
- ❒ How should oral presentations be prepared for?
- ❒ How should the oral presentations be handled?
- ❒ How should oral presentations be evaluated?

## Discussion Topics

**What instructions should be provided regarding oral presentations?**

**Proposal Preparation Instructions**

The instructions governing the oral presentation should encourage the offeror to not develop overly elaborate presentations or presentation material. The instructions for oral presentation should include the following:

Description of the topics that the offeror must address and the technical and management factors that must be covered;
Statement concerning the total amount of time that will be available to make the presentation;
Description of limitations on Government-offeror interaction during, and, if possible after, the presentation;
Statement whether the presentation will constitute discussions as defined in FAR 15.306(d);
Statement whether the presentation will encompass price or cost and fee;
Description and characteristics of the presentation site;
Rules governing the use of presentation media;
The anticipated number and types of positions of the Government attendees;
Description of the format and content of presentation documentation, and their delivery; and
Statement whether the presentation will be recorded (e.g., videotaped).

The solicitation should require that, as part of the presentation, the offeror will provide a listing of names and position titles of all presenters and copies of all slides and other briefing materials that will actually be used in the presentation. It is preferable that such materials be provided to the evaluation team prior to the presentation to permit the evaluators to familiarize themselves with the information. Materials referenced in a presentation, but not an actual part of the presentation, must not be accepted, or used in, evaluations.

**How should oral presentations be prepared for?**

**Initial Preparation**

The order of presenters must be determined. A lottery is most often used to determine the sequence of presentations by offerors. The time between the first and the last presentation should be as short as practicable to minimize any advantage to the later presenters. In addition, oral presentations should be scheduled as soon as practicable after receipt of proposals.

The facility in which the presentation is to occur must be determined. In most cases the facility is one selected and controlled by the buying activity. However, nothing would preclude an oral presentation being given at an offeror's facility.

The selection of a facility can be reduced to the following:

1. Make it comfortable for both the presenters and the Government evaluators. The room should be large enough to accommodate all of the participants, the recording equipment, lighting, audio-visual aids, and furniture.
2. Make it accessible.
3. Make it available, if possible, for inspection by the offerors prior to the time set for the actual presentation.

The solicitation should, to the extent practicable, describe the physical characteristics of the facility and resources available to the offeror. In addition, the solicitation should be clear as to what types of equipment will be available to the offeror for use in the presentation, what equipment, if any, should be provided by the offeror, and any prohibitions regarding equipment types and uses.

Prior to the presentation, the Contracting Officer should review the ground rules of the presentation session with the offeror. Additional matters for discussion include any restrictions on Government-offeror communications, information disclosure rules, documentation requirements, and housekeeping items.

Also, prior to the commencement of the presentation, the contracting officer should remind the Government participants of their responsibilities during and following the presentation. They should be advised that an oral presentation is procurement sensitive and that they may not discuss, within or outside the agency, (except among themselves) anything that occurred or was said at a presentation.

As a general rule, all of the Government evaluators should be present at every presentation. The Contracting Officer must attend and should chair every presentation. In a GAO case the offeror protested that the agency erred in not having the Source Selection Official (SSO) attend the presentation. The GAO stated that they are unaware of any requirement that an SSO attend presentation sessions.

Presentations by the offeror should to be made in person since, through the use of video conferencing a measure of government control of the meeting may be diminished. Accordingly, the submission of video tapes or other forms of media should not be authorized and should be rejected.

In addition, it is strongly recommended that the presenters should be the actual key personnel who will perform or personally direct the work being described, such as project managers, task leaders, and other in-house staff.

There are two tools available to manage the time each offeror is allotted for the oral presentation. First, and most obvious, is the imposition of a firm time limit. Firm time limits for the presentation must be established in the RFP, and each offeror must be allotted the same amount of time. Second, time may be controlled by restricting the amount of presentation material that an offeror may use during the presentation. Agencies used a combination of both a firm time limit and restrictions on information to control the time. There is no single or ideal amount of time to be allotted. The general rule of using the complexity of the procurement requirement to determine the time needed for the oral presentation may not be a reliable indicator. Another factor to consider when determining the proper amount of time is the effect on both the presenters and the evaluation team. The longer the presentation goes on the harder it is on both parties to stay focused on the presentation. Furthermore, by limiting the amount of time available for the presentation, sales pitches and theatrics can be minimized. The length of time spent on each part of the presentation should be left to the offeror's discretion. It is not generally advisable to limit the time of individual topics or sections within the presentation; that can be the responsibility of the presenter.

**How should the oral presentation be handled?**

**The Presentation**

One of the more problematic areas of the oral presentation approach is the nature and extent of communications between the offeror and the Government evaluation team. This is largely due to the strict rules established in regulation regarding communications with offerors during the course of the solicitation process.

The term "oral presentation" is not synonymous with "oral discussions" as defined in Section 15.306 of the Federal Acquisition Regulation. Oral discussions, as envisioned by the FAR, generally consist of verbal communications between the Government and an offeror that provides an opportunity for an offeror to explain, supplement, or enhance written material previously provided to address evaluated deficiencies and significant weaknesses in the proposal, with the end objective being the submission of a revised proposal by the offeror. The FAR prescribes strict controls (see FAR 15.306, 15.306(d), and 15.307) over when, where, and to what extent, the Government can communicate with an offeror regarding its proposal.

This is done in order to ensure fairness in the evaluation process. The result is a very rigid and somewhat unnatural communication process. As such, oral presentations, by their very nature can become problematic because of the concern about inadvertently triggering the rules regarding discussions. As stated earlier, restrictions on communications between the Government and the offeror should be addressed by the Contracting Officer to all parties prior to the commencement of the presentation.

Another significant area of concern is the record of the oral presentation. FAR 15.102(e) states that the Contracting Officer shall maintain a record in order to document what the government relied upon in order to make a source selection decision. The method and level of detail is up to the agency and must be communicated to the offerors prior to commencement of the oral presentation. Some examples of records include videotaping, audio tape recording, a written record, Government notes, and copies of briefing slides or presentation notes. A caution on the use of video- and audio-taping is needed. Since the tape will become part of the official record, it may be available to the public under the Freedom of Information Act. Like a written proposal, the tape must undergo review by both the Government and the offeror whose presentation is being requested, and a redacted version of the tape must be generated. Because of the tape media, this can be both difficult and time consuming.

In a GAO case, a protestor claimed that the presentation/discussion sessions had not been recorded. In this case, the contemporaneous record consists of handwritten notes taken by the agency. The offeror did not provide the agency with any presentation materials during its presentation. The GAO ruled that given that "government notes" are specifically mentioned in FAR 15.102(e) as a permissible method of maintaining a record of oral presentations, and given the lack of any prejudicial disagreement between the parties as to what was said during the presentation, the protestors complaint provides no basis to challenge the award.

**How should the oral presentation be evaluated?**

**Evaluation**

There is no firm rule regarding the most appropriate time to evaluate the presentation. Some agencies have elected to perform the evaluation immediately upon conclusion of each presentation. Other agencies have performed the evaluations of presentations after all of the presentations have been made. If practicable, it is recommended to score the oral presentations immediately after each presentation is made. If the latter approach is chosen, it is recommended that the evaluators should caucus following each presentation to exchange reactions, summarize potential strengths and weaknesses, and verify perceptions and understandings.

## PART VII. Clarifications vs. Communications

### Background

Clarifications and Communications are defined in the Federal Acquisition Regulation (FAR) as follows:

**Clarifications** are limited exchanges between the Government and offerors that may occur when award without discussions is contemplated (see FAR 15.306 (a)).

**Communications** are exchanges between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range (see FAR 15.306 (b))

**Discussions** are negotiations conducted in a competitive acquisition, that take place after establishment of the competitive range (see FAR 15.306(d)).

The difference between what constitutes discussion or clarification has been a prominent problem within government contracting activities. A discussion between the Contracting Officer (CO) and an offeror obligates the CO to conduct discussions with all offerors in the competitive range, however, a request for clarification does not. When a CO communicates with some but not all offerors in the competitive range, other offerors may allege that they have been improperly excluded from discussions and thereby denied an equal opportunity to compete and may protest the source selection.

The CO may enter into communications with offerors who may or may not be included in the competitive range and not be obligated to communicate with the other offerors. The exchange may include critical information pertaining to the acceptability of the proposal or past performance concerns.

The objective of exchanges, including clarifications and communications, is to allow the Government to meet its needs in the most effective, economical and timely manner. However, there are limitations as to how this can be accomplished. Prior to the Clinger-Cohen Act, there were prohibitions on technical leveling and auctioning that have been removed from the FAR. However, there are new prohibitions in FAR 15.306 (e) specifically forbidding: (1) favoring one offeror over another; (2) revealing an offeror's technical solution including unique technology, innovative and unique uses of commercial items, or any other information that would compromise an offeror's intellectual property; (3) revealing the names of individuals proving past performance information, knowingly furnishing source selection information; or (5) revealing an offeror's price

without permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.

Another important limitation during pre-competitive range exchanges of information is that clarifications and communication shall not provide an opportunity for proposal revisions. If this happens, all other offerors must also be allowed to revise their proposals. This can become especially complicated during oral presentations since an important goal of oral presentations is to provide an opportunity for dialogue among the parties. Since oral proposals generally include a session of questions and answers, care must be taken that the questions asked and the answers received do not modify the oral proposal presented. The CO must anticipate problems, take care to treat all offerors equally and keep records of all such communications.

Clarifications are used to enable the Contracting Officer to clarify certain aspects of proposals in order to proceed to award without discussions. Communications are used to clarify areas of ambiguity in order to determine whether the affected proposal should be included in the competitive range.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 15.306 (Exchanges with Offerors after Receipt of Proposals); and FAR 52.215-1 (Instructions to Offerors—Competitive Acquisition)

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**Issues/Questions**

- ❒ What should clarifications include?
- ❒ What should communications be used to accomplish?
- ❒ What are the limitations on pre-competitive range communications?
- ❒ How are clarifications and communications appropriately used?

## Discussion Topics

**What should clarifications include?**

1. To learn the relevance of past performance information

2. To respond to adverse past performance information if the offeror has not previously had that opportunity
3. To resolve minor or clerical errors such as
   - Obvious misplacement of decimal point in proposed price or cost information
   - Obviously incorrect prompt payment discount
   - Obvious reversal of price f.o.b. destination and f.o.b. origin or
   - Obvious error in designation of the product unit
4. Resolve issues of offeror responsibility or acceptability of the proposal as submitted.

The key word in applying clarifications is "limited" communication. Clarifications are permitted to give the offeror an opportunity to make clear and obvious key points about the proposal as originally submitted. The offeror may not revise, expand (by adding new information that enhances the proposal), or amplify its proposal. The intent of clarifications is to remove obvious ambiguity, not to permit the offeror to improve its position by drawing inferences from the Government's questions/information gathering exchanges and using those inferences to shade the meaning of the original proposal so that it becomes more attractive and more beneficial to the Government.

Of course, any opportunity for revision or enhancement must be made available to all offerors with proposals deemed acceptable for inclusion in a competitive range.

Communications are exchanges between the Government and offerors after receipt of proposals with the purpose of establishing a competitive range. Communications are authorized only when the offeror is not clearly in or clearly out of the competitive range. In other words, communications are used to determine whether an offer has a reasonable chance for award, i.e., should be included in the competitive range.

Specifically, communications:

- must be held with offerors whose past performance information is the determining factor that would prevent them from being in the competitive range. Adverse past performance must be addressed if the offeror has not had a prior opportunity to respond

- may be held with other offerors whose exclusion from or inclusion in the competitive range is uncertain.

**What should communications be used to accomplish?**

- Enhance the Government's understanding of the proposal (again, in order to determine whether to include the proposal in the competitive range):
- May address ambiguities of concern in the proposal (perceived deficiencies, weaknesses, errors, obvious omissions or mistakes)
- May address information relating to relevant experience
- Allow reasonable interpretation of the proposal (but not to enhance or revise it)
- Facilitate the Government's evaluation process

As stated previously, neither clarifications nor communications are permitted to be discussions in the pre-competitive range phase. Once a competitive range has been established, communications will be expanded to include discussions and may also include additional clarifications.

**What are the limitations on pre-competitive range communications?**

1 Cure proposal defects or material omissions
2 Materially alter the technical or cost elements or the proposal
3 Otherwise revise the proposal.

Should any of the above circumstances occur, discussions have ensued. The Contracting Officer must then hold the same level of discussions with all offerors. For all practical purposes, the Contracting Officer has then established a competitive range that consists of all offerors. This could lead to holding discussions with offerors that do not have acceptable proposals and most probably would not be included in the competitive range. Accordingly, it is important not to let pre-competitive range communications stray into discussions.

**How are clarifications and communications appropriately used?**

Clarifications and communications are effective tools when used appropriately and well documented. They allow some limited exchanges with offerors to facilitate the Government's decisions concerning award without discussions or inclusion in the competitive range. Invocation of either clarifications or communications with one offeror does not require exchanges with all offerors – if they are handled correctly and documented carefully.

Care needs to be taken by the Contracting Officer to ensure that the exchanges are within the limits defined in FAR 15.306 (a) and (b) and that no offeror is allowed to revise its proposal as the result of these types of exchanges.

As with all elements of the source selection/negotiation process, clarifications and communications must be carefully documented by the Contracting Officer to insure that there is no appearance that one offeror is favored over another. The nature and extent of the exchanges needs to be set out clearly for the record.

# PART VIII. Cost or Price Analysis

### Background

Probable cost to the Government is a mandatory evaluation factor (See Federal Acquisition Regulation (FAR) Subpart 15.404-1(d)). Thus, this element must be evaluated in every procurement. There are two aspects of this evaluation. First, the contracting officer must ensure that the contract price, or cost and fee, is fair and reasonable. Second, in cost-reimbursement contracts the contracting officer must determine the probable cost of performance and use that cost in the selection process. The contracting officer shall use cost or price analysis to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the work. The contracting officer shall document the cost or price evaluation.

The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgement was derived.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.401 (Definitions); FAR 15.403 (Obtaining Cost or Pricing Data); FAR 15.404-1 (Proposal Analysis Techniques); and FAR 31.201-4 (Determine Allocability)

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### Issues/Questions

- ❒ What is price analysis and when should it be performed?
- ❒ What is cost analysis and when should it be performed?

## Preferred Approaches

### What is price analysis and when should it be performed?

### Price Analysis

The contracting officer is required to make a price analysis on every procurement to ensure that the overall price to be included in the contract is fair and reasonable.

In the competitive negotiation process, price analysis is the preferred technique for determining price reasonableness because it permits the contracting officer to make the determination without a detailed analysis of the cost and profit elements of each proposal using cost analysis techniques.

Price analysis is generally based on data obtained from sources other than the prospective contractor. This data is gathered by the Government negotiating team from as many sources as possible. Generally, to assure that the price being included in the contract is reasonable, a sound price analysis will be based on several different types of data.

The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis.

Comparison of proposed prices received in response to the solicitation. In this case competition is relied on to ensure that the costs are fair and reasonable.

Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity and the reasonableness of the previous prices can be established. A determination must be made that ensures that the price that is being compared to the proposed price has been determined to be fair and reasonable. Either through presence of adequate price competition or some other manner such as cost or price analysis.

Use of parametric estimating. This analysis tool is used to identify inconsistencies in pricing that require further review. It is a technique used to estimate a particular cost or price by using an established relationship with an independent variable. Steps to follow when using this technique are:

1. Define the dependent variable (e.g. cost dollars, hours, and so forth.)
2. Select the independent variable to be tested for developing estimates of the dependent variable.
3. Collect data concerning the relationship between the dependent and independent variables.
4. Explore the relationship between the dependent and independent variables.
5. Select the relationship that best predicts the dependent variable.
6. Document your findings.

Comparison between competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

Comparison of proposed prices with independent Government cost estimates.

Analysis of pricing information provided by the offeror. Sufficient information must be obtained to determine the reasonableness of the proposed price. When there is insufficient information available from other sources, information must be requested from the contractor that is sufficient to determine a fair and reasonable price. Care must be taken to ensure that you request only the required information and not certified cost and pricing.

**What is cost analysis and when should it be performed?**

**Cost Analysis**

Cost analysis is used to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis is: (1) the review and evaluation of the separate cost elements and profit/fee in an offeror's or contractor's proposal (including cost or pricing data or information other than cost or pricing data), and (2) Application of judgment.

A cost analysis must performed anytime that certified cost and pricing data is required as defined in FAR 15.403-(4)(a)(1). A proposal must be analyzed to determine what costs to use in developing your negotiation objective and what price you determine to be fair and reasonable. When using cost analysis to negotiate contracts a price analysis must also performed as it is possible to assure that all of the specific cost elements in a proposal are reasonable and determine that the overall price is not.

In accordance with FAR 15.404-1(d)(2), a cost realism analysis when awarding a cost type contract must be performed. This is a special analysis required primarily to ensure that proposed costs are not unrealistically low. In addition, this analysis provides the foundation for estimating the fee. Furthermore, a cost realism analyses may also be used on competitive fixed-priced incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors proposed costs have resulted in quality or service shortfalls (See FAR 15.404-1(d)(3). Additionally, one of the criteria required for the determination of reasonableness and allocability is the determination that the cost is allocable to

the contract. The FAR at 31.201-4 states that " a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship.

Subject to the foregoing a cost is allocable if it (a) Is incurred specifically for the contract; (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown".

**Direct Costs**: Those costs that are incurred specifically for the contract are identified as direct costs. These costs take the form of material, labor, tooling, subcontract costs and other direct costs. There are two aspects of these costs that must be analyzed, volume and unit price. As an example, the amount of labor hours, rates and skill mix proposed must be analyzed to determine if they are reasonable to perform the contract.

**Indirect Costs**: Indirect costs are (1) costs that cannot practically be assigned directly to the production or sale of a particular product. In accounting terms such costs are not directly identifiable with a specific cost objective, or (2) direct costs of such minor amount that the costs associated with directly accounting for them exceed the benefit of directly accounting for them. These costs may be treated as indirect costs provided that the accounting treatment is consistently applied and it produces substantially the same results as treating the cost as a direct cost.

The term indirect cost covers a wide variety of cost categories and the costs involved are not all incurred for the same reasons. A firm may have as few as one or as many as one hundred cost accounts. In general indirect cost accounts fall into two major categories:

**Overhead**: These are indirect costs incurred primarily to support specific operations. Examples include: material overhead; manufacturing overhead; engineering overhead; field service overhead; and site overhead.

**General and Administrative Costs (G&A)**: These are management, financial, and other expenses related to the general management and administration of the business unit as a whole. These costs may be either incurred by or allocated to the general business unit. Allocation occurs when home office expenses are allocated to a division as a business unit. Examples of G&A costs include; salary and other costs of the executive staff of the corporate or home office; salary and other costs of such staff services as legal, accounting, public relations, and financial offices; selling and marketing expense.

# PART X. Cost/Tech Tradeoffs Under "Best Value" Procurements

## Background

Under a "Best Value" continuum there is a recognition that the Government always seeks to obtain the best value in negotiated acquisitions using any one, or a combination, of source selection approaches, and that the acquisition should be tailored to the requirement. At one end of this continuum is the low priced technically acceptable strategy, and at the other end is a process by which cost or price, past performance, and technical considerations can be traded off against each other to identify the proposal that provides the Government with the overall best value. Tradeoffs are used when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

A best value analysis lends itself to determining the lowest cost alternative. Best value procurements involve tradeoffs between cost, technical and past performance--For example, if the government's requirement needs are to increase efficiency and thereby reduce the agencies operating cost, the purchase of a high end computer at a high price may a better value than a low end computer at a low price in achieving these requirements.

Establishing the evaluation scheme allowing for a cost/technical tradeoff decision allows for a great deal of discretion and the exercising of judgement by the Source Selecting Official (SSO).

**Applicable statutes, procurement regulations, or small business regulations**

Federal Acquisition Regulation (FAR) 15.101-1 (Tradeoff Process) and FAR 15.308 (Source Selection Decision)

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**Issues/Questions**

- ❒ What are the steps in performing a cost/tech tradeoff?
- ❒ What documentation is needed for a tradeoff decision?

## Discussion Topics

**What are the steps in performing a cost/tech tradeoff?**

**Steps in Performing a Cost/Tech Tradeoff**

The Request For Proposal (RFP) should contain language which establishes the procedures that allow award to other than the lowest price offeror or other than the highest technically rated offeror. After establishing all factors to be evaluated and their relative importance, the RFP must, "state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price." See FAR 15.101-1(b)(2).

An evaluation of all the technical and management criteria should be performed in accordance with the evaluation scheme provided for in the RFP. It is important for the source evaluation team to develop written narratives which describe the strengths and weaknesses of each offer as they are important tools in making and documenting a tradeoff decision.

The price the Government will use in making a tradeoff decision should be defined in the RFP. For a fixed price offer, this will usually be the offered price. For a cost reimbursable contract, this may be calculated as a "most probable cost" under cost realism procedures.

If the Government receives an offer which, when evaluated offers both the lowest evaluated price and the highest rated technical/management offer, no tradeoff analysis is required. If however, that is not the case, the SSO should determine whether the value of technical and management differences between proposals justifies paying the cost differential between the proposals. The ability to differentiate meaningfully among the proposals is very important in making this decision. Often an RFP will state that the closer the technical score is, the more important cost will become.

**What documentation is needed for a tradeoff decision?**

**Documentation of Tradeoff Decision**

In accordance with FAR 15.308, source selection decision, "The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSO, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision".

The agency files should contain documentation which demonstrates that its evaluation of the offerors responses to a Request for Proposals was reasonable and in accordance with the criteria

outlined in the RFP. In a protest, given the discretion granted to agencies in conducting best value procurements, disappointed offerors generally will have only two legal bases for challenging an agency's cost/technical tradeoff analysis–first, that the agency's underlying cost and technical evaluations that formed the basis for the cost/technical tradeoff are inconsistent with the terms of the solicitation, and second that the cost/technical tradeoff decision was unreasonable. There is no legal requirement that the agency quantify any cost/technical tradeoffs in dollars. An agency should use whatever evaluation approach (e.g., narrative, quantification) that best its needs. For example, agencies can use narrative explanations of its cost/technical tradeoff so long as it is reasonable and consistent with the criteria identified in the RFP. Some examples of rationale for the business judgements and tradeoffs made by the Source Selection Authority include, but are not limited to, the amount of cost differential, project or service criticality, and potential consequences to the DOE in the event of poor performance. The determining factors should be described in a clear and convincing manner, providing justification as to how they relate to anticipated contract success.

# PART XI. Award Without Discussions

### Background

Federal Acquisition Regulation (FAR) Part 15 allows for award of contracts without discussions with the offerors if the solicitation states that the Government intends to evaluate proposals and make award without discussions. Clarifications are limited exchanges between the Government and offerors, that may occur without jeopardizing the ability to award without discussions. Additional information on the nature of clarifications versus discussions is presented in subsequent sections.

### Applicable statues, procurement regulations, or small business regulations

FAR 15.306(a)(3) (Clarifications and Award Without Discussions), FAR 52.215-1 (Instructions to Offerors - Competitive Acquisition), 10 U.S.C 2305(b)(4)(A)(ii) and 41 U.S.C.253b(d)(1)(B)

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### Issues/Questions

- ❒ What is DOE's position regarding award without discussions?
- ❒ Why make an award without discussions?
- ❒ What are the guidelines regarding award without discussions?

## Discussion Topics

### What is DOE's position regarding award without discussions?

Contracting Officers should, to the maximum extent practicable, award contracts without discussions. However, consideration should be given to the nature of the requirement and the evaluation criteria to ensure that it would unlikely that discussions would result in any improvement to proposals.

### Why make an award without discussions?

Discussions may add weeks to procurement lead time. The time involved in solicitation preparation, evaluation and source selection tax our limited procurement and program personnel

resources. The additional time necessary to conduct negotiations imposes yet another burden on personnel that have many other commitments they must meet.

In most cases, discussions will not enhance the Government's ability to obtain best value. Though it is unlikely that discussion will improve an offerors chances of award, discussion will likely increase offerors costs since, they will need to keep the proposal team in tact in order to address discussion questions as well as prepare a revised proposal.

**What are the guidelines regarding award without discussions?**

Application of the following guidelines will increase the likelihood of evaluating proposals and making awards without discussions:

Evaluation factors must be specific to the needs of the program and the statement of work in the solicitation as opposed to using generic factors that can be applied to many different types of procurements.

Information that offerors are required to submit for evaluation must be closely tied to the evaluation factors. Solicitation instructions for submission of information must be specific and in sufficient detail so that proposals submitted by responsive offerors will contain all of the information necessary for evaluators to clearly assess, in accordance with the evaluation factors, the offeror's strengths, weaknesses and risks in performance of the prospective contract.

The solicitation should state that any proposed deviation from the terms and conditions in the solicitation may make the offer unacceptable for award without discussions, and that the Government may make an award without discussions to another offeror that did not take exception to the terms and conditions of the solicitation.

The solicitation must state that the Government intends to evaluate proposals and make award without discussions. This language is contained in FAR clause 52.215.1 without alternates. If a solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so must be documented in the contract file.

# PART XII. Contents of an Evaluation Report

## Background

The FAR requires that the evaluation of the relative strengths, deficiencies, and significant weaknesses of a proposal be documented in the contract file. The content of this evaluation should be in the form of a report that definitively and comprehensively reflect the Government's evaluation consistent with the evaluation criteria stated in the solicitation. Furthermore, the report should accurately reflect the deliberations of the Technical Evaluation Committee or the Source Evaluation Board (TEC/SEB), and be consistent with the rating plan. Though the content of the report is consistent for a either a TEC or SEB, the report prepared by the SEB should be significantly more detailed.

The evaluation report outline below is a listing of areas that may be appropriate to address in the evaluation report. The selection and use of these areas must be consistent with the nature of the specific proposals being evaluated and the particular situation of the individual acquisition. Some of these areas may be combined as appropriate. Some of these areas will only be applicable depending on the circumstances of the acquisition, e.g., establishing the competitive range, award without discussions. The subject areas may be used, as appropriate, for both the initial evaluation report (competitive range report) and the final evaluation report. The individual areas may be included in the main body of the report or certain areas may be more appropriate for inclusion as an attachment to the report.

## Applicable Regulations

FAR 15.305 (Proposal Evaluation); and FAR 15.308 (Source Selection Decision)

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## Issues/Questions

- ❒ What are the guiding principles for developing an evaluation report
- ❒ What does an evaluation address and what does a sample resemble?

## Discussion Topics

### What are the guiding principles for developing an evaluation report?

Develop concise and comprehensive documentation that reflects the Government's overall evaluation of proposals.

The evaluation report becomes the official record documenting the logic and rationale used to arrive at the evaluation and ratings.

The evaluation report must as a minimum contain the relative strengths, weaknesses, deficiencies, and other considerations of each proposal evaluated against the stated evaluation criteria contained in the solicitation.

Include scores, adjectival ratings, and relative rankings of offerors in the evaluation report.

The level of detail of the evaluation documentation is dependent on the nature, scope, and complexity of the acquisition. Evaluated strengths, weaknesses, and deficiencies must be addressed in sufficient detail to support the rating or ranking given.

The report should reflect the process used to evaluate proposals (consistent with the rating or source selection plan).

The evaluation report should either incorporate, attach, or reference all relevant evaluation information upon which the panel or board used to arrive at its consensus evaluation, e.g., audits reports, technical evaluation reports, etc.

Develop a comparative assessment of proposals that can be used by the source selection authority (SSA) as a basis for making a selection decision.

Provide sufficient information so that the SSA can clearly understand the area being evaluated and how it relates to the stated evaluation criteria.

Provide information that helps the SSA appreciate distinctions among proposals and the relative significance of those distinctions.

Develop documentation which the Government can use as a basis for debriefing unsuccessful offerors.

The report can become either the "script" for the oral debriefing or written excerpts from the report can be provided to individual offerors as a part of a written debriefing.

Consider that the evaluation report may be reviewed by a third party, e.g., GAO or a court, and the report needs to be very definitive as to its conclusions reached and the basis for such conclusions.

**What does an evaluation address and what does a sample resemble?**

**Sample Evaluation Report Outline**

**Executive Summary**

Description of Acquisition and Solicitation
Proposals Received
Summary Evaluation and Ratings
Competitive Range Determination or Award Without Discussions
Special Considerations
Award Recommendation

**Description of Acquisition**

Mission Need and Scope of Work
Programmatic Approvals
Funding
Development of Acquisition Strategy
Procurement History
Development of Source List

**Evaluation Panel/Board Membership**

Name, Functional Title, and Organization

**Chronology of Major Events**

**Description of Request for Proposals (RFP)**

Qualification Criteria
Technical Evaluation Criteria, Subcriteria, and Relative Weights
Business Management Evaluation Criteria, Subcriteria, and Relative Weights

Cost/Price Evaluation Criteria and Relative Weight
Fee Evaluation Criteria and Relative Weight
Basis for Award

Amendments to RFP

**Evaluation Process**

Rating/Evaluation Plan
Scoring or Rating Methodology
Use of Committees and Advisors

**Preproposal Conference and Site Tour**

Date and Place
Number of Firms Attending

**Elimination of Proposals Before Initial Ratings**

Late Proposal
Not Meet Qualification Criteria
Totally Unacceptable Proposal

**Proposal Evaluation**

Technical Proposal Evaluation
- Strengths and Weaknesses
- Scoring or Rating - Initial and final

Business Management Proposal Evaluation
- Strengths and Weaknesses
- Scoring or Rating - Initial and final

Past Performance Evaluation
- Means of Obtaining Information
- Results of Past Performance Information

Cost/Price Evaluation
- Audit Results
- Comparison to Independent Government Cost Estimate
- Scoring or Rating - Initial and final

Fee Evaluation

Weighted Guidelines Analysis
Comparison with DOE Fee Curves
Assumption of Risk

**Other Considerations**

Organizational Conflicts of Interest

Foreign Ownership, Control, or Influence
Intellectual Property
Offer and Other Documents
Financial Capability
Responsibility of Prospective Contractors
Special Areas of Concern

**Competitive Range Recommendation**

Included in Competitive Range Report

**Competitive Range Determination**

Included in Final Evaluation Report

**Discussions with Offerors in the Competitive Range**

Principal Areas Covered During Written or Oral Discussions
Summary of Differences Between Initial and Final Proposals

**Award Recommendation**

If Requested by the SSA

**Signature Page for Evaluators**

# PART XIII. Properly Documented Record

## Background

Proper documentation of the entire Source Selection Process is a critical aspect of source selection that can seriously affect the success of the procurement.

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

The source selection process requires proper documentation. Proper documentation can greatly assist the SSA in understanding the rationale employed by the evaluation team and give confidence to the SSA that the findings of the Source Evaluation Board (SEB) were consistent with the stated evaluation criteria and rating plan and are reliable. The documentation can also demonstrate to any third-party forum that the evaluation is performed in a fair and honest manner and in a manner consistent with the solicitation. Also, a properly documented record will greatly assist those called on to justify the selection decision.

## Applicable statutes, procurement regulations, or small business regulations

FAR 15.308 (Source Selection Decision); FAR 15.102 (Oral Presentations); and 15.305 (Proposal Evaluation)

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## Issues/Questions

- ❒ What documentation should be used to support the selection decision?
- ❒ What evidence should be provided regarding proposal evaluations?
- ❒ How are oral presentations documented?
- ❒ What documentation is necessary regarding electronic communications?

## Discussion Topics

### What documentation should be used to support the selection decision?

### Documentation for the Selection Decision

Regarding documentation, FAR 15.308 requires that the "documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the [Source Selection Authority], including benefits associated with additional costs. In ITT Federal Services International Corp., Comp. Gen. Dec. B-283307.2, Nov 3, 1999, the Comptroller General has interpreted this requirement as follows:

ITT contends that the selection decision document here is inadequate, on its face, to support the cost/technical tradeoff it purports to make. Where a cost/technical tradeoff is made, the selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, "including benefits associated with additional costs." Federal Acquisition Regulation (FAR) sect. 15.308; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD para. 61 at 5. ...The selection decision document here fails to meet the standard set forth in the FAR for explaining the rationale for tradeoffs that lead to incurring of additional costs. As quoted above, the document first concludes that overall the proposals were technically equal, then that CSA's costs were reasonable, and that the quality of CSA's proposal outweighs its higher cost. Not only are these findings inconsistent, but there is no explanation of the benefits associated with the allegedly higher costs of the CSA proposal.

In the above case, the protest was sustained and the decision recommends, in part, that the agency perform a new best value determination.

The Source Evaluation Board (SEB) must bear in mind that while the SSA has a great deal of discretion in making the source selection decision, he/she must first have a full understanding of the evaluations. For this reason the SSA must be presented with sufficient information on each of the competing offerors and their proposals in order to make a comparative analysis and arrive at a rational, fully supportable selection decision. Narrative statements serve as the most important part of the documentation supporting the decision. The selection decision must show the relative differences among proposals and their strengths, weaknesses and risks in terms of the evaluation factors. Each of these is an essential part of providing adequate support for the ultimate selection decision. Narrative statements serve to communicate specific information concerning relative advantages or disadvantages of proposals to the SSA that the rating scheme alone (whether adjectival or numerical) obviously cannot.

Such documentation need not be lengthy, as long as it effectively conveys the basis for the evaluator's assessment.

Proposals receiving the same rating can still have obvious distinctions, requiring an assessment of the offeror's ability to accomplish the task; these distinctions could have a direct impact on the source selection decision.

Preparation of such statements provides an excellent discipline for the evaluators because it forces them to justify their ratings and be consistent with the stated evaluation criteria.

With the high costs for the preparation of a proposal, offerors want to be assured that the evaluation was fair and impartial. Protests often arise when an offeror feels that this was not the case.

The Comptroller General has ruled that an award will not be overturned unless there is no rational basis for the award decision or unless the RFP criteria are not adhered to. See 51 Com. Gen. 272 (1971). Procuring agencies have an obligation to adequately document their source selection decisions so that a reviewing body can determine whether those actions were in fact proper. See KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD

**What evidence should be provided regarding proposal evaluations?**

**Proposal Evaluation**

Evaluation decisions must be based on tangible evidence to support an agency's decision. In Amtec Corp., Comp. Gen Dec. B-240647, 91-2 CPD, the Comptroller overturned a marginal technical evaluation because the agency record contained no evidence supporting such a grading. Similarly, in Compuware Corp. GSBCA 9533-P, 88-3 BCA, the board rejected a cost realism evaluation in which the contracting officer refused to accept auditor conclusions. The board commented that the contracting officer's decision was not supported by any evidence. Therefore, it is clear that proposal evaluations conducted in accordance with FAR 15.305 must be appropriately documented in order to withstand scrutiny.

**How are oral presentations documented?**

**Oral Presentations and Documentation**

There are numerous instances where the source selection decision was overturned because it lacked a reasoned analysis (e.g., there was no documentation of the relative strengths and weakness of the proposals or not being able to furnish sufficient supporting documentation).

Complicating even further the matter of sufficient documentation is the use of oral presentations.

FAR 15.102(e) requires that the CO keep a record of oral presentations, but allows wide discretion as to type and degree of documentation required. This places a greater burden on the SEB to be able to capture the data provided by the proposer. To document the oral presentation,

To document the oral presentation, the SEB can either rely on all offerors presenting a sufficient amount of detailed graphics, the dictation skills of evaluators, or by preserving a record of the oral presentation proceedings through the use of video or audio recording. Remember, where an agency fails to create or retain such documentation, it bears the risk that the GAO will not conclude that the agency had a reasonable basis for its procurement decisions. See American President Lines, B-236834.2, July 20, 1990.

**What documentation is necessary regarding electronic communications?**

**Electronic Record Documentation**

Given the need for proper documentation, the advent of the electronic age requires that additional measures be taken to ensure adequacy of the record. Given the requirement for proper documentation, the contract file must still contain the final record. Some offices have been using electronic media for storage of these records. With the rapid changes in information technology, will that media be readable in five or ten years? All critical documents (Source Selection Statements, SEB Reports, approvals, protest decisions, etc.) should still be kept in the official contract file. E-mail correspondence and electronic approvals must still be printed and kept in the official contract file. The electronic age has also revolutionized the way we do business and raises concerns regarding the safeguarding and protecting of procurement sensitive data. When transmitting procurement sensitive data electronically, adequate precautions must be taken to ensure data does not end up in the wrong hands. In those rare cases when sensitive data is transmitted, the use of password is essential.

# PART XV. Foreign Ownership, Control or Influence (FOCI)

## Background

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, the Department of Energy (DOE) must insure that the contractor has a Facility Clearance. In deciding whether or not to grant such a Facility Clearance, DOE must determine whether or not the contractor is subject to Foreign Ownership, Control or Influence that could pose an undue risk to the common defense and security.

In addition to these regulatory FOCI situations, the DOE is also prohibited by statute from awarding a DOE contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. Such an award can be made only after obtaining a Secretarial waiver in accordance with the statutory provisions.

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, DOE must determine whether or not the contractor possesses a "Facility Clearance." A "Facility Clearance" is an administrative determination that a facility is eligible for access to classified information or special nuclear material. In deciding whether or not to grant a Facility Clearance, DOE must determine whether the contractor is subject to Foreign Ownership, Control or Influence.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

In order to make this determination, DOE obtains FOCI information from offerors using the solicitation provision at DEAR 952.204-73, Standard Form 328, Certificate Pertaining to Foreign Interests, (and various other documents relating to the company's finances; owners, officers and directors, etc.). Based on the information disclosed by the offeror, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror will not pose an undue risk to the common defense and security.

In those cases where FOCI is present, and the DOE determines that an undue risk to the common defense and security may exist, the offeror or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

The types of plans that a contractor can propose are: (1) measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; (2) modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; (3) assignment of specific security duties and responsibilities to board members or special executive level committees; or (4) any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis.

If the offeror and the DOE cannot negotiate a plan of action that isolates the offeror from FOCI satisfactory to the DOE, then the offeror will not receive a Facility Clearance and shall not be considered for contract award.

**National Security Program Contracts**

In addition to the general FOCI situations described above, which are governed by regulatory provisions (i.e., DEAR), there is also a special FOCI situation that is governed by statute. Specifically, 10 U.S.C. § 2536, prohibits the award of a Department of Energy contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. (Note that the entity must be controlled by a foreign government for this statute to apply.)

"Entity controlled by a foreign government" means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. "Effectively owned or controlled" means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law. "Proscribed categories of information" include: (1) Top Secret information; (2) Communications Security (COMSEC) information (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended; (4) Special Access Program (SAP) information; or, (5) Sensitive Compartmented Information (SCI).

The Secretary of Energy may waive this prohibition, pursuant to 10 U.S.C. 2536(b)(1)(A), if the Secretary determines that waiver is essential to the national security interests of the United States.

The Secretary may also waive this prohibition in the case of a contract awarded for environmental restoration, remediation, or waste management at a Department of Energy facility, if the Secretary determines that the waiver will advance the environmental restoration, remediation, or waste management objectives of the Department and will not harm the national security interests of the United States, and the entity to which the contract is awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under section 144c of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)) (10 U.S.C. 2536(b)(1)(B).

Applicable statutes, procurement regulations, or small business regulations

10 U.S.C. § 2536; Executive Order, 12829, Jan 6, 1993, National Industrial Security (NISP); National Industrial Security Program Manual, DOD 5220.22-M; Department of Energy Acquisition Regulations (DEAR) 904.70 (Foreign Ownership, Control or Influence over Contractors); DEAR 952.204-2, (Security Clause); DEAR 952.204-73 (Facility Clearance (Deviation)); DEAR 952.204-74 (Foreign Ownership, Control or Influence over Contractors; Standard Form 328, (Certificate Pertaining to Foreign Interests; and Acquisition Letter 99-03 (Foreign Ownership, Control or Influence.

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**Issues/Questions**

- ❒ What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

## Discussion Topics

### What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

The contracting officer should receive a Procurement Request-Authorization (DOE F 4200.33 or equivalent) and Contract Security Classification Specification (CSCS) (DOE F 5634.2) from the procurement request originator.

Upon receipt of these forms, the contracting officer must include the appropriate terms and conditions in the solicitation [DEAR 952.204-73, Facility Clearance (Deviation)], and should state in the solicitation that if an offeror is included in the competitive range, they may be required to complete the FOCI Certificate Pertaining to Foreign Interests, SF 328, which contains questions concerning the degree and extent of foreign ownership and control over the offeror.

Once the contracting officer identifies a competitive range, the Defense Security Service/ Central Verification Activity should be reviewed and the local safeguards and security office should be contacted to determine if the possible offerors have an approved facility clearance.

If an offeror possesses a facility clearance, the contracting officer will send the CSCS (DOE F 5634.2) to the local DOE safeguards and security office for approval. Once the local DOE safeguards and security office signs and returns the CSCS to the contracting officer, an award of the contract can be made.

If an offeror in the competitive range does not possess a facility clearance, the contracting officer shall forward a FOCI package to the offeror (and any tier parents, if applicable). This package includes the Certificate Pertaining to Foreign Interests (SF 328).

After obtaining the Certificate Pertaining to Foreign Interests (SF 328) and accompanying documents from an offeror, the contracting officer must review the submission to ensure that the SF 328 as well as all supporting documentation are attached prior to submitting the package to safeguards and security.

Upon receipt of the complete FOCI package, the contracting officer forwards the FOCI package to safeguards and security for processing.

Upon completion of DOE's review of the offeror's foreign involvement, the local safeguards and security office should provide the contracting officer with written notification of the results of the FOCI review. If the FOCI determination is favorable and the offeror is granted a DOE-approved facility clearance, the local DOE safeguards and security office will sign and return the DOE F 5634.2 (CSCS) to the contracting officer. (If the FOCI determination is unfavorable, the safeguards and security office will attempt to negotiate a plan to negate or mitigate FOCI. If a satisfactory plan cannot be negotiated then the offeror will not receive a Facility Clearance and the offeror shall not be considered for contract award.)

Contract award can be made upon: (1) receipt of notification of a favorable FOCI determination from the local safeguards and security office, (2) receipt of the signed DOE F 5634.2 (CSCS) from the local DOE safeguards and security office, and (3) assurance from the contracting officer that the appropriate security clauses are included in the contract.

It should be noted that if, after contract award, a contractor's FOCI situation changes so that it becomes subject to FOCI for the first time or the extent and nature of FOCI changes, DOE must assess whether those changes will pose an undue risk to the common defense and security.

In making this determination, the Department considers proposals made by the contractor to avoid or mitigate foreign influences. If these foreign influences cannot be avoided or mitigated, the contracting officer may terminate the contract.

The contracting officer may terminate the contract for default if the contractor fails to meet obligations imposed by the FOCI clause (e.g., provide the information required by the clause, or make the clause applicable to subcontractors), or if, in the contracting officer's judgment, the contractor creates a FOCI situation in order to avoid performance or a termination for default. The contracting officer may terminate the contract for convenience if the contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem. In any event, without an adequate mitigation plan, the contractor's Facility Clearance will be terminated and they can no longer perform work requiring access to classified information or a significant quantity of nuclear material.

# PART XVI. Debriefings

## Background

In a FAR Part 15 procurement, contracting officers are required to offer debriefings to all unsuccessful offerors. The debriefing is the method by which the offerors obtain information to decide whether to protest and is a possible venue for heading off a protest. Debriefings need to be informative and professionally presented. They should never degenerate into debates over the propriety of the source selection process or the accuracy of the government's evaluation. The general approach to a debriefing should be to provide all required information, satisfy the debriefed offeror's reasonable questions about the procurement, and provide as much information as possible without prejudicing the procurement in the event it must be reopened for any reason. The timing of a debriefing affects both the timeframe for filing a GAO protest and also the time within which a protest will require the protested contract performance to be suspended. Because most of DOE's Part 15 procurements are for services, this guidance is written with services procurements in mind.

When a contract is awarded on a basis other than price alone, unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.

However, the debriefing requirements only apply to procurements carried out under FAR Part 15 requirements. There is no requirement for a debriefing for placement of an order under a schedule contract pursuant to FAR Subpart 8.4, for placement of a contract using simplified acquisition procedures under FAR Part 13 (including the test program for certain commercial items in FAR Subpart 13.5), for placement of a task or delivery order under an indefinite delivery contract pursuant to FAR Subpart 16.5, for an contract issued pursuant to the sealed bid procedures of FAR Part 14, or at the time an option is exercised.

The debriefing should provide the unsuccessful offeror with sufficient information to enable him to understand why his proposal was not selected and to enable him to present a better proposal in a future competition. In other words, the information should be of "value" to the unsuccessful offeror.

## Applicable statutes, procurement regulations, or small business regulations

FAR 15.503 (Notifications to Unsuccessful Offerors); FAR 15.505 (Preaward Debriefing of Offerors); FAR 15.506 (Postaward Debriefing of Offerors); FAR 15.507 (Debriefing Available When Procurement Reopened); FAR 33.104(c) (Interrelationship of Debriefing and

Stay/Suspension of Contract); 4 C.F.R. § 21.2(a)(2); 31 U.S.C. § 3553(d)(4)(B) (Requiring Suspension of Protested Contract Performance if Protest is Filed Within Five Days of Required and Requested Debriefing); and 41 U.S.C. § 253b(e), (f), (g) (Preaward and Postaward Debriefing Requirements).

**********

**Issues/Questions**

- ❒ What should be the contracting officer's strategy?
- ❒ When should debriefings be held and how should they be scheduled?
- ❒ What is the effect of the debriefing schedule on potential protests?
- ❒ What are the special considerations for preaward debriefings?
- ❒ What the clocks start when debriefings are conducted?
- ❒ What information is to be provided and when should it be provided?
- ❒ What information may not be provided?
- ❒ Who should attend debriefings?
- ❒ What are "Open Book" debriefings?
- ❒ What common questions or problems are associated with debriefings?

## Discussion Topics

### What should be the contracting officer's strategy?

### The Contracting Officer's strategy

The contracting officer should plan for the debriefing well before award is made. Based on the particular circumstances of the procurement, the contracting officer should devise a debriefing strategy to provide as much information as the offeror might reasonably request and should prepare for likely offeror questions. Some contracting officers have found it useful to request the offerors to provide any questions in writing a day or so before the debriefing. This gives the agency time to review the questions and provide a more cogent answer to the questions. Even if the offeror provides questions in advance, it should not and cannot be prohibited from posing additional questions at the debriefing. The offeror should come away from the debriefing with an understanding of why its proposal was not selected. Oftentimes there are one or two elements of the offeror's strategy that negatively affected the evaluation and that can be summarized for the offeror's benefit. For example, an offeror might have decided that it understood the government's requirements better than the government and pursued a strategy of offering the government what the offeror believed was best notwithstanding the requirements in the solicitation.

In this instance, it can be helpful to be prepared to review the portion of the solicitation that stated these requirements. Where discussions were held, it can be very helpful to point out to an offeror where the issue that led to its lack of success was raised in discussions.

An understanding of the perspective of a disappointed offeror is sometimes useful in conducting a debriefing. Preparation and submission of a proposal may be a time consuming, costly, and an sometimes emotional exercise for the offeror's proposal team. Nonacceptance of a proposal under such circumstances can produce a degree of emotional and professional trauma in the team members. In response disappointed offerors may react with resentment ("How could I not win?!"), suspicion ("This process must be rigged!"), and anger ("The agency has it in for me!"). As a consequence, many debriefings are not viewed by disappointed offerors as an opportunity to learn how to improve the next time, but rather as an opportunity to vent, demonstrate the poor judgement of the selecting official and evaluators, and identify a basis to overturn the decision through a, bid protest. Although government personnel frequently respond to this reaction by offering as little information as possible, this is not a desirable strategy for the debriefing. Indeed it is frequently more productive to use the debriefing to discharge the emotion, demonstrate the procedural credibility of the decision, and convince the disappointed offeror that a basis for protest does not exist. Strategies for doing so should be fully considered in preparing for the debriefing.

**When should debriefings be held and how should they be scheduled?**

The general principle applicable to debriefings is that an unsuccessful offeror should be offered a debriefing soon after DOE determines that the offeror is unsuccessful. The FAR distinguishes between preaward and postaward debriefings, depending on when the debriefing is held. The FAR establishes a clear preference that an offeror excluded from the competitive range be provided with a preaward debriefing, and we address the implications of this choice in the next section. A postaward debriefing should be held as soon as possible after the award.

The optimum schedule has the contracting officer faxing a letter to the unsuccessful offeror on day 0, informing the unsuccessful offeror of its right to request a debriefing within three days and, in the same letter, informing the unsuccessful offerors of the offered date for their debriefings should they choose to request a debriefing. A sample letter is attached as Attachment A. The offered date should optimally be a date between four and eight days after the unsuccessful offeror letter is faxed. An unsuccessful offeror does not have the right to any particular schedule or location for the debriefing. For postaward debriefings, the letter offering the debriefing optimally should be sent to the offeror on the day of award. For preaward debriefings, the letter should be sent as soon as DOE makes a determination that the offeror is no longer under consideration for award.

**What is the effect of the debriefing schedule on potential protests?**

**Effect of the debriefing schedule on potential protests**

In a FAR Part 15 procurement, a company cannot pursue a GAO protest on an issue other than a solicitation issue before its debriefing, if that debriefing was "requested and required." GAO will dismiss a protest filed before the debriefing as premature. Therefore, it is generally best to schedule the debriefing very soon after the offeror is no longer under consideration for award.

**What are the special considerations for preaward debriefings?**

**Special considerations for preaward debriefings**

If the offeror was excluded from the competitive range, the debriefing generally should be held as a preaward debriefing soon after the offeror is notified of its exclusion from the competitive range. The debriefing may be held as a postaward debriefing based on the CO's decision or the offeror's request, but these choices have different consequences.

**If the contracting officer delays the preaward debriefing**:

The contracting officer has the discretion to delay the debriefing until after award, based on "compelling reasons" that holding a preaward debriefing is not in the best interests of the government. The contracting officer is required to document the rationale for delaying the debriefing. If the government decides to delay the debriefing until after award, the unsuccessful offeror cannot protest until after the debriefing and, if there is a successful protest, the procurement actions after the offeror was excluded may be nullified.

**If the offeror requests that the preaward debriefing be delayed**:

The offeror can request that the government delay a preaward debriefing until after award. In the event that the debriefing is delayed due to the offeror's request, the contracting officer should indicate in writing that debriefing is being postponed at the offeror's request. In the event the offeror requests the government to delay the debriefing from preaward to postaward, GAO generally will not find a protest based on the debriefing to be timely.

**What the clocks start when debriefings are conducted?**

**Clocks**

Once a "required and requested" debriefing is held, two clocks start to run on the offeror's time for filing a protest. The first clock determines whether GAO will consider the protest. Generally, for a protest to be timely filed at GAO, it must be filed within ten days after the debriefing. If the protester waits until more than ten days after it learned of the basis for its protest and that date is more than ten calendar days after the debriefing, GAO will dismiss the protest as untimely. Please note that protesters can also pursue protests at the Court of Federal Claims, which does not have a ten calendar day time limit for filing protests. The second clock determines whether the agency will have to stay the award of the protested contract or suspend performance on the protested contract. If a protest is filed at GAO and GAO notifies DOE of the protest within either five calendar days after debriefing or ten calendar days after contract award, whichever is later, DOE must suspend performance of the protested contract. If GAO notifies DOE of a protest filed before award is made, DOE must stay the award of the protested contract. In both cases, the stay is in place until GAO decides the protest or until DOE overrides the stay.

**What information is to be provided and when should it be provided?**

FAR 15.506(d) and 15.505(e) set forth detailed lists of information to be provided and the applicable list provides a fairly good agenda for the debriefing.

**Information in advance**:

Much of this information can be provided in advance of the actual debriefing, either in the unsuccessful offeror letter or in a later written communication prior to the debriefing. It is a better practice to provide the debriefed offeror with a copy of its own evaluated strengths and weaknesses before the debriefing. This practice saves time for everyone, and prevents disagreement over what was said, gives the offeror a chance to get past any emotional reaction to the strengths and weaknesses in the privacy of its offices, and usually improves the cogency of the questions asked at the debriefing.

**Dialogue**:

Because the debriefing rules require the government to provide reasonable responses to relevant questions about whether source selection procedures were followed, it is virtually impossible to provide a complete debriefing to an offeror without an opportunity for dialogue, either in person or by telephone.

**Interpretation of "overall ranking" and "technical rating":**

When FAR 15.506(d)(3) refers to providing the "overall ranking of all offerors," it means the ranking when there was a combined ranking including cost/price and technical factors and does not require the CO to provide just the technical rankings or just the cost/price rankings. DOE generally has not performed such rankings in its source selection process, nor are such rankings required. When FAR 15.506(d)(2) refers to providing the "technical rating" of the awardee and of the debriefed offeror, it does not mean that every factor and subfactor score must be revealed. If a competitive range was drawn and discussions were held, there is no requirement to provide the offeror with its or the awardee's pre-discussions scores. There is no requirement to provide the offeror with the awardee's subfactor scores. Providing more than the required information concerning the awardee's scores can be regrettable if the procurement must be reopened for corrective action, a change in requirements, or some other reason. Moreover, in some instances, providing specific scoring information could amount to a violation of the prohibition against providing point-by-point comparisons between the awardee's and the debriefed offeror's proposals.

**Whose ratings should be provided**:

In the unlikely and hopefully rare event that the source selection official disagrees with aspects of the technical evaluation committee's report, either with respect to scores or to the strengths and weaknesses, the information that is required to be provided to the offeror is the evaluation on which the selection was based, that is, the source selection official's evaluation.

**What information may not be provided?**

FAR 15.505(f) and 15.506(e) provide detailed lists of information that must not be provided in the debriefing. The usual item that comes up is the prohibition on providing "point-by-point comparisons of the debriefed offeror's proposal with those of other offerors." For this reason, it is advisable that the government not have the other offerors' proposals or the evaluation of the other offerors in the debriefing room. Some agencies take the position that revealing detailed score information about the awardee may constitute providing point-by-point comparisons. An exception to these limitations exists in the form of an "open book debriefing" described below.

**Who should attend debriefings?**

The FAR provides that the contracting officer is in charge of the debriefing and anticipates that he or she will get support from technical and legal personnel as needed. Neither the Source Selection

Authority (SSA), the SEB Chair, or the SEB team members are required to attend. Normally it may be sufficient to have the contracting officer, a technical evaluator (to ensure that communication conveying the technical evaluation are accurate), and counsel to the procurement attend the debriefing. It is a good practice to have counsel present, especially if the offeror indicates it is bringing legal counsel to the debriefing, there are indications that a protest may be filed, or the procurement is significant based on dollar size, complexity, or other sensitivity. On those occasions where the contracting officer does not have the knowledge or expertise to explain the cost evaluation, it is advisable to bring someone who has that knowledge and expertise. Notwithstanding the foregoing, it should be noted that the presence of other critical officials in the source selection process such as the SSA and the SEB chair may aid in the presentation to the disappointed offeror and add to the credibility of the source selection.

These officials are particularly useful in explaining the basis for the selection decision and the results of the SEB's evaluation of the offeror's proposal. As the number and type of participants in the debriefing grows, however, the contracting officer must take particular care in preparing for and controlling the communication. Coordination with counsel is critical.

**What are "Open Book" debriefings?**

**"Open Book" debriefings**

In some very large, complex procurements, generally M&O procurements, DOE has used a technique called open book debriefings, in which DOE and all the offerors enter into a confidentiality agreement that permits DOE to reveal more information in the debriefing than is normally permitted. This technique has been extremely successful, but it is properly reserved for very large, complex procurements that do not involve repetitive requirements. If used improperly, this technique may conflict with the FAR and/or result in potential violations of the Trade Secrets Act (which subject the government personnel to personal criminal penalties as well as significant potential fines). Therefore, this technique should only be used after consultation with DOE counsel who can draft the appropriate agreements and ensure that all necessary consents are obtained.

**What common questions or problems are associated with debriefings?**

**Common questions and problems**

**Do not debate the evaluation or the selection:**

The debriefers' job is to provide information to the offeror about the procurement and not to reconsider the evaluation or debate it. This means that it is more important to listen to complaints about the evaluation results than to respond to them. It is especially important not to speculate about what would have happened if the offeror had proposed something different or a lower price.

**Be sure the debriefing has a definite conclusion:**

The debriefing should have a definite conclusion so that the time when the offeror's two protest clocks begins to run is clear. Once DOE has provided the required information and the offeror has finished asking its "relevant questions about whether the source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed," the contracting officer should indicate that the debriefing is concluded. This means that it is strongly ill-advised to tell a protester that "we'll get back to you" on a topic. If necessary, take a short break during the debriefing and seek whatever advice or information or document is needed. A well-prepared debriefing team almost never needs an additional day to provide required information or respond to relevant questions.

**Recording the debriefing:**

The government is not required to record the debriefing nor to permit the debriefed offeror to make an audio or video recording. DOE contracting officers have generally denied offerors' requests to record a debriefing. If the contracting officer considers agreeing to a request to record the debriefing, he or she should insist that two identical recordings be made and one left with the agency. This will avoid disputes over whether the recording was altered in some way. The contracting officer is required to prepare a summary of the debriefing and include it in the contract file.

**Even untimely debriefing requests should be accommodated:**

If an offeror does not request a debriefing in a timely fashion, but later requests a debriefing, the better practice is to provide the debriefing but to be clear that it is an accommodation and not a "requested and required" debriefing. The contracting officer should, however, insist that the request be in writing and should include documentation in the file that the debriefing was not timely requested.

**The awardee is also entitled to a debriefing:**

Although debriefings are commonly provided to unsuccessful offerors, FAR 15.506(a)(1) provides that offerors can request debriefings and does not exclude the awardee.

**Debriefings go forward even if there is a protest:**

Sometimes an offeror will protest or state its intent to protest before the debriefing. This does not affect the offeror's right to a debriefing. In these instances, it is obviously prudent to have counsel present and involved in the debriefing planning.

**Take a break!!:**

It is generally advisable to take breaks during the debriefing if the government attendees need to caucus concerning a question. Such discussion should take place in a different room and out of the hearing of the offeror. In addition, a break can be useful to permit the offeror to consolidate its questions and recover its composure.

**Finally, do not obsess:**

While the debriefers should make every effort to be accurate during the debriefing, keep in mind that the statements made in a debriefing will virtually never form the basis of a GAO decision to sustain a protest. There are legions of denied protests where the information provided at the debriefing was inaccurate in some way or where the protester claims it was told one thing at the debriefing while the evaluation record shows the opposite. Moreover, GAO will not address the quality of the debriefing in a protest decision.

# Headquarters Policy Flash

**FLASH 2002-37**

DATE: November 25, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **General Services Administration (GSA's) New Federal Acquisition Regulation (FAR) Deviation**

SUMMARY: This Flash is issued to advise of the new FAR Deviation issued by GSA. Business holding government contracts will soon be required to certify their size and status each time an option period is exercised under the terms of a new policy announced by GSA on November 15, 2002.

**FLASH 2002-37**
**November 25, 2002**

Some GSA Schedules contract holders that were small when originally awarded a Schedules contract, are now large, and in some cases may have been purchased by larger companies but are still listed as small on GSA contracts. This is not how the small business programs were intended to function and results in lost opportunities for those businesses intended to be help by these programs.

Previously, GSA and the Small Business Administration interpreted language from the FAR to mean that vendors kept their status as a small business for the five-year term of a GSA Schedules contract. At the end of the initial term, vendors would be able to retain that small business status into each of the three, five-year option periods.

GSA's new policy is intended to:

√ address a loophole in Federal contracting that has allowed businesses to retain their status as "small" (and all the sub-categories) even after they no longer meet the requirements for being classified as small.

√ ensure that federal contracts intended for small businesses are available to contractors with legitimate small business status. (David Drabkin, GSA's Senior Procurement Executive, issued the deviation on October 10, 2000.)

The change means that contractors operating under the Multiple Award Schedules in GSA's Federal Supply Service, or under any other multiple award contracts, such as the FAST program in GSA's Federal Technology Service, will have to recertify that they qualify as a small business each time their contract or contracts are open for renewal. Failure to recertify could lead to exclusion from federal contracting.

For questions related to this Flash, contact Steve Zvolensky at (202) 586-5936 or via e-mail at stephen.zvolensky@hq.doe.gov

Gwendolyn S. Cowan,
Director

cc:
PPAG Members

# Headquarters Policy Flash

## FLASH 2002-38

DATE: December 2, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT:
1. Project Labor Agreements
2. New Acquisition Letter, AL 2002-08, dated December 02, 2002
3. Reactivation of Financial Assistance Letter (FAL) 2001-02, dated July 30, 2001.

SUMMARY: This flash transmits a new Acquisition Letter to provide guidance for the application to M&O and other major facilities contractors, contracts for construction management services, and contract clauses pending formal amendments to the Department of Energy Acquisition Regulation (DEAR). This flash also lifts the suspension of FAL 2001-02 which had been issued to provide financial assistance guidance regarding PLAs (Ref: Flash 2002-08, dated 02/12/02).

**FLASH 2002-38**
**December 02, 2002**

1. **Project Labor Agreements**

Executive Order (E.O.) 13202, *Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects*, as amended by E.O. 13208, was issued to require that agencies and their construction managers remain neutral towards the use of PLAs for all new construction projects.

E.O. 13202 was issued to improve the internal management of the Executive branch by:

- ✓ promoting and ensuring open competition of Federal and federally funded or assisted construction projects;
- ✓ maintaining Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects;
- ✓ reducing construction costs to the Government and to the taxpayers;
- ✓ expanding job opportunities, especially for small and disadvantaged businesses;
- ✓ preventing discrimination against Government contractors or their employees based upon labor affiliation or lack thereof; and
- ✓ preventing the inefficiency that may result from the disruption of a a previously established contractual relationship in particular cases.

The Executive Orders were implemented in the Federal Acquisition Regulation (FAR) interim rule published in the Federal Register on May 16, 2001, 66 FR 27414, as part of FAC 97-26. However, as a result of an injunction against the E.O. and pending litigation to resolve the dispute, another interim rule was published in the Federal Register at 67 FR 10527, March 7, 2002, staying the rule until final judicial resolution. On July 12, 2002, a decision of the U.S. Court of Appeals for the District of Columbia Circuit, reversed the judgment of the District Court and vacated the injunction. As a result, FAC 2001-10, published November 22, 2002 (67 FR 70516), terminated the stay and adopted the May 16, 2001 interim rule as final without change. The rule is effective November 22, 2002.

The FAR amendments at 36.202(d) resulting from FAC 2001-10 specify that agencies can not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to agreements with one or more labor organizations. Agency heads are permitted to exempt a project from the requirements of the E.O. under special circumstances. FAR 36.202(d) also provides for the exemption of a project governed by a project labor agreement in place as of 02/17/01, which had a construction contract awarded as of 2/17/01. The FAR amendments, however, did not provide contract clauses to implement the changes.

**2. New Acquisition Letter, AL 2002-08, dated December 02, 2002**

A new Acquisition Letter was developed to provide additional guidance regarding the Federal implementation's impact on DOE contract awards. The clauses should be inserted in all solicitations/awards issued after the effective date of the final rule.

Guidance in the new Acquisition Letter includes:

- ✓ Application of the E.O.s to the activities of the Department of Energy's (DOE's) major facilities contractors, including DOE's M&O contractors.
- ✓ Application of the E.O.s for major facilities contracts already awarded.
- ✓ Process for requesting exemptions.
- ✓ Model clauses

For questions related to the Acquisition Letter, contact Bob Webb at (202) 586-8264 or via e-mail at robert.webb@pr.doe.gov

**3. Reactivation of Financial Assistance Letter 2001-02, dated July 30, 2001.**

For questions related to the Financial Assistance Letter, contact Trudy Wood at (202) 586-5625 or via e-mail at trudy.wood@pr.doe.gov

This AL has been reviewed by the Field Management Council and approved by the Secretary for release.

Gwendolyn S. Cowan

Gwendolyn S. Cowan, Director

cc:
PPAG Members
FAAC Members

Department of Energy
Acquisition Regulation

No. 2002-08
Date 12/02/02

# ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA.

**Subject:** **Project Labor Agreements**

## References:

Executive Order 13202, dated February 17, 2001
Executive Order 13208, dated April 6, 2001
FAR 36.202

## When is this Acquisition Letter (AL) Effective?

This AL is effective on the date of issuance.

Note: Executive Order 13202, as amended by Executive Order 13208, was the subject of litigation in the federal courts. The Federal Acquisition Regulation (FAR) and agency implementation was suspended pending resolution of the litigation. On July 12th, the U.S. Court of Appeals for the D.C. Circuit upheld Executive Orders 13202 and 13208 in its decision in Building and Construction Trades Dep't, AFL-CIO v. Allbaugh. On November 22, 2002, Federal Acquisition Circular 2001-10 was published in the Federal Register (67 FR 226). It included a final rule which terminates the stay and adopts the May 16, 2001 interim rule as final without change. The final rule was effective on November 22, 2002.

## When does this AL Expire?

This AL remains in effect until superseded or canceled.

## Who is the Point of Contact?

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202) 586-8264, or via e-mail at Robert.Webb@pr.doe.gov.

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

## What is the Purpose of this AL?

The purpose of this AL is to provide guidance for implementation of Executive Orders 13202 and 13208, issued earlier this year. The guidance describes the Executive Orders' application to and provides a clause for use in the Department of Energy's (DOE's) management and operating and other major facilities contractors. It also provides a model clause that may be used to implement the Executive Orders in contracts for construction management services.

## What is the Background?

On February 17, 2001, President Bush issued Executive Order 13202 establishing the policy of the Administration with regard to the use of project agreements \1 by Federal agencies and their construction managers for Federal construction projects. An amendment to Executive Order 13202, Executive Order 13208, was issued on April 6, 2001.

Executive Order 13202 requires that agencies and their construction managers remain neutral towards project labor agreements. That is to say, for all Federal construction contracts awarded after the date of the Executive Order, neither the Federal agency for whom the construction is being performed nor its construction manager, if one is employed, may require the negotiation or execution of a project labor agreement. By the same token, they cannot prohibit a construction contractor from implementing a project labor agreement. Executive Order 13202 provides that the head of the agency, generally, may exempt construction contracts from the Order's requirements in order to avert an imminent threat to public health or safety or to serve the national security. Additionally, Executive Order 13208 authorizes the head of an agency to exempt a particular construction project awarded after the date of Executive Order 13202 where a project labor agreement for that project was in effect before that date. The Executive Orders are implemented in the Federal Acquisition Regulation at 36.202.

DOE has allowed the use of project labor agreements over many years. It has required them in four instances: Hanford, the Nevada Test Site, Rocky Flats, and the Idaho National Engineering and Environmental Laboratory. Generally, when the Department has required project labor agreements, all work at the site is subject to the agreement, and the agreement is known within DOE as a Site Stabilization Agreement.

DOE is unique in that most, if not all, of the construction that takes place for the Department takes place under the auspices of contractors that manage and operate the DOE sites. Project labor agreements normally run for the duration of a project. In DOE where a Site Stabilization Agreement is in effect, the expectation has been that the agreement will continue as long as there is a DOE presence at the site.

Currently, there are six other project labor agreements in effect for Departmental projects or sites. These are not the result of DOE direction, but have resulted from decisions of DOE contractors or subcontractors.

\1- In DOE, the term "project agreements," means project labor agreements and includes Site Stabilization Agreements.

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## Guidance Included in this Acquisition Letter

**I. How will Executive Orders 13202 and 13208 be Implemented Generally? . . . . . 4**

**II. Do Executive Orders 13202 and 13208 Apply to the Activities of DOE's Major Facilities Contractors, including DOE's Management and Operating Contractors? . . . . . 4**

**III. For Major Facilities Contracts Already Awarded, when do the Executive Orders Apply? . . . . . 5**

**IV. How are Requests for Exemption to be Processed? . . . . . 5**

**Attachment 1- Clause for Use in Contracts for Construction Management . . . 7**

**Attachment 2- Clause for Use in Contracts for Management and Operating and other Major Facilities Contracts . . . . . 8**

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## I. How will Executive Orders 13202 and 13208 be Implemented Generally?

Executive Order 13202 requires that agencies and their construction managers remain neutral towards project labor agreements. Therefore, for all Federal construction contracts awarded after February 17, 2001, neither the Federal agency for whom the construction is being performed nor its construction manager, if one is employed, may require or prohibit the negotiation or execution of a project labor agreement. Additionally, Executive Order 13208 authorizes the head of an agency to exempt construction contracts awarded after February 17, 2001, when a project labor agreement for that construction project was required or was in effect as of the date of Executive Order 13202 and at least one other related construction contract had been awarded as of that date or upon a finding that special circumstances require exemption to avoid imminent threat to health, safety, or national security.

The Federal Acquisition Regulation (FAR) implementation of the Executive Orders is contained at FAR 36.202, but that coverage does not provide any implementing contract clauses. In order to comply with Executive Orders 13202 and 13208, contracting officers should insert the model clause included with this AL as Attachment 1 in contracts for construction management services.

## II. Do Executive Orders 13202 and 13208 Apply to the Activities of DOE's Major Facilities Contractors, Including DOE's Management and Operating Contractors?

DOE's major site and facilities contracts are characterized by their broad scopes of work and the close relationship between the agency and the contractor. Most are national laboratories, including Federally Funded Research and Development Centers, special production facilities, or sites whose mission consists largely of clean up leading to closure. It is under these contracts that substantially all of the construction of DOE-owned facilities takes place.

DOE management and operating and other major facilities contractors have varying roles with regard to the construction activities on their sites.

- Generally, DOE management and operating contractors are required to subcontract for construction. Under some limited circumstances, they may be constructors, i.e., perform at least a portion of the construction activity with their own forces.

- These contractors may perform what is normally considered construction management services, but they are not hired as construction managers.

- They may also subcontract for construction management services; or they may subcontract directly for construction.

- If the major facilities contractor hires a construction manager, that construction manager might subcontract for construction.

When the management and operating and other major facilities contractors act as a construction manager, the Executive Orders prohibit them from requiring or prohibiting project labor agreements. In those projects for which these contractors act as the constructor, they retain the right to require or, not inconsistent with governing law, prohibit project labor agreements for that particular construction project.

In order to comply with Executive Orders 13202 and 13208, contracting officers should insert the model clause provided with this AL as Attachment 2 in management and operating contracts and other major facilities management contracts. Because of the unusual nature of these contracts, the next section discusses the point in time when the model clause should be incorporated.

## III. For Major Facilities Contracts Already Awarded, when do the Executive Orders Apply?

Executive Order 13202 states that it does not affect contracts awarded prior to its effective date. Executive Order 13208 authorizes the agency head to exempt contracts for a particular construction project where, with respect to that construction project, a project labor agreement was in effect or had been required and at least one construction contract subject to the project labor agreement had been awarded as of February 17, 2001.

Where a new contract is solicited and awarded, that contract will be subject to the Executive Orders, unless the Cognizant Secretarial Officer (CSO) seeks exemption. See IV *infra*. Additionally, some major facilities contracts are extended noncompetitively in five year increments with a major renegotiation of the terms. The requirement of the Executive Orders should be applied at the noncompetitive extension of these contracts. The Executive Orders are made to apply by the insertion of the clause, included as Attachment 2.

Alternatively, if the contract has been competitively awarded with an option to extend the period of performance, the exercise of the option does not equate to the award of a new contract, and the Executive Orders do not apply. They also do not apply at the annual fee negotiation or other similar points.

## IV. How are Requests for Exemption to be Processed?

Executive Order 13202 provides that the head of the agency may exempt certain agreements under special circumstances, such as, to avert an imminent threat to public health or safety or to serve the national security.

Additionally, Executive Order 13208 provides that the head of the agency may exempt construction projects where a project labor agreement was required or negotiated and at least one construction contract was awarded as of the effective date of Executive Order 13202, February 17, 2001.

Should the need for an exemption from application of the Executive Orders arise, the Manager of the affected operations office should forward a request for exemption with supporting rationale, to the CSO for concurrence. The CSO must acquire concurrences prior to forwarding the request to the Secretary for approval, by forwarding the request:

(1) For DOE contracts or projects, to the Office of Contract Management (ME-621) of the Office of Procurement and Assistance Management and to the Office of General Counsel; or

(2) For National Nuclear Security Administration (NNSA) contracts or projects, to the Director, Office of Procurement and Assistance Management, NNSA, and to the General Counsel, NNSA,

## Attachment 1- Clause for Use in Contracts for Construction Management

Contracting Officers should include the following model clause in any solicitation and contract for construction management services.

**Open Competition and Labor Relations on Federal Contracts (DEC 2002)**

"Labor organization," as used in this clause, shall have the same meaning it has in 42 U.S.C. 2000e(d).

(a) The Contractor shall not-

(1) Require bidders, offerors, contractors, or subcontractors to enter into or adhere to nor prohibit those parties from entering into or adhering to agreements with one or more labor organizations, *i.e.*, project labor agreements, for this or other related construction project(s); or

(2) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for refusing to become or to remain signatories or to otherwise adhere to project labor agreements for this or other related construction project(s).

(b) Nothing in this clause shall limit the right of bidders, offerors, contractors, or subcontractors to voluntarily enter into project labor agreements for this or related construction projects.

# Attachment 2- Clause for Use in Contracts for Management and Operating and other Major Facilities Contracts

Contracting Officers should include the following model clause in any solicitation and contract for the management or operation of a DOE site or facility.

**Open Competition and Labor Relations under Management and Operating and Other Major Facilities Contracts (DEC 2002)**

"Labor organization," as used in this clause, shall have the same meaning it has in 42 U.S.C. 2000e(d).

(a) Unless acting in the capacity of a constructor on a particular project, the Contractor shall not-

(1) Require bidders, offerors, contractors, or subcontractors to enter into or adhere to nor prohibit those parties from entering into or adhering to agreements with one or more labor organizations, *i.e.*, project labor agreements, that apply to construction project(s) relating to this contract; or

(2) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for refusing to become or to remain signatories or to otherwise adhere to project labor agreements for construction project(s) relating to this contract.

(b) When the Contractor is acting in the capacity of a constructor, *i.e.*, performing a substantial portion of the construction with its own forces, it may use its discretion to require bidders, offerors, contractors, or subcontractors to enter into a project labor agreement that the Contractor has negotiated for that individual project.

(c) Nothing in this clause shall limit the right of bidders, offerors, contractors, or subcontractors to voluntarily enter into project labor agreements.

**Department of Energy**
**Assistance Regulation**

**No.** 2001-02
**Date** 07/30/2001

# FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

**Subject:** **Preservation of Open Competition and Government Neutrality Towards Contractors' Labor Relations on Federally Funded Construction Projects.**

## References:

Executive Order 13202, dated February 17, 2001
Executive Order 13208, dated April 6, 2001

## When is this Financial Assistance Letter (FAL) Effective?

This FAL is effective 10 business days from the date of issuance.

## When does this FAL Expire?

This FAL remains in effect until superseded or canceled.

## Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy at (202) 586-5625, or by e-mail at trudy.wood@pr.doe.gov.

Please visit our website at www.pr.doe.gov/fahhome.html for information on Financial Assistance Letters and other policy issues.

**FAL 2001-02 (07/30/2001)**

## What is the Purpose of this FAL?

This FAL provides the Department's contracting officers and financial assistance personnel guidance regarding the implementation of Executive Order 13202 of February 17, 2001, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, and Executive Order 13208 of April 6, 2001, Amendment to Executive Order 13202.

## What is the Background?

Executive Order 13202 of February 17, 2001, as amended by Executive Order 13208 of April 6, 2001, requires agencies entering into grants or cooperative agreements for construction projects, to ensure that the bid specifications, project agreements, or other controlling documents for construction contracts awarded by the financial assistance recipient, or by a construction manager acting on behalf of the recipient, neither require nor prohibit offerors, contractors or subcontractors from entering into agreements with one or more labor organizations. It also permits agency heads to exempt a project from the requirements of the Executive Order under special circumstances, but the exemption may not be related to a potential or presence of an actual labor dispute. The amendment also authorized the head of the agency to exempt certain projects which had a construction contract awarded as of April 11, 2001.

## What is the Guidance Included in the FAL?

Contracting Officers should incorporate the following special provision in new or renewal grants or cooperative agreements, if the objective of the award is to construct, rehabilitate, alter, convert, extend, or repair buildings, highways, or make other improvements to real property.

*PRESERVATION OF OPEN COMPETITION AND NEUTRALITY TOWARDS LABOR RELATIONS ON FEDERALLY FUNDED CONSTRUCTION PROJECTS*

*a.* *Unless in conflict with State or local laws, the recipient shall ensure that the bid specifications, project agreement, or other controlling documents in construction contracts awarded pursuant to this agreement, or pursuant to a subaward to this agreement, do not:*

1. *Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or*

2. *Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).*

b. *The term "construction contract" as used in this provision means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.*

c. *Nothing in this provision prohibits bidders, offerors, contractors or subcontractors from voluntarily entering into agreements with labor organizations.*

# Headquarters Policy Flash

**FLASH 2002-39**

DATE: December 10, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Financial Assistance Letter (FAL) 2002-03, Implementation of DOE's Industry Interactive Procurement System (IIPS)**

SUMMARY: This Policy Flash announces the issuance of Financial Assistance Letter (FAL) 2002-03, entitled "Implementation of DOE's Industry Interactive Procurement System (IIPS)," dated December 6, 2002.

**FLASH 2002-39**
**December 10, 2002**

This FAL provides guidance on implementing IIPS for financial assistance, including posting financial assistance solicitations on the IIPS web site and model IIPS instructions that can be incorporated into those solicitations.

**Note**: ME-651 is in the process of enhancing financial assistance to address the forthcoming requirement to publish funding opportunity notices (financial assistance solicitations and notices) to the FedGrants web site. Concurrent with this modification, a financial assistance module of IIPS is being developed to streamline and to make IIPS more efficient and "user-friendly". We expect the enhancements to be complete in early January. Therefore, the new solicitation language should be included in solicitations that will close after January 31, 2003, when the enhancements are completed.

Gwendolyn S. Cowan, Director

cc:
PPAG Members
FAAC Members

**Department of Energy**
**Assistance Regulation**

**No. 2002-03**
**Date 12/06/02**

# FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

**Subject: Implementation of DOE's Industry Interactive Procurement System (IIPS)**

## When is this Financial Assistance Letter (FAL) Effective?

This FAL is effective 10 business days from the date of issuance.

## When Does this FAL Expire?

This FAL remains in effect until superseded or canceled.

## Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy at (202) 586-5625, or by email at trudy.wood@pr.doe.gov

Please visit our website at www.pr.doe.gov/fahome.html for information on Financial Assistance Letters and other policy issues.

## What is the Purpose of this FAL?

This FAL provides guidance on implementing the Industry Interactive Procurement System (IIPS) for financial assistance.

## What is the Background?

On October 1, 2001, DOE contracting officers began using IIPS for competitive financial assistance actions in accordance with the direction contained in an April 3, 2001 memorandum from the DOE and NNSA Directors, Office of Procurement and Assistance Management. In June 2002, the Office of Science began using IIPS to post solicitations and receive new applications under its Program Rule.

During the last year, IIPS users suggested improvements to the system and expressed concern about the lack of standard solicitation instructions on how to use IIPS. They noted that many contracting activities had included IIPS instructions in their solicitations or on their web sites; however, the instructions varied in content and detail and some were easier to understand than others. ME-651 is currently making limited enhancements to IIPS relating to the submission of financial assistance applications (e.g., instead of submitting 3 separate volumes, applicants will submit a single volume with specified file attachments). This FAL provides guidance for posting financial assistance solicitations on the IIPS web site and model IIPS instructions that can be incorporated into those solicitations.

## Guidance Included in this Financial Assistance Letter

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**I. What are the DOE Contracting Officers' Responsibilities?**

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# I. What are the DOE Contracting Officers' Responsibilities?

## A. IIPS REQUIREMENT

In accordance with the direction contained in an April 3, 2001 memorandum from the DOE and NNSA Directors, Office of Procurement and Assistance Management, Contracting Officers must use IIPS for competitive financial assistance solicitations. If it is not practicable to use IIPS for a specific requirement, the Contracting Officer must obtain a waiver from the DOE Director, Office of Management Systems and Services for a DOE solicitation, or from the NNSA Director, Office of Acquisition and Assistance Policy for a NNSA solicitation. Requests for waivers should be signed by the Procurement Director and provide sufficient justification to support the request.

## B. SOLICITATION

The Contracting Officer must ensure that:

- the application preparation instructions in the solicitation identify the files that must be included in the application and the format for the files (e.g., MS Word, PDF). Except for DOE or standard forms, solicitations that close after January 31, 2003 must describe what information is to be included in each of the following files:

  File Names as Listed on the IIPS Application Creation Page

  - Application/Pre-application (Contracting Officers must describe the requirement for a pre-application, if any, and specify SF 424 or DOE F 4650.2)
  - Certifications and Assurances
  - Project Summary
  - Narrative
  - Budget (Contracting Officers must specify SF 424A, SF 424C, DOE 4600.4 or 4620.1)
  - Budget Narrative

  (Additional Files, if needed)
  - Attachment 1
  - Attachment 2
  - Attachment 3
  - Attachment 4

- the solicitation specifies which forms must be included in an application and the location where the forms are available. Suggested solicitation language:

*Application Forms.*
*The application form (Insert: SF 424 or DOE F 4650.2), Budget Form (insert: SF 424A, SF 424 C, DOE F 4600.4, or 4620.1), and Certifications and Assurances are available at {Insert URL or location of forms}. You must complete the required information, type the name of the individual authorized to sign the form in the signature block, and save the file with the designated name for that form.*

### C. AMENDMENTS

The Contracting Officer must ensure that:

- all amendments are posted on IIPS as a "Document" (See IIPS User Guide).
- the prior version of the solicitation is removed from IIPS.
- changes to the solicitation are incorporated in a new conformed file of the solicitation and a line in the margin annotates the changed sections.
- the conformed solicitation file is posted on IIPS. The conformed solicitation must identify the original issuance date and the date of the last revision.

## II. What Information Should Be Included in the Solicitation?

Contracting Officers should include the information contained in paragraphs A, B, and C, in this section, in solicitations issued through IIPS that close after January 31, 2003. If there is a specified application deadline, Contracting Officers should include paragraph D, Application Due Date. Contracting Officers should also include paragraph E, More than One Application, if applicable.

### A. LOCATE SOLICITATION, JOIN MAILING LIST, SUBMIT QUESTIONS, VIEW AMENDMENTS OR QUESTIONS AND ANSWERS

If you would like to receive notifications related to this specific solicitation, submit questions on the content of the solicitation, or view amendments or questions and answers, you should locate this solicitation, and then follow the appropriate directions:

1. **Locate Solicitation.**
   - Go to the IIPS website at http://e-center.doe.gov and click on "Browse Opportunities", or login in if you are registered.
   - Click on any of the options for viewing the solicitation (whichever is easiest for you to locate this solicitation).
   - Click on "Enter IIPS".
   - Locate and click on the solicitation number to view "Synopsis and Solicitation Information".
   - Click on hyperlink under "File Attachments" or "URL Links" to access the full solicitation or program notice.

2. **Join Solicitation Mailing List.**
   Click on the "Join Solicitation Mailing List" button at the top of the page, enter the required information, and submit. After you have joined the list, you should receive an email when a solicitation message is posted. Even though you have joined the mailing list, you should visit the solicitation page periodically to ensure that you have the latest information.

3. **View Amendments.**
   - Click on the yellow folder next to the solicitation number to view amendments and solicitation messages; or
   - Follow directions for "Locate Solicitation" to view a conformed copy of the solicitation (a line in the margin annotates changed sections).

4. **Submit Question on the Content of the Solicitation.**
   Click on the "Submit Question" button at the top and enter required information. You will receive an electronic notification that your question has been answered. DOE/NNSA will try to respond to a question within 5 days, unless a similar question and answer have already been posted on the website.

5. **View Questions and Answers.**
   Click on the "View Questions" button at the top of the page. If no questions have been submitted and answered, a statement to that effect will appear at the top of the page. You should periodically check the IIPS website for new questions and answers.

## B. SUBMISSION REQUIREMENTS

1. **Electronic Submission.**
   Applications must be submitted through the DOE Industry Interactive Procurement System (IIPS) at http://e-center.doe.gov in accordance with the instructions in this solicitation. ONLY APPLICATIONS SUBMITTED THROUGH IIPS WILL BE CONSIDERED FOR AWARD.

2. **Electronic Signature.**
   Applications submitted through IIPS constitute submission of electronically signed applications. The name of the authorized organizational representative (i.e., the administrative official, who, on behalf of the proposing organization, is authorized to make certifications and assurances or to commit the applicant to the conduct of a project) must be typed in the signature block on the form to be accepted as an electronic signature. A scanned copy of the signed document is not required.

3. **IIPS Registration.**
   In order to submit an application, you must be authorized by the applicant (i.e., institution or business entity) to submit an application on its behalf and you must

register in IIPS. You are encouraged to register as soon as possible. You only have to register once to apply for any DOE award. To register:

- Go to the IIPS website at http://e-center.doe.gov.
- Click on the "Register" button on the left.
- Click on the box that says, "Check this box for Acquisitions greater than Simplified Acquisitions threshold or financial assistance" and then click on the radio button next to the "Register only" option.
- Click on "Proceed to Form."
- Read the "Security Alert" and click on "Yes" to proceed.
- Read the "Notice of Disclaimer" and click on "I Accept."
- Complete the Registration Form.
- Click on "Submit Registration." You will receive an acknowledgement confirming receipt of your registration.
- Then you will receive an email confirming successful registration. If you do not receive an email confirmation within one business day, contact the IIPS Help Desk at 1-800-683-0751 and select option 1, or send an email to HelpDesk@e-center.doe.gov.
- Note the user name on your confirmation and your password for future reference. You must use this user name and password for any applications submitted in IIPS.

4. **Submit Application or Pre-application (if a pre-application is required):** You are strongly encouraged to submit your application or pre-application at least 24 hours before the deadline in order to have time to resolve any transmission problems. If you are registered in IIPS, you may use the IIPS test site at http://doe-iips.pr.doe.gov/iips/busopor.nsf/TestSolicitation?OpenView&login to practice submitting an application. You can also access the test site from the link provided at the top of each solicitation page.

   To submit an application, complete the following steps:

   **Step 1 -- Prepare Application**
   Prepare all of the files in accordance with the instructions in this solicitation prior to starting the transmission process. You should submit the entire application package in one IIPS session (i.e., do not logoff before all the files are attached).

   **Step 2 – Locate Solicitation and Create Application**
   - Enter the IIPS website at http://e-center.doe.gov.
   - Click on "Login" button on the left.
   - Click on the radio button that says, "Industry Interactive Procurement System."
   - Enter your user name (as shown on your registration email confirmation) and password. (Note: These are case sensitive.)

- The "View Synopses and Solicitations as Sorted by...." screen will appear. Click on one of the choices and locate the solicitation.
- Click on the solicitation number and the Synopsis & Solicitation Information screen will appear.
- Click on "Create Application" (you may have to scroll to the right to locate the button) and complete the information on the Application Cover Page. Enter the project title and the principal investigator/project director, if any, in the "Subject" blank.

**Step 3 --- Attach Files and Submit Application**

- Click on "Submit Cover Page & Attach Files", complete information, and submit.
- Click on "Attach Application" link.
- Attach each file in the corresponding block on the page and then click "Submit."
- IIPS will provide an acknowledgement.
- Click on the link on the acknowledgement to verify submission. It will take you to your submission.
- In order to verify successful transmission at a later date, click on the yellow folder beside the solicitation number. Your application should appear.

5. **Questions or Problems with Transmission**
View the "IIPS Frequently Asked Questions" by clicking on the "Help" button. You may also call 1-800-683-0751 and select option 1, or send an email to IIPS_HelpDesk@e-center.doe.gov, for help with the IIPS system. If you have questions on the content of the solicitation, follow the directions for "Submit Question on the Content of the Solicitation."

6. **IIPS User Guide:** Additional instructions are available in the IIPS User Guide. Click on the "help" button to access the guide.

## C. REVISIONS, DELETIONS, AND WITHDRAWAL OF APPLICATIONS

1. **Remove application or application file(s) from IIPS**
To delete or withdraw an application or an application file(s), send an email to the IIPS Help Desk requesting the application or file(s), be removed. Be sure to identify your user name, the applicant's name, and the subject, as shown on the cover page of the application.

2. **Submit revised application**
Follow the steps in "Submit Application or Pre-application" to submit a revised application (i.e. cover page and all required files).

3. **Submit revised file**
After the Help Desk has removed the requested file from your application:

# Headquarters Policy Flash

**FLASH 2002-40**

DATE: December 11, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Extension of Price-Anderson Act:

- Awarded Contracts
- Proposed Awards
- Reinstatement of AL 2002-04

SUMMARY: On December 2, 2002, President Bush signed into law the Bob Stump National Defense Authorization Act for Fiscal Year 2003. Section 3171 of that Act extended the Price-Anderson Act (PAA) through December 31, 2004.

**FLASH 2002-40**
**December 11, 2002**

- **Awarded Contracts**

  As a result, any contracts awarded during the period of August 1 through December 2, 2002, that contained Pub. L. 85-804 indemnity coverage, i.e., the specially modified FAR clause at 52.250-1, in lieu of the then expired Price-Anderson indemnity clause at DEAR 952.250-70, should now be modified.

  - The effective period for the specially modified FAR clause should be limited to August 1, 2002, or the actual award date, whichever is later, through December 2, 2002.

  - The Nuclear Hazards Indemnity Clause at 952.250-70 should be added to the contract, effective to cover public liability from a nuclear incident arising on or after December 3, 2002. No other changes to the clause are necessary.

- **Proposed Awards**

  The Office of Contract Management will withdraw from the concurrence process any requests to the Secretary for authority to provide idemnification under Pub. L. 85-804. The Nuclear Hazards Indemnity Clause at 952.250-70 will replace the specially modified clause at FAR 52.250-1.

- **Reinstatement of AL 2002-04**

  With the extension of PAA through December 31, 2004, AL 2002-04 is hereby reinstated in full force and effect. Field offices should immediately rely on the guidance in AL 2002-04 for processing requests for Pub L. 85-804 indemnification coverage for contractors.

For questions related to this Flash, contact Bob Webb at (202) 586-8264 or via e-mail at robert.webb@pr.doe.gov

Gwendolyn S. Cowan

Gwendolyn S. Cowan, Director

cc:
PPAG Members

# Headquarters Policy Flash

## FLASH 2002-41

DATE: December 20, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Revisions and Additions to the Department of Energy (DOE) Acquisition Guide -**

- **Chapter 7 - Acquisition Planning**
- **Chapter 71 - Headquarters Review of Contract and Financial Assistance Actions**

SUMMARY: An addition to the DOE Acquisition Guide, Chapter 7 "Acquisition Planning", has been made as well as a revision to Chapter 71 "Headquarters Review of Contract and Financial Assistance Actions" of the Guide.

## ■ Chapter 7 - Acquisition Planning

The Federal Acquisition Regulation (FAR) Part 7 requires agencies to perform acquisition planning and conduct market research (see FAR Part 10) for all acquisitions. This planning is to promote and provide for acquisition of commercial items and to obtain full and open competition whenever possible. The benefits of timely and sound acquisition planning are numerous and include timely award of the contract, improved regulatory and procedural compliance, and improved delivery of program needs.

This new chapter addresses acquisition planning requirements by providing guidance on:

- the need for acquisition planning and formal acquisition plans;
- review and approval levels for acquisition plans;
- procedural matters not specifically addressed in Part 7 of the Federal Acquisition Regulation; and
- special areas of interest to DOE's procurement needs.

**Note**: This chapter does not try to duplicate the guidance on how to perform acquisition planning or what the documentation requirements are as these are contained in the referenced regulations. In addition, this chapter provides an extensive reference section on regulations and guidance relating to acquisition planning.

Questions concerning this Acquisition Guide Chapter should be addressed to Mr. Thomas Brown at (202) 586-9075 or via e-mail at thomas.brown@pr.doe.gov

## ■ Chapter 71 - Headquarters Review of Contract and Financial Assistance Actions

Currently, Acquisition Guide Chapter 71, Headquarters Review of Contract and Financial Assistance Actions, sets out broad requirements for obtaining Headquarters Business Clearance review and approval for award documents and solicitations exceeding the delegation authority assigned to the Head of the Contracting Activities. As a result of changes in business practices, both at Headquarters and the Field, and new organizational alignments, there is a need to provide more information and greater structure to the Headquarters Business Clearance process.

**FLASH 2002-41**
**December 20, 2002**

This revised chapter, which replaces the current coverage in its entirety, provides procurement, program, and other personnel involved in the review and approval process, a comprehensive discussion of the documentation required to be submitted and the scope of the Headquarters review and approval process. This discussion should help to allow for a more efficient and effective Headquarters Business Clearance review and approval process, thereby reducing lead-times associated with receipt of final Headquarters approval and allowing Contracting Officers to better predict lead-times for acquisition planning purposes.

This new chapter provides:

- a more succinct discussion of the clearance process;
- a more expansive identification of the types of actions that may be submitted for clearance review;
- requirements for supporting documentation; and
- a general scope of the Office of Contract Management's review.

*Since the comments from the Procurement Directors were received, a new section has been added to the guide chapter entitled "Special Considerations for Delivery Orders."*

Questions concerning this Acquisition Guide Chapter should be addressed to Mr. David Leotta at (202) 586-1227 or via e-mail at david.leotta@hq.doe.gov

Gwendolyn S. Cowan, Director

cc:
PPAG Members

# ACQUISITION PLANNING

## ❒ REFERENCES

| | |
|---|---|
| FAR 4.803(a)(1) | Contents of Contract Files |
| FAR 5.405(a) | Exchange of Acquisition Information |
| FAR Part 7 | Acquisition Planning |
| FAR Part 8 | Required Sources of Supply |
| FAR Part 10 | Market Research |
| FAR 11.402 | Factors to Consider in establishing Schedules |
| FAR 15.201(c) | Exchanges with Industry Before Receipt of Proposals |
| FAR Subpart 16.1 | Selecting Contract Types |
| FAR 16.504(c) | Indefinite-Quantity Contracts - Multiple Award Preference |
| FAR Subpart 17.6 | Management and Operating Contracts |
| FAR Part 19 | Small Business Programs |
| FAR 25.802(a)(2) | Other International Agreements and Coordination |
| FAR 34.004 | Acquisition Strategy |
| FAR 36.301(a) | Two-Phase Design-Build Selection Procedures |
| FAR 37.6 | Performance-Based Contracting |
| FAR 38.101(c) | Federal Supply Schedule Program |
| FAR 39.101(b)<br>39.102(c) | Acquisition of Information Technology |
| FAR 41.202 | Acquiring Utility Services |

| | |
|---|---|
| **DEAR Part 908** | **Required Sources of Supply** |
| **DOE O 413.3** | **Program and Project Management for the Acquisition of Capital Assets, October 13, 2000** |
| **DOE O 430.2A** | **Departmental Energy and Utilities Management, April 15, 2002** |
| **Acquisition Letter 96-09** | **Full and Open Competition - Management and Operating Contracts, September 16, 1996** |
| **Acquisition Letter 2000-08** | **Site Utilization and Management Planning, August 18, 2000** |
| **Deputy Secretary Letter** | **Project Acquisition Plans and Critical Decisions, November 15, 2001, signed by Francis S. Blake** |
| **Director, OMBE/CFO Letter** | **Mission Need Justification and Project Acquisition Plans, February 14, 2002, signed by Bruce M. Carnes** |

## ❒ OVERVIEW

This section discusses the requirements for acquisition planning.

## ❒ DEFINITIONS

**Acquisition**: The act of acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal Government through purchase or lease.

**Acquisition Planning**: The process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

**Major System (MS) Project:** Any project or system of projects with a total project cost (TPC) of $400 million or greater or any Other Project so designated by the Office of the Secretary. A project may be classified as an MS either solely by the Office of the Secretary or by the Deputy Secretary in response to recommendations from the appropriate Program Secretarial Officer (PSO) or head of a Departmental office, which is endorsed by the appropriate Under Secretary. Office of Engineering and Construction Management (OECM) maintains and periodically publishes a list of MS projects.

**Other Project:** Any project with a TPC less than $400 million and not designated as an MS project, including line item projects, general plant projects, capital equipment, and information technology, whether funded by capital or operating funds.

**Project:** In general, a unique effort that supports a program mission, having defined start and end points, undertaken to create a product, facility, or system, and containing interdependent activities planned to meet a common objective or mission. Project types include planning and execution of construction, renovation, modification, line items for maintenance and repair, environmental restoration decontamination and decommissioning efforts, information technology, and large capital equipment or technology development activities. Tasks that do not include the above elements, such as basic research, grants, ordinary repairs, maintenance of facilities, and operations are not considered projects.

***Guiding Principles***

- Sound acquisition planning ensures that the contracting process is conducted in a timely manner, in accordance with statutory, regulatory, and policy requirements, and reflects the mission needs of the program.

- Acquisition planning benefits from an integrated team approach that includes appropriate representation from all organizations having an interest in the requirement.

- Contracting professionals play a key role in ensuring that acquisition planning is accomplished for each requirement and that the acquisition plan reflects appropriate acquisition streamlining techniques and a sound business approach to buying the needed goods and services.

## ❒ BACKGROUND

The Federal Acquisition Regulation (FAR) Part 7 requires agencies to perform acquisition planning and conduct market research (see FAR Part 10) for all acquisitions. This planning is to promote and provide for acquisition of commercial items and to obtain full and open competition whenever possible.

While FAR Part 7 is the basic part of the FAR that covers acquisition planning, various other parts of the FAR also contain references to specific parts of the acquisition planning process (See

references at the end of this chapter). In addition, DOE Order 413.3, Program and Project Management For the Acquisition of Capital Assets, addresses acquisition planning for projects and major system acquisitions. Order 413.3 cancels and supercedes DOE Notice 430.1, Energy Systems Acquisitions Advisory Board Procedures. However, Order 413.3 retains the Energy Systems Acquisitions Advisory Board (ESAAB) process. Order 413.3 also references several OMB Circulars including OMB Circular A-109, Major System Acquisitions, which is in the process of being replaced by OMB Circular A-11, Part 3. Senior DOE management has also issued guidance on the acquisition process highlighting the importance of acquisition planning in the Department (See references 24 and 25).

This chapter of the Acquisition Guide is meant to provide guidance on what the various acquisition regulations are and to highlight some less well know requirements.
This chapter also addresses the procedures required by FAR 7.103. This chapter does not try to duplicate the guidance on how to perform acquisition planning or what the documentation requirements are as these are contained in the referenced regulations.

## FAR 7.103 PROCEDURES

### Competition

To the maximum extent practicable, acquisition planners shall address the requirement to specify needs, develop specifications, and to solicit offers in a manner to promote and provide for full and open competition in accordance with FAR Part 6, as supplemented by Part 906 of the Department of Energy Regulation (DEAR), and Chapter 6 of this guide.

### Commercial Items

Acquisition plans and solicitations should encourage offerors to supply commercial items, or to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items.

### Written Plans

Written acquisition plans are required for all acquisitions estimated to exceed $5 million (or such other threshold as established by the Office of Procurement and Assistance Management) except for the following classes of acquisitions:

- √ Architect-engineering services
- √ Broad agency announcements or unsolicited proposals
- √ Basic research from non-profit organizations
- √ Competitive procurement of commercial items

- √ Interagency agreements (IA) (applies only to the IA and not to any Contracts issued pursuant to an IA)

Acquisition planners should use the principles of FAR Part 7 in performing acquisition planning for all acquisitions whether or not a written plan is required.

**Acquisition Value**

The estimated value of an acquisition is the total possible value of a procurement including the sum value of the basic period of performance, all options, and all phases of all possible awards.

**Designated Planner**

The designated planner for all acquisitions requiring a written acquisition plan is the applicable project manager. However, the contracting officer/contract specialist assigned to the requirement should assist the project manager in assuring that the acquisition plan is adequate and fully supports the proposed acquisition approach. The contracting officer is responsible for acquisition planning for all actions that do not require a written acquisition plan.

**Review and Approval Levels**

- **Acquisitions subject to DOE Order 413.3**: DOE Order 413.3, Program and Project Management For the Acquisition of Capital Assets, establishes levels for both the review and approval of acquisition execution plans for requirements subject to the order.

- **Acquisitions subject to DOE Order 430.2A**: DOE Order 430.2A, Departmental Energy and Utilities Management, establishes the requirement for the review of utility procurement actions. (NOTE: NNSA utility actions are approved by NNSA based on review recommendations from FEMP)

- **All Other Acquisitions:** Acquisitions plans for requirements not subject to either DOE Orders 413.3 or 430.2A are to be reviewed and approved in accordance with local procedures established by the HCA. For all acquisitions that require the review and approval in accordance with Chapter 71, Review and Approval of Contract Actions, of this guide, the acquisition plan for actions that have been selected for review should be submitted to the Office of Contract Management (ME-62) prior to the solicitation being issued.

It is recommended that acquisition plans should be approved prior to the establishing a source evaluation board (SEB) and if no formal SEB is being used, prior to soliciting proposals.

## Local Procedures

The head of the contracting activity (HCA) or designee should establish the local procedures for acquisition planning for all acquisitions consistent with FAR Part 7, DOE Order 413.3, this Chapter, and other applicable regulations.

## Changes

The acquisition plan may be changed or amended if circumstances, facts or assumptions of the original plan have changed or if it makes good business sense to do so. Material or significant amendments to the acquisition plan such as changes in contract type, competition, method of solicitation, funding, or major milestones should be approved at the same level as the original plan and be properly documented.

## Program and Phased Acquisition Plans

Acquisition plans may be prepared on a system or individual contract basis depending on the acquisition. If the plan is developed on a system basis, the plan should fully address all component acquisitions of the program or system. A single acquisition plan may be used for all phases of a phased acquisition provided the plan fully addresses each phase, and no significant changes occur after plan approval to invalidate the description of the phases. If such significant changes do occur, the plan should be amended and approved at the same level as the original plan.

## Design to Cost/Life Cycle Costs

Design to cost and life cycle cost techniques will be discussed in all acquisition execution plans for projects of $20 million or above subject to DOE Order 413.3

## Urgent Requirements

For acquisitions having compressed delivery or performance schedules because of the urgency of the need, the approving authority may waive the acquisition planning formality and detail.

## Other Items

**Acquisition planners** should:

a) Include use of the metric system of measurement in proposed acquisitions in accordance with 15 U.S.C. 205a, *et seq.* (see FAR 11.002(b)) and agency metric plans and guidelines;

b) Specify needs for printing and writing paper consistent with the minimum content standards specified in section 505 of Executive Order 13101 of September 14, 1998, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition (see FAR 11.303);

c) Comply with the policy in FAR 11.002(d) regarding procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services;

d) Specify needs and develop plans, drawings, work statements, specifications, or other product descriptions that address Electronic and Information Technology Accessibility Standards (see 36 CFR part 1194) in proposed acquisitions (see FAR 11.002(e)) and that these standards are included in requirements planning, as appropriate (see FAR Subpart 39.2);

e) Ensure that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods and, therefore, fixed-priced contracts (see FAR 37.602-5) should occur for follow-on acquisitions;

f) Structure contract requirements to facilitate competition by and among small business concerns; and

g) Avoid unnecessary and unjustified bundling that precludes small business participation as contractors (see FAR 7-107)(15 U.S.C. 631(j)).

**Contracting officers** should:

a) Make a determination, in accordance with FAR 37.205, prior to issuance of a solicitation for advisory and assistance services involving the analysis and evaluation of proposals submitted in response to a solicitation, that a sufficient number of covered personnel with the training and capability to perform an evaluation and analysis of proposals submitted in response to a solicitation are not readily available within the agency or from another Federal agency in accordance with the guidelines at FAR 37.204; and

b) Ensure that no purchase request is initiated or contract entered into that would result in the performance of an inherently governmental function by a contractor and that all contracts or orders are adequately managed so as to ensure effective

official control over contract or order performance. (See Chapter 37, Service Contracting, of the Acquisition guide.)

## ❒ SPECIAL INTEREST AREAS

### DOE Order 413.3

All projects (see Definitions) of $5 million or more are subject to DOE Order 413.3. The term "Acquisition Executive Plan"(AEP) should be substituted for the term "Acquisition Plan." The Federal Project Manager is responsible for the development of the AEP for each project subject to 413.3. If a covered project only has one contract, the approved AEP will meet the FAR 7.102(a) requirement for acquisition planning. If the AEP and the project represents two or more contracts, a separate written acquisition plan is required for each contract of $5 million or more unless the approving authority waives the requirement. Waivers may be granted by the approving authority only when he/she determines that the approved AEP was detailed enough and still valid to fulfill the FAR 7.102(a) requirement for the instant contract. In this case both the waiver and the AEP shall be made part of the contract file.

### Site Utilization and Management Planning

Acquisition Letter (AL) 2000-08 covers site utilization and management planning. No DOE contracting officer is authorized to award any management and operating contract or other contract subject to AL 2000-08 either competitively or noncompetitively or through the exercise of an option, unless the requirement is derived from, and the acquisition strategy is consistent with site utilization and management information approved by senior management. Acquisition planning must be a process of meeting DOE's needs with regard to the site. Each proposed acquisition must be analyzed in light of the site utilization and management requirements.

### Management and Operating (M&O) Contracts

Acquisition planning for competing or extending an existing M&O contract should start at least 18 months prior to the contract expiration date. Such planning should be consistent with AL 96-09, Full and Open Competition - M&O Contracts. The acquisition plan for a new M&O contract must be approved by the Head of the Agency as well as any renewal that the Head of the Agency has not authorized beyond the basic contract period. If the Head of the Agency has previously authorized use of the M&O contract beyond the basic contract period, an acquisition plan to exercise an option to extend a competitively-awarded management and operating contract shall be approved by the HCA and the cognizant program Assistant Secretary(s).

## Socioeconomic Programs

Acquisition planning should consider contracting or subcontracting opportunities for small businesses, small disadvantaged businesses, women-owned small business concerns, historically underutilized business zones, and other socioeconomic programs. FAR 19.501(d) requires contracting officers to review acquisitions to determine if they can be set aside for small businesses. If the requirement cannot be set aside, the acquisition plan for a negotiated procurement should consider including incentives for the selected contractor to meeting small business subcontracting goals. (See FAR 19.705-1, General Support of the Program.)

## Utility Services

Prior to executing a utility service contract, the contracting officer shall conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition provided that any resultant contract would not be inconsistent with applicable state law governing the provision of electric utility services. (See FAR 41.202).

All contracts, contract modifications (excluding administrative or incremental funding modifications) or other arrangements for the acquisition and/or sale of utility services should be submitted to the Office of Federal Energy Management Programs (FEMP) in accordance with DOE Order 430.2A, Departmental Energy and Utilities Management. (NOTE: NNSA utility actions are submitted through the Office of Procurement and Assistance Management, NNSA) These utility services include energy conservation measures or demand-side management services or other utilities incentives programs. Submission of a utility procurement plan is considered the functional equivalent of an acquisition plan. Therefore, an approved utility procurement plan will satisfy the FAR requirement for acquisition planning.

All planned acquisitions that are in excess of the HCA's delegated procurement authority should be identified in the annual projected actions in accordance with Chapter 71, Review of Contract Actions, of this guide.

## Task or Delivery Orders

For the purposes of acquisition planning, orders placed under a Federal Supply Schedule contract, task order or delivery order contracts awarded by another agency (for example a Government-wide acquisition contract (GMAC) or multi-agency contract (MAC)) will be considered the same as separate contracts. Review and approval levels for each order shall be the same as an equivalent contract action. (See FAR 16.505(a)(7)(i).)

## Information Technology (IT)

Acquisition planners for IT acquisitions shall comply with the capital planning, and investment control requirements in 40 U.S.C. 1422 and OMB Circular A-130 (See FAR 7.103(t) and 7.105(b)(4)(ii)(A) and (B)). In addition, contracting officers should consider the rapidly changing nature of IT through market research and the application of technology refreshment techniques. The acquisition plans should analyze risks, benefits and costs in accordance with FAR Subpart 39.1. (See FAR 16.505(a)(7)(i) in regards to task or delivery orders for IT requirements.)

## Early Exchange of Future Acquisitions Information

An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can help identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instruction and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Techniques for sharing this information are listed in FAR 15.201 and include draft RFPs and small business conferences.

## Indefinite-Quantity Contracts

In accordance with FAR 16.504(c), the contracting officer must determine whether multiple awards are appropriate as part of acquisition planning and document the decision in the acquisition plan or contract file. For indefinite-quantity contracts for advisory and assistance services exceeding three years and $10 million, including all options, the contracting officer must make multiple awards unless the contracting officer or other official designated by the Head of the Agency determines in writing as part acquisition planning, that multiple awards are not practicable. (See FAR 16.504(c)(2)). This requirement does not apply if a determination is made that the advisory and assistance services are incidental and not a significant component of the contract. (See FAR 16.504(c)(2)(ii)).

## International Agreements

When placing contracts with contractors located outside the United States, for performance outside the United States, contracting officers, in accordance with FAR 25.802, must:

- √ Determine the existence and applicability of any international agreements and ensure compliance with these agreements; and

√ Conduct the necessary advance acquisition planning and coordination between the appropriate U.S. executive agencies and foreign interests as required by these agreements.

**Two Phase Design-Build Method**

Acquisition planning using two phase design-build selection procedures (not to be confused with FAR Part 14 Two-Step Sealed Bidding) should include the considerations of FAR 36.301.

# Headquarters Review of Contract and Financial Assistance Actions

## ❑ Overview

This section discusses the procedures for Headquarters Business Clearance review and approval of contract and financial assistance actions managed by DOE contracting activities.

## ❑ Background

Solicitations, contract awards, and other contract and financial assistance actions which exceed the authority delegated to the Head of Contracting Activity (HCA), are likely to provoke unusual public interest, or, are new or of an unusual nature, are to be submitted to the Procurement Executive, or designee, for appropriate review and approval.

Reviewable actions include those relating to the solicitations and award of contracts, financial assistance, subcontracts, and agreements with other governmental agencies, and subsequent modifications, extensions, and settlements or terminations thereof.

The Office of Contract Management (OCM) is available to consult with Headquarters and Field Office personnel regarding actions that are likely to provoke unusual public interest, or, are of a new and unusual nature, or raise questions of policy or are questions of a procedural nature that may arise in the course of contract negotiation, award, and administration. Such issues should be raised to the OCM at the earliest practicable date.

## ❒ Annual Projected Actions

Prior to the beginning of each fiscal year, the OCM issues a request for each contracting activity to provide a projection for the upcoming fiscal year of known or contemplated contract and financial assistance actions exceeding delegated thresholds, and other sensitive or unique actions expected for that year. Based on the contracting activity's submission, the OCM will identify specific actions to be submitted to the OCM for Headquarters Business Clearance review and approval. If an action is selected for Headquarters Business Clearance review and approval, the OCM, will notify the Procurement Director at which point(s) in the acquisition cycle the action must be submitted for Headquarters Business Clearance review and approval. The OCM may, under certain circumstances, select an action for "limited" review, e.g., review of the solicitation only as opposed to review of both the solicitation and the subsequent award documents. Actions not selected for Headquarters Business Clearance review and approval are deemed to have received a waiver from such review.

Contracting activities are also expected to report to the OCM actions that may arise during the course of the fiscal year which exceeds the local delegation thresholds and that has not been submitted in the annual projected actions. The OCM will review each action on a case-by-case basis to determine if the action should be submitted for Headquarters Business Clearance review and approval. Accordingly, contracting officers (COs) should ensure that adequate lead time exists in the acquisition schedule to permit Headquarters Business Clearance review and approval to occur. Poor acquisition planning is not an acceptable basis for a waiver.

## ❒ Headquarters Business Clearance Review

A complete package must be submitted to OCM in order to facilitate the review process. The attachments to this chapter list the documentation to be submitted for each type of action. A complete package is one that contains all the appropriate documentation listed in the attachments hereto. The initial review is one that results in the first set of questions, comments, issues and/or suggestions that are provided to the CO for resolution. The final review is one that results in the receipt of Headquarters Business Clearance review and approval based upon the resolution of questions, comments, issues and/or suggestions that were provided to the CO. Normally the initial review should be completed within 10 working days from receipt of a complete package. The initial review may, or may not, result in Headquarters Business Clearance review and approval. The time required to receive Headquarters Business Clearance review and approval varies on a case-by-case basis, as approval is dependent on such things as the complexity of the procurement, the nature and extent of review comments, internal coordination requirements, and the quality of the documents submitted for review. Experience indicates that final Headquarters Business Clearance review and approval for competitive solicitations and contracts for major site and facility management may take significantly longer. Contract and financial assistance lead times should take these variables into consideration. In the event that an expedited review is

needed to support program needs, COs should contact the contracting activity's OCM liaison ("buddy").

An advance review is one that is performed on a less than complete package and has not been through any internal review and approval by the contracting activity. Advance review of preliminary draft documents for advice/consultation or to facilitate the review process should be coordinated with the contracting activity's "buddy". However, an advance review of preliminary draft documents should not be considered as final Headquarters Business Clearance review and approval, and does not substitute for the initial review.

Depending on the type of action being reviewed, the OCM will send the review package to the following offices for review, as appropriate:

- Assistant General Counsel for Procurement and Financial Assistance (GC-61).
- The Office of Procurement and Assistance Policy (ME-61)
- The Office of Resource Management (ME-63)
- Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62)
- The cognizant Headquarters program official
- The Office of Small and Disadvantaged Business Utilization (ED-3)
- The Office of Environment, Safety, and Health (EH-73)
- The Deputy General Counsel for the Environment and Nuclear Programs (GC-50)
- The Office of Worker and Community Transition (WT-1)

Additional offices may be requested to review a package depending on the nature of the requirement. The OCM is aware of the time constraints the contracting activities are under, therefore, every attempt will be made to coordinate the action and resolve questions, comments, issues and/or suggestions in "real time". That is, OCM will facilitate dialogue between Headquarter's review offices and the contracting activity during the course of the review.

## ❒ Special Considerations for Delivery Orders

If a contract has been reviewed, or the review has been waived (under the provisions of Federal Acquisition Regulation (FAR), Part 15, Contracting by Negotiation), then delivery orders issued against that contract need not be identified to OCM for any additional review. However, delivery orders which exceed the delegation of the HCA issued against Governmnet-wide Acquisition Contracts (GWACs), or under the provisions of FAR Subpart 8.4, Federal Supply Schedules, must be reported to OCM so that OCM can make a decision on the need for any review.

## ❒ Submission of Documents

In general, electronic submission of the review package is preferred. If paper copies are to be provided, the number of copies needed should be coordinated with the contracting activity's "buddy" based on anticipated review requirements.

Attached hereto, by type of action, are document submission requirements and a summary of the general scope of OCM's Headquarters Business Clearance review and approval. Attachment E, Management and Operating (M&O) Contracts, applies specifically to extend/compete, option exercise, and Performance Based Incentive (PBI)/award fee actions as they relate to M&O or other major site and facility contracts. Any other actions for M&O or other major site and facility contracts should refer to the other attachments to this document for guidance as appropriate.

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**ATTACHMENT A**

# *CONTRACT SOLICITATIONS*

## DOCUMENTATION SUBMISSION

### Draft Request for Proposal (RFP) (Including the Model Contract)

The following documentation and information should be provided:

- Draft RFP, including the model contract;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official;
- Acquisition Plan;
- Site Utilization and Management Plan (or equivalent), if required;
- Justification for Other Than Full and Open Competition (JOFOC), if applicable;
- Rating Plan or Source Selection Plan, if applicable;
- Copies of any deviations processed or being requested; and,
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

### Draft Invitation for Bid (IFB)

The following documentation and information should be provided:

- Draft IFB;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official;
- Acquisition Plan; and
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

## DOCUMENTATION REVIEW

### Draft RFP (Including the Model Contract)

The OCM review of the solicitation package will include:

- Appropriateness and adequacy of the acquisition strategy;

- Review the solicitation to ensure that it is internally consistent. For example, verify the following:

  - Sections L and M are consistent and there are no discrepancies between what offerors are asked to provide in section L versus what the Government plans to evaluate as stated in section M;
  - Section M is consistent with the rating/source selection plan;
  - The evaluation criteria are clear and do not overlap;
  - The evaluation criteria are appropriate for the acquisition, including how cost/price will be evaluated and how best value trade-offs will be determined; and
  - Past performance is evaluated in accordance with FAR Part 15, and that the information requested in the past performance questionnaire is consistent with the information requested and evaluated in sections L and M.

The OCM review of the model contract will include:

- Regulatory and policy compliance;
- Position descriptions are clear and appropriately written to meet the Government's requirements (that is, not overly restrictive or overly permissive);
- Verification that the clauses, including the Section H, Special Contract Requirements and deviations, are appropriate for the type of contract requirements;
- The following as appropriate:

  - Foreign Ownership, Control and Influence (FOCI) clauses;
  - If the solicitation contemplates a set-aside, the required small business or small disadvantaged business clauses;
  - Appropriate cost accounting standards clauses;
  - Organizational Conflicts of Interest clauses specified by FAR Subpart 9.5 and Department of Energy Acquisition Regulation (DEAR) Subpart 909.5; and
  - Compliance with the requirements of FAR Part 19. Review the solicitation for price evaluation adjustment factors and any other required evaluation factors for small disadvantaged business and HUBZone business participation as specified in FAR Subparts 19.11, 19.12, and 19.13.

- Verification that the RFP contains the required performance based elements.

  - Is the Statement of Work (SOW) written in terms of results/outcome vs. "how" the work is to be accomplished? Ensure that performance objectives are focused on the outcome and results rather than process or activities.
  - Are there performance requirements that define the work in measurable, mission-related terms?

- Does it contain performance standards (e.g., quality, timeliness, quantity, cost control) tied to the performance requirements?
- Is there a Government quality assurance (QA) plan that describes how the contractor's performance will be measured against the performance standards?
- Are there positive and negative incentives tied to the Government QA plan measurements?
- Ensure that the performance objectives, measures and PBIs are appropriate in scope, number, etc., fee allocated to the specific objective is reflective of the value or importance of the work contemplated.
- If the SOW is not performance based, the cognizant contracting officer must provide a written explanation as to why the solicitation cannot be performance based or why it is exempt from the requirement.

- Verification that the SOW does not contain any inherently Governmental functions.

**Draft IFB**

The OCM review of the model contract will include:

- Regulatory and policy compliance;
- Verification that the clauses, including the Section H, Special Contract Requirements and deviations, are appropriate for the type of contract requirements;
- The following as appropriate:

  - Foreign Ownership, Control and Influence (FOCI) clauses;
  - If the solicitation contemplates a set-aside, the required small business or small disadvantaged business clauses;
  - Appropriate cost accounting standards clauses;
  - Organizational Conflicts of Interest clauses specified by FAR Subpart 9.5 and Department of Energy Acquisition Regulation (DEAR) Subpart 909.5; and
  - Compliance with the requirements of FAR Part 19. Review the solicitation for price evaluation adjustment factors and any other required evaluation factors for small disadvantaged business and HUBZone business participation as specified in FAR Subparts 19.11, 19.12, and 19.13.

- Verification that the SOW does not contain any inherently Governmental functions.

**ATTACHMENT B**

# *COMPETITIVE/NON-COMPETITIVE CONTRACTS/CONTRACT MODIFICATIONS*

## DOCUMENTATION SUBMISSION

The following documentation and information should be provided:

- Draft RFP/contract modification;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official;
- Justification for Other Than Full and Open Competition (JOFOC), if applicable;
- Documentation (including technical evaluation of costs) to support a pricing action;
- Copies of any deviations processed or being requested; and,
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

## DOCUMENTATION REVIEW

The OCM review of the contract/contract modification will include:

- Appropriateness and adequacy of the acquisition strategy;
- Regulatory and policy compliance;
- Verification that the clauses, including the Section H, Special Contract Requirements, and deviations, are appropriate for the type of contract requirements;
- Verification that the contract/contract modification is in compliance with the terms and conditions of the contract.
- Verification that the SOW does not contain any inherently Governmental functions;
- Verification that release language, if appropriate, is included;
- Ensure that the cost evaluation makes sound business sense and was accomplished using all appropriate resources (i.e. DCAA audit reports, government estimate, technical evaluation of costs, etc.); and
- Verification that the contract/contract modification contains the required performance based elements.

**ATTACHMENT C**

# *NEGOTIATION MEMORANDUM*

## DOCUMENTATION SUBMISSION

The following documentation and information should be submitted to the OCM, in accordance with the procurement cycle phase set forth below:

**Prior to Negotiations.**

Prior to the start of formal negotiations and briefing of the Source Selection Official (not discussions with offerors) concerning contract awards, the following documents are required for review:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Technical Evaluation Committee (TEC) or Source Evaluation Board (SEB) report (if applicable);
- Draft (unsigned) Source Selection Statement (SSS) (if applicable);
- Documentation (including technical evaluation of costs) to support a pricing action (including evaluation of fee or profit); and
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

For IFBs the following documentation and information is required:

- Record of bid opening and selection;
- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- A copy of the successful bid;
- A record of the price analysis that was performed; and
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

**Prior to the Completion of Negotiations.**

If there were significant departures from the objectives of the pre-negotiation plan or provisions of the model contract, or if new and significant issues developed which were not addressed in the pre-negotiation plan, the CO shall submit these revisions to the OCM for review and approval.

**After Completing Negotiations.**

One copy of the post negotiation summary and negotiated contract should be submitted for Headquarters Business Clearance review and approval to the OCM prior to award of the contract. In the event all of the pre-negotiation objectives were substantially met, OCM may elect to waive, or limit, its review of post negotiation documents. In this event, the CO should provide OCM with a copy for information purposes and not for the purpose of obtaining Headquarters Business Clearance review and approval.

**DOCUMENTATION REVIEW**

The OCM review of the pre-negotiation package will:

- Ensure that TEC or SEB report is consistent with the rating/source selection plan;
- Ensure that the evaluation (technical and cost) of offers conforms with Sections L and M of the solicitation and that evaluation criteria were properly evaluated;
- Ensure that strengths and weaknesses cited in the TEC or SEB report are supportable and properly documented;
- Ensure that evaluation of offerors was consistent and in accordance with the rating/source selection plan;
- Ensure that the cost evaluation makes sound business sense and was accomplished using all appropriate resources (i.e. DCAA audit reports, government estimate, technical evaluation of costs, etc.);
- If discussions were held, ensure that discussions were complete and meaningful;
- Ensure that the SSS is in accordance with the rating/source selection plan, applies sound business judgement, and is legally supportable; and
- Ensure that the SSS contains a sufficiently documented discussion of cost vs. technical tradeoffs.

**IFBs**

The OCM review of the IFB will:

- Ensure the price analysis documentation was performed properly and makes sound business sense;

- Ensure that the award will be made to the lowest acceptable bidder; and
- Ensure that the apparent successful bid, and the award, conform to the provisions of the IFB.

**ATTACHMENT D**

# *FINANCIAL ASSISTANCE*

## DOCUMENTATION SUBMISSION

Prior to the release of the solicitation the following documentation and information shall be provided:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Copies of any deviations processed or being requested;
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof;
- If it is a competitive action, the draft solicitation including the Program Policy Factors and the model agreement, and the Merit Review Plan;
- If it is a non-competitive action, the Determination of Non-competitive Financial Assistance and the model agreement; and
- Renewal applications/awards. The CO shall notify OCM when the renewal will cause the financial assistance award to exceed the delegated authority of the contracting activity.

Prior to the award of the financial assistance action, the following documentation and information shall be provided:

- The model agreement if not previously reviewed;
- Supporting documentation such as a copy of the selected proposal, budget review documentation and technical evaluation (if applicable);
- Recommendation to the Source Selection Official and the SSS (if applicable); and
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

## DOCUMENTATION REVIEW

The OCM review of the financial assistance package prior to release of the solicitation will include:

- Solicitation strategy to include technical, business and financial aspects;
- Regulatory and policy compliance; and
- Verification that the solicitation provisions are appropriate (i.e non-profit, universities, etc.).

The OCM review of the financial assistance package prior to award of the financial assistance action will include:

- Verification that the solicitation provisions are appropriate (i.e non-profit, universities, etc.), if not previously reviewed;
- Ensure that the cost evaluation makes sound business sense and was accomplished using all appropriate resources (i.e. DCAA audit reports, government estimate, technical evaluation of costs, etc.); and
- Verification that the selection documentation is consistent with the solicitation selection criteria and programmatic policy factors.

**ATTACHMENT E**

# *MANAGEMENT AND OPERATING CONTRACTS*

## DOCUMENTATION SUBMISSION

### Extend/Compete Actions (including options in non-competitively awarded contracts)

No later than 18 months prior to the expiration of the term of the contract, a recommendation to extend/compete a management and operating contract shall be submitted to the Head of the Agency through the Director for Procurement and Assistance Management. In accordance with AL 96-09, the following documentation must accompany such a submittal.

- A JOFOC (if extension is recommended) prepared in accordance with FAR Part 6;
- Certification by the HCA and cognizant program Assistant Secretary that the use of full and open competition is not in the best interests of the Department (if extension is recommended);
- A description of the incumbent's performance history including measurable results against established performance measures and criteria;
- Identification of significant projects planned during the extension period;
- Identification of issues and negotiation objectives for the extension period, including the extent to which performance based management provisions are present, or, can be negotiated into the contract;
- If the contractor is a Federally Funded Research and Development Center (FFRDC), a review of the use and continued need for the FFRDC designation in accordance with FAR 35.017-4;
- A determination that the M&O contract or performance based management contract remains appropriate;
- A discussion of the potential impact of a change in contractor on program needs; and
- Site Utilization and Management Planning Documentation.

### Exercise of Option for an M&O or Other Major Site or Facility Contract

The exercise of an option shall be approved by the Procurement Executive and the cognizant Assistant Secretary(ies). The documentation required is identical to the documentation required in an extend/compete package, less the JOFOC and the Certification by the HCA and cognizant program Assistant Secretary that the use of full and open competition is not in the best interests of the Department. The contracting activity shall submit documentation prepared by the CO and approved by the cognizant Assistant Secretary(ies) that the exercise of the option is in the best interest of the Government.

**PBIs/Award Fee Plans**

This section does not apply to the yearly fee negotiations of M&O contracts where PBI waiver requests had previously been approved in accordance with DOE Acquisition Guide Chapter 71, Performance Based Incentives and Related Approvals, Section D, Administrative Requirements for PBI Waiver Requests. The following information should be provided with the documentation submitted to OCM for Headquarters Business Clearance review and approval:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- The Performance Evaluation and Management Plan/Award Fee Plan (or equivalent document);
- Documentation supporting the fee methodology;
- Documentation supporting the selection and/or changes to performance-based requirements, objectives, measures and incentives; and
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

**DOCUMENTATION REVIEW**

**Extend/Compete Actions**

The OCM will:

- Review the JOFOC and supporting documents;
- Prepare Action Memo from Procurement Executive to ME-1;
- Prepare Action Memo from ME-1 through the Undersecretary to the Secretary;
- Prepare Statement authorizing The Use of a Management and Operating Contract with signature line to be authorized by the Secretary, Deputy Secretary or Under Secretary;
- Prepare Statement authorizing the continued Use of an FFRDC Designation; and
- Prepare letters notifying Congress of non-competitive extensions in accordance with Acquisition Letter 2000-11 (12/15/00).

**Exercise of Option for an M&O or Other Major Site or Facility Contract**

The OCM will:

- Review supporting documents;
- Prepare letters informing Congress of the option exercise; and
- Prepare Action Memo for Procurement Executive.

**PBIs/Award Fee Plans**

The OCM will:

- Review the relationship of the performance objectives, measures and incentives to the critical strategic path and the tactical objectives of the site;
- Ensure that the performance objectives, measures and incentives PBIs are appropriate in scope, number, etc..for the work contemplated;
- Ensure that the objectives to be measured are suited for the application of PBIs/award fee;
- Review the structure of the PBI itself;
- Ensure that the amount of fee allocated to the specific objective are reflective of the value or importance of the work;
- Ensure that performance objectives are focused on the outcome and results rather than process or activities;
- Review the fee structure and the allocation between, and among, objective and subjective measures;
- Ensure that performance objectives, measures and incentives are structured to improve overall contractor performance;
- Verify that any performance objectives, measures and incentives are in accordance with procedures of the applicable Headquarters program office and that appropriate Headquarters program office coordination has occurred;
- Review the relationship of proposed performance objective, measures and incentives to current/past performance objectives, measures and incentives to ensure that proposed metrics have considered/built on past metrics; and
- Ensure that the impact of year-to-year changes to operating conditions have been considered in the development of performance objectives, measures and incentives.

**ATTACHMENT F**

# *RATIFICATION ACTIONS*

## DOCUMENTATION SUBMISSION

The ratification of an unauthorized commitment shall be supported with the following documentation:

- All records and documents concerning the commitment;
- A written statement through the cognizant local supervising Program Office Director containing:
  - Name of the Government representative who entered into the unauthorized commitment;
  - A statement as to why authorized procurement procedures were not used;
  - Rationale why the contractor was selected;
  - A list of other sources considered;
  - Description of work performed or products delivered;
  - A reference to funds availability at the time of the unauthorized commitment.
  - The status of the work; and
  - Recommendation(s) for corrective action(s) for avoidance of unauthorized commitments; and
- A document originated by the CO and signed off by the HCA that includes:
  - A statement that supplies or services have been provided and accepted by the Government, or that the Government has or will obtain a benefit resulting from performance;
  - A synopsis of events that transpired resulting in the unauthorized commitment;
  - A statement that the resulting contract would have been proper if made by a CO;
  - A determination by the CO that the price is fair and reasonable;
  - A statement by the CO recommending payment;
  - Evidence of local legal review; and
  - A statement that funds are currently available.

## DOCUMENTATION REVIEW

The OCM will:

- Forward any comments to CO for response/resolution;
- Obtain General Counsel's concurrence;
- Prepare a point paper to present to the Procurement Executive with a recommendation to either approve or not approve the ratification; and
- Send a response back to the CO.

**ATTACHMENT G**

# *SUBCONTRACT ACTIONS*

## DOCUMENTATION SUBMISSION

The following documentation and information should be provided:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Copy of the subcontract or modification;
- If sole source, a copy of the justification for a noncompetitive action;
- If competitive, a copy of the source selection criteria;
- Documentation supporting the technical evaluation;
- Documentation (including technical evaluation of costs) to support a pricing action; and
- Evidence of local independent review and approval, including legal review. This includes submission of comments and resolution thereof.

## DOCUMENTATION REVIEW

The OCM review of the subcontract package will include:

- Acquisition strategy to include business and financial aspects;
- Regulatory and policy compliance;
- Verification that the clauses are appropriate for the type of contract and technical requirements;
- Review may include the following:
    - FOCI clauses;
    - If the solicitation contemplates a set-aside, the required small business or small disadvantaged business clauses;
    - Appropriate cost accounting standards clauses; and
    - Organizational Conflicts of Interest clauses specified by FAR Subpart 9.5 and DEAR Subpart 909.5.
- Review the documentation to ensure that it is internally consistent. For example, verify the following:
    - The evaluation criteria are clear and do not overlap;

- The evaluation criteria are appropriate for the acquisition including how cost/price will be evaluated;
- Past performance is evaluated; and
- Position descriptions are clear and appropriately written to meet requirements (that is, not overly restrictive or overly permissive).

- The prime contractor may be asked to provide an explanation and justification for any unusual solicitation language.

# Headquarters Policy Flash

## FLASH 2002-42

DATE: December 20, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circular (FAC) 2001-10**

SUMMARY: On November 22, 2002, FAC 2001-10 was published in the Federal Register at 67 FR 70516. Contracting personnel should review the details of each item in the full text of the FAC.

**FLASH 2002-42**
**(December 20, 2002)**

**Federal Acquisition Circular (FAC) 2001-10**

The following five items are in FAC 2001-10, which was published in the Federal Register on November 22, 2002, at 67 FR 70516. *The effective date of each item is listed in the summary provided.* The FAC is available via the internet at http://www.arnet.gov/far/facsframe.html

1. **General Records Schedule (FAR Case 2002-016)**

   *Effective Date: December 23, 2002*

   This final rule amends FAR Part 4, Administrative Matters, to restore the previous language of FAR 4.705-2 prior to its revision in FAC 97-18, published in the Federal Register on June 6, 2000, at 65FR36012. The June 6, 2000, Federal Register change inadvertently resulted in longer record retention periods for contractors and subcontractors. This rule-

   - ☞ Revises the subsection title of FAR 4.705-2 to read "Pay administration records" instead of "Construction contract pay administration records" making all record retention requirements in the section applicable to contracts and not just construction contracts.

   - ☞ Revises FAR 4.705-2(a) to change from a record retention period of three years after completion of the contract, unless contract performance is subject to an enforcement action, to four years after generation of the records.

   - ☞ Provides that compliance with either record retention of three years or four years is acceptable for the period from June 6, 2000, through the effective date of this final rule.

2. **Executive Order 13202, Preservation of Open Competition and Government Neutrality Toward Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (FAR Case 2001-016)** *[Termination of Stay of Interim Rule]*

   *Effective Date: November 22, 2002*

   The final rule terminates the stay and adopts the May 1, 2001, interim rule as final without change. See full coverage of guidance on this subject provided in Acquisition Letter 2002-08, Project Labor Agreements, dated December 2, 2002.

### 3. Caribbean Basin Country End Products (FAR Case 2000-306)

*Effective Date: November 22, 2002*

This is a final rule converting, with changes, an interim rule published in the Federal Register at 67 FR 6116 on February 8, 2002. This rule-

- ☞ Extends the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with exception of end products from the Dominican Republic, Honduras, and Panama.

- ☞ Implement the determination of the U.S. Trade Representative as to which countries qualify for the enhanced trade benefits under the Act.

### 4. Financing Policies (FAR Case 2000-007)

*Effective Date: December 23, 2002*

The final rule revises certain financing policies at FAR Part 32, Contract Financing, and related contract provisions at FAR Part 52, Solicitation Provisions and Contract Clauses. This rule-

- ☞ Removes the restriction on use of performance-based payments on fixed-price contracts prior to definitization; and

- ☞ Permits large businesses, in their billings to include certain vendor and subcontractor costs that have been incurred, but not paid, provided that the subcontractor is paid within 30 days.

**FLASH 2002-42**
**(December 20, 2002)**

**5. Technical Amendments**

*Effective Date: November 22, 2002*

The amendments update references and make editorial changes to FAR Part 7, Acquisition Planning, and Part 19, Small Business Programs.

Questions concerning this Flash should be directed to Denise Wright at (202) 586-6217 or via e-mail at denise.wright@pr.doe.gov

Gwendolyn S. Cowan
Director

cc:
PPAG Members

Federal Register

Friday,
November 22, 2002

Part IV

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

48 CFR Ch. 1, Parts 4, 7, et al.
Federal Acquisition Regulations; Final Rules

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

## Federal Acquisition Circular 2001–10; Introduction

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

**ACTION:** Summary presentation of final rules and technical amendments and corrections.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–10. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.arnet.gov/far.*

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

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–10 and specific FAR case number(s). Interested parties may also visit our Web site at *http://www.arnet.gov/far.*

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | General Records Schedule | 2002–016 | Nelson. |
| II | Executive Order 13202, Preservation of Open, Competition and Government Neutrality Towards Government Contractors' Labor Relations On Federal and Federally Funded Construction projects. | 2001–016 | Nelson. |
| III | Caribbean Basin Country End Products. | 2000–306 | Davis. |
| IV | Financing Policies | 2000–007 | Olson. |
| V | Technical Amendments | | |

**SUPPLEMENTARY INFORMATION:** Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–10 amends the FAR as specified below:

### Item I—General Records Schedule (FAR Case 2002–016)

This final rule amends the FAR to reflect the previous language of FAR 4.705–2 exactly as it was written prior to revision of this subsection by FAC 97–18, item IV, General Records Schedule (FAR case 1999–615) published in the **Federal Register** on June 6, 2000 (65 FR 36012). It was brought to the attention of the Councils that the prior change to FAR 4.705–2 made in FAC 97–18 inadvertently resulted in longer record retention periods for contractors and subcontractors. This final rule—

- Revises the subsection title of FAR 4.705–2 to read "Pay administration records" instead of "Construction contract pay administration records," thus, making all record retention requirements in the entire subsection applicable to all contracts rather than limiting it to construction contracts;
- Revises FAR 4.705–2(a) to change from a record retention period of 3 years after completion of contract unless contract performance is the subject of enforcement action, to 4 years after generation of the records.

For the period from June 6, 2000, through the effective date of this final rule, compliance with either the record retention requirements contained in this rule or the requirements published in FAC 97–18 is acceptable.

### Item II—Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (FAR Case 2001–016)

This final rule terminates the stay and adopts the May 16, 2001, interim rule as final without change. The rule amends FAR parts 17, 22, and 36 to implement Executive Order 13202, as amended by Executive Order 13208. Contracting officers, or any construction manager acting on behalf of the Government, may not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to project labor agreements with one or more labor organizations. It also permits agency heads to exempt a project from the requirements of the Executive order under special circumstances, but the exemption may not be related to the possibility of, or an actual, labor dispute.

### Item III—Caribbean Basin Country End Products (FAR Case 2000–306)

The interim rule published in the **Federal Register** as item V of FAC 2001–04 (67 FR 6116, February 8, 2002), is converted to a final rule with changes. The interim rule implemented the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. It also implemented section 211 of the United States-Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under that Act. However, on July 12, 2002, the USTR published a notice in the **Federal Register** to reinstate the treatment on Government procurement of products from Honduras. The notice stated that products of Honduras shall be treated as eligible products for purposes of section 1–101 of Executive Order 12260. Such treatment shall not apply to products

originating in Honduras that are excluded from duty-free treatment under 19 U.S.C. 2703(b). The determination to reinstate Honduras as published by the USTR has been incorporated in this final rule.

**Item IV—Financing Policies (FAR Case 2000–007)**

This final rule revises certain financing policies at FAR part 32, Contract Financing, and related contract provisions at FAR part 52. The rule—

• Removes the restriction on use of performance-based payments on fixed-price contracts prior to definitization; and

• Permits large businesses, in their billings to the Government, to include certain vendor and subcontractor costs that have been incurred, but not actually paid, provided that, ordinarily, they pay the subcontractor within 30 days.

**Item V—Technical Amendments**

These amendments update references and make editorial changes at FAR 7.105(b)(4)(i) and 19.502–2(a).

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001–10 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–10 are effective December 23, 2002, except for items II, III, and V, which are effective November 22, 2002.

Dated: November 1, 2002.

**Deidre A. Lee,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: October 28, 2002.

**David A. Drabkin,**

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

Dated: October 28, 2002.

**Tom Luedtke,**

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

[FR Doc. 02–29088 Filed 11–21–02; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 4**

**[FAC 2001–10; FAR Case 2002–016; Item I]**

**RIN 9000–AJ49**

## Federal Acquisition Regulation; General Records Schedule

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise pay administration record retention requirements.

**DATES:** *Effective Date:* December 23, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 2001–10, FAR case 2002–016.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule amends the FAR to reflect the previous language of FAR 4.705–2 exactly as it was written prior to revision of this subsection by FAC 97–18, item IV, General Records Schedule (FAR case 1999–615), published in the **Federal Register** on June 6, 2000 (65 FR 36012). It was brought to the attention of the Councils that the prior change to FAR 4.705–2 made by FAC 97–18 inadvertently resulted in longer record retention periods for contractors and subcontractors.

For the period from June 6, 2000, through the effective date of this final rule, compliance with either the record retention requirements contained in this rule or the prior requirements published in FAC 97–18 is acceptable.

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

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR part in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–10, FAR case 2002–016), in correspondence.

**C. Paperwork Reduction Act**

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

**List of Subjects in 48 CFR Part 4**

Government procurement.

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR part 4 as set forth below:

## PART 4—ADMINISTRATIVE MATTERS

1. The authority citation for 48 CFR part 4 continues to read as follows:

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

2. Amend section 4.705–2 by revising the section heading and paragraph (a) to read as follows:

**4.705–2 Pay administration records.**

(a) Payroll sheets, registers, or their equivalent, of salaries and wages paid to individual employees for each payroll period; change slips; and tax withholding statements: Retain 4 years.

* * * * *

[FR Doc. 02–29089 Filed 11–21–02; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 17, 22, and 36**

**[FAC 2001–10; FAR Case 2001–016; Item II]**

**RIN 9000–AJ14**

## Federal Acquisition Regulation; Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects

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

**ACTION:** Final rule; termination of stay of interim rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published in the **Federal Register** at 66 FR 27414, May 16, 2001, an interim rule implementing Executive Order (E.O.) 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects. As a result of a permanent injunction against the E.O. and pending litigation to resolve the dispute, the Councils published an interim rule in the **Federal Register** at 67 FR 10527, March 7, 2002, staying the heart of the rule. The Federal Acquisition Regulatory (FAR) Council intended the stay would last until final judicial resolution of the dispute. The FAR Council requested comments on the FAR interim rule stay. This final rule terminates the stay and adopts the May 16, 2001, interim rule as final without change.

**DATES:** Effective November 22, 2002, the stay of 48 CFR 36.202(d) is terminated. As of November 22, 2002, the interim rule amending 48 CFR parts 17, 22, and 36 published on May 16, 2001 (66 FR 27414), is adopted as final without change.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 2001–10, FAR case 2001–016.

**SUPPLEMENTARY INFORMATION:**

### A. Background

On February 17, 2001, President George W. Bush signed Executive Order (E.O.) 13202 revoking E.O. 12836 of February 1, 1993, and Presidential Memorandum of June 5, 1997, entitled "Use of Project Labor Agreements for Federal Construction Projects." The E.O. was published in the **Federal Register** at 66 FR 11225, February 22, 2001, and amended by E.O. 13208 published in the **Federal Register** at 66 FR 18717, April 11, 2001.

The E.O. 13202 is intended to improve the internal management of the Executive branch by—

- Promoting and ensuring open competition on Federal and federally funded or assisted construction projects;
- Maintaining Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects;
- Reducing construction costs to the Government and to the taxpayers;
- Expanding job opportunities, especially for small and disadvantaged businesses;
- Preventing discrimination against Government contractors or their employees based upon labor affiliation or lack thereof, thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects; and
- Preventing the inefficiency that may result from the disruption of a previously established contractual relationship in particular cases.

To implement Executive Order 13202, as amended, an interim rule was published in the **Federal Register** on May 16, 2001, 66 FR 27414, as part of Federal Acquisition Circular 97–26. Consistent with Executive Order 13202, as amended, FAR 36.202(d) of that interim rule specified that agencies could not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to agreements with one or more labor organizations. It also permitted agency heads to exempt a project from the requirements of the Executive order under special circumstances, but specified that such an exemption could not be related to a possible or an actual labor dispute. FAR 36.202(d) also provided for the exemption of a project governed by a project labor agreement in place as of February 17, 2001, which had a construction contract awarded as of February 17, 2001.

In response to the interim rule, the Councils received 179 letters. All but one of the respondents supported the rule. The one respondent (Building and Construction Trades Department, AFL–CIO) that did not support the rule believed the Executive order in which the rule was based is unlawful; that the interim rule is based both on misapprehensions about the nature of Project Labor Agreements and on economic assumptions that lack any factual basis; and that the interim rule is so vague as to mislead affected parties about their ability to exercise their statutory rights. Since the rule mirrors the directives contained in the Executive orders, the Councils agreed that no change to the rule was necessary.

This same respondent, along with other plaintiffs, commenced a lawsuit to enjoin the enforcement of the E.O. issued by the President. A permanent injunction against enforcement of Executive Order 13202 was issued November 7, 2001, by the U.S. District Court for the District of Columbia (*see* Building and Construction Trades Department, AFL–CIO v. Allbaugh, D.D.C., 172 F.Supp.2d 138, D.D.C. 2001). The Government submitted its appeal (No. 01–5436 (D.C. Cir.)). In order to comply with the court order, a stay of the heart of the interim rule with a request for comments was published in the **Federal Register** at 67 FR 10527, March 7, 2002, pending resolution of the litigation.

In response to the interim rule stay, one respondent (The Associated General Contractors of America (AGC)) submitted comments. AGC believed that the unresolved legal challenge to the Executive Order 13202 does not require a stay of the interim rule, and it is inappropriate for the Councils to impede the enforcement of the E.O. The Councils determined that the stay would remain pending resolution of the litigation.

A decision by the United States Court of Appeals for the District of Columbia Circuit on July 12, 2002, reversed the judgment of the District Court and vacated the injunction (295 F.3d 28, D.C. Cir. 2002). Accordingly, the Councils are terminating the stay and adopting the May 16, 2001, interim rule as final without change.

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

**B. Regulatory Flexibility Act**

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

This rule amends FAR parts 17, 22, and 36 to implement Executive Order 13202 as amended on April 6, 2001 (E.O. 13208). The Executive orders require that any construction contract awarded after February 17, 2001, or any obligation of funds pursuant to such contract, must not require or prohibit offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction project(s); or otherwise discriminate against offerors, contractors, or subcontractors for becoming or refusing to become or remaining signatories or otherwise adhere to agreements with one or more organizations, on the same or other related construction projects. The rule primarily affects the internal operating procedures of Government agencies. The rule will apply to all large and small entities that seek award of construction contracts that are Federal and federally funded. During fiscal year 2001, there were over forty-seven thousand contract actions awarded to small businesses according to the Federal Procurement Data System. These actions were worth a total of over $6 billion. It is expected that the awarding offices neutrality toward Government contractors' and subcontractors labor relations regarding project labor agreements will expand job opportunities to small entities, specifically nonunion small businesses. This gives small businesses the ability to negotiate and establish business relationships to deliver efficient and cost effective high quality construction projects.

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

**C. Paperwork Reduction Act**

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

**List of Subjects in 48 CFR Parts 17, 22, and 36**

Government procurement.

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

**Stay Terminated; Interim Rule Adopted as Final Without Change**

Accordingly, DoD, GSA, and NASA terminate the interim rule stay published in the **Federal Register** at 67 FR 10527 on March 7, 2002, and further adopt as a final rule without change the interim rule amending 48 CFR parts 17, 22, and 36, which was published in the **Federal Register** at 66 FR 27414 on May 16, 2001.

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

[FR Doc. 02–29090 Filed 11–21–02; 8:45 am]

BILLING CODE 6820–EP–P

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 25 and 52**

**[FAC 2001–10; FAR Case 2000–306; Item III]**

**RIN 9000–AJ27**

## Federal Acquisition Regulation; Caribbean Basin Country End Products

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to convert this FAR case from an interim rule to a final rule with changes. This interim rule amended the FAR to implement the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. It also implemented section 211 of the United States-Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under that Act. However, on July 12, 2002, the USTR published a notice in the **Federal Register** to reinstate the treatment on Government procurement of products from Honduras. The determination to reinstate Honduras as published by the USTR has been incorporated in this final rule.

**DATES:** *Effective Date:* November 22, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2001–10, FAR case 2000–306.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This rule amended the Federal Acquisition Regulation (FAR) to implement the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. This rule also implemented section 211 of the United States-Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under the Act.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 67 FR 6116, February 8, 2002, and no comments were received. However, on July 12, 2002 (67 FR 46239), the USTR published a notice in the **Federal Register** to reinstate the treatment on Government procurement of products from Honduras. The notice stated that products of Honduras shall be treated as eligible products for purposes of section 1–101 of Executive Order 12260. Such treatment shall not apply to products originating in Honduras that are excluded from duty-free treatment under 19 U.S.C. 2703(b). The determination to reinstate Honduras as published by the USTR has been incorporated in this case. The Councils have agreed to convert this FAR case from an interim rule to a final rule with changes.

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

**B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final

rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it only affects a limited number of products from a few Caribbean Basin countries. The Berry Amendment (formerly at 10 U.S.C. 2241, note, but recently codified at 10 U.S.C. 2533a) still prohibits the Department of Defense from buying most of the textile and apparel articles receiving duty-free treatment under this Act.

### C. Paperwork Reduction Act

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

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

Government procurement.

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

### Interim Rule Adopted as Final With Changes

Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 25 and 52, which was published in the **Federal Register** at 67 FR 6116, February 8, 2002, as a final rule with the following changes:

1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

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

## PART 25—FOREIGN ACQUISITION

**25.003 [Amended]**

2. Amend section 25.003 in the definition "Caribbean Basin country" by adding "Honduras," after "Haiti,".

**25.400 [Amended]**

3. Amend section 25.400 in paragraph (a)(2) by removing ", Honduras,".

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**52.225–5 [Amended]**

4. Amend section 52.225–5 in the clause heading by removing "(Feb 2002)" and adding "(Nov 2002)" in its place; and in paragraph (a) in the definition "Caribbean Basin country", by adding "Honduras," after "Haiti,".

[FR Doc. 02–29091 Filed 11–21–02; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 32 and 52

**[FAC 2001–10; FAR Case 2000–007; Item IV]**

**RIN 9000–AI92**

## Federal Acquisition Regulation; Financing Policies

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to permit the use of performance-based payments type of financing on fixed-price contracts prior to definitization, and to revise the criteria governing when a prime contractor can bill the Government for costs incurred, but not yet paid, for supplies and services purchased directly for the contract and for associated subcontractor financing payment requests.

**DATES:** Effective Date: December 23, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501–3221. Please cite FAC 2001–10, FAR case 2000–007.

**SUPPLEMENTARY INFORMATION:**

### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 56454, September 18, 2000. The proposed rule—

- Revised the requirement at FAR 32.1003(b) to permit performance-based payments type of financing on fixed-price contracts prior to definitization;
- Completely removed the "paid cost rule" restriction from the payment clauses at FAR 52.216–26, Payments of Allowable Costs Before Definitization, and FAR 52.232–7, Payments under Time-and-Materials and Labor-Hour Contracts. The "paid cost rule" is the requirement that a large business must actually pay (not just incur) costs for supplies and services purchased directly for the contract and financing payments to subcontractors before including the payments in its billings to the Government. A final rule under FAR case 1998–400 was published in the **Federal Register** at 65 FR 16274, March 27, 2000. The intent of that final rule was to remove this restriction from all the payment clauses if contractors met certain conditions. Inadvertently, this restriction was not removed in its entirety from FAR 52.216–26(d)(2) and FAR 52.232–7(b)(3). The proposed rule published under this FAR case 2000–007 corrected this oversight and the rule—
- Established, for both cost-reimbursement and fixed-price contracts, a standard time period of 30 days that contractors have to pay their subcontractors after the contractors have billed the Government for incurred subcontractor costs. As indicated in the previous paragraph, the final rule under FAR case 1998–400 amended the FAR to permit a large business to include, in its billings, certain costs that it had incurred but not actually paid, if the following conditions were met: The unpaid amounts were paid (1) in accordance with the terms and conditions of a subcontract or invoice; and (2) ordinarily prior to the submission of the contractor's next payment request to the Government. The second condition permitted a large business to submit cost vouchers on a cost-reimbursement contract every 14 days, but the large business could bill no more frequently than every 30 days when billing progress payments on a fixed-price contract. Therefore, contractors may need to maintain several systems and procedures to accommodate the timing differences for payments to subcontractors, depending on whether the costs are billed on a cost-reimbursement or fixed-price type prime contract. To eliminate the timing differences, the proposed FAR rule revised the second condition to establish a single standard time period of 30 days; and
- Made several editorial changes.

Four respondents submitted public comments to the proposed rule. The Councils considered all comments when developing the final rule which differs from the proposed rule with regard to when a contractor can bill the Government for supplies and services purchased directly for the contract and associated financing payment requests received from their subcontractors that have not yet been paid for by the prime contractors. As amended by this final rule, the contractor can bill the Government when contractor payment

for the amount determined due the supplier or subcontractor is scheduled to be made within 30 days of the submission of the contractor's current payment request to the Government. The Councils believe that a 30-day float period for the prime contractor represents a reasonable time period and do not believe it would be in the best interests of the Government or subcontractors to effectively encourage float periods in excess of 30 days.

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

**B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold and, therefore, do not have the progress payment or performance-based payment type of financing. In addition, the "paid cost rule" restriction does not apply to small entities.

**C. Paperwork Reduction Act**

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

**List of Subjects in 48 CFR Parts 32 and 52**

Government procurement.

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 32 and 52 as set forth below:

1. The authority citation for 48 CFR parts 32 and 52 continues to read as follows:

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

## PART 32—CONTRACT FINANCING

2. Amend section 32.504 by revising the introductory text of paragraph (b) and paragraph (b)(2) to read as follows:

**32.504 Subcontracts under prime contracts providing progress payments.**

* * * * *

(b) The contractor's requests for progress payments may include the full amount of commercial item purchase financing payments, performance-based payments, or progress payments to a subcontractor, whether paid or unpaid, provided that unpaid amounts are limited to amounts determined due and that the contractor will pay—

* * * * *

(2) Ordinarily within 30 days of the submission of the contractor's progress payment request to the Government.

* * * * *

3. Amend section 32.1003 by revising the introductory text and paragraph (b) to read as follows:

**32.1003 Criteria for use.**

The contracting officer may use performance-based payments only if the following conditions are met:

* * * * *

(b) The contract is a fixed-price type contract; and

* * * * *

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.216–7 by revising the date of the clause; and by revising the introductory text of paragraph (b)(1)(ii)(A) and paragraph (b)(1)(ii)(A)(*2*) to read as follows:

**52.216–7 Allowable Cost and Payment.**

* * * * *

Alowable Cost and Payment (Dec. 2002)

* * * * *

(b) *Reimbursing costs.* (1) * * *

(ii) * * *

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

* * * * *

(*2*) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

* * * * *

5. Amend section 52.216–26 by revising the date of the clause, the introductory text of paragraph (d)(2)(i), and paragraph (d)(2)(i)(B) to read as follows:

**52.216–26 Payments of Allowable Costs Before Definitization.**

* * * * *

**Payments of Allowable Costs Before Definitization (Dec 2002)**

* * * * *

(d) * * *

(2) * * *

(i) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

* * * * *

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

* * * * *

6. Amend section 52.232–7 by revising the date of the clause, and paragraphs (b)(3) and (b)(4)(ii) to read as follows:

**52.232–7 Payments under Time-and-Materials and Labor-Hour Contracts.**

* * * * *

**Payments Under Time-and-Materials and Labor-Hour Contracts (Dec 2002)**

* * * * *

(b) * * *

(3) The Government will reimburse the Contractor for supplies and services purchased directly for the contract when the Contractor—

(i) Has made payments of cash, checks, or other forms of payment for these purchased supplies or services; or

(ii) Will make these payments determined due—

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

(4)(i) * * *

(ii) The Government will limit reimbursable costs in connection with subcontracts to the amounts paid for supplies and services purchased directly for the contract when the Contractor has made or will make payments determined due of cash, checks, or other forms of payment to the subcontractor—

(A) In accordance with the terms and conditions of a subcontract or invoice; and

(B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

* * * * *

7. Amend section 52.232–16 by revising the date of the clause, the introductory text of paragraph (a)(2), and paragraph (a)(2)(ii) to read as follows:

**52.232–16 Progress Payments.**

* * * * *

**Progress Payments (Dec 2002)**

* * * * *

(a) * * *

(2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that are determined due and will be paid to subcontractors—

* * * * *

(ii) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government.

* * * * *

[FR Doc. 02–29092 Filed 11–21–02; 8:45 am]

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 7 and 19

**[FAC 2001–10; Item V]**

## 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 update references and make editorial changes.

**DATES:** *Effective Date:* November 22, 2002.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. Please cite FAC 2001–10, Technical Amendments.

**List of Subjects in 48 CFR Parts 7 and 19**

Government procurement.

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 7 and 19 as set forth below:

1. The authority citation for 48 CFR parts 7 and 19 continues to read as follows:

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

## PART 7—ACQUISITION PLANNING

2. Amend section 7.105 by adding a sentence to the end of paragraph (b)(4)(i) to read as follows:

**7.105 Contents of written acquisition plans.**

* * * * *

(b) * * *

(4) *Acquisition considerations.* (i) * * * Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed-price basis (see 37.102(a) and 16.505(a)(3)).

* * * * *

## PART 19—SMALL BUSINESS PROGRAMS

**19.502–2 [Amended]**

3. Amend section 19.502–2 in the first sentence of paragraph (a) by removing "13.202(g))" and adding "13.201(g))" in its place.

[FR Doc. 02–29093 Filed 11–21–02; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Chapter 1

## Federal Acquisition Regulation; Small Entity Compliance Guide

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–10 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001–10 which precedes this document. These documents are also available via the Internet at *http://www.arnet.gov/far.*

**FOR FURTHER INFORMATION CONTACT:** Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–10

| Item | Subject | FAR case | Analyst |
|---|---|---|---|
| I | General Records Schedule | 2002–016 | Nelson |
| II | Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal And Federally Funded Construction Projects. | 2001–016 | Nelson |
| III | Caribbean Basin Country End Products | 2000–306 | Davis |
| IV | Financing Policies | 2000–007 | Olson |
| V | Technical Amendments. | | |

**Item I—General Records Schedule (FAR Case 2002–016)**

This final rule amends the FAR to reflect the previous language of FAR 4.705–2 exactly as it was written prior to revision of this subsection by FAC 97–18, Item IV, General Records Schedule (FAR case 1999–615) published in the **Federal Register** on June 6, 2000 (65 FR 36012). It was brought to the attention of the Councils that the prior change to FAR 4.705–2 made in FAC 97–18 inadvertently resulted in longer record retention periods for contractors and subcontractors. This final rule—

- Revises the subsection title of FAR 4.705–2 to read "Pay administration records" instead of "Construction contract pay administration records," thus, making all record retention requirements in the entire subsection applicable to all contracts rather than limiting it to construction contracts;
- Revises FAR 4.705–2(a) to change from a record retention period of 3 years after completion of contract unless

contract performance is the subject of enforcement action, to 4 years after generation of the records.

For the period from June 6, 2000, through the effective date of this final rule, compliance with either the record retention requirements contained in this rule or the requirements published in FAC 97–18 is acceptable.

**Item II—Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (FAR Case 2001–016)**

This final rule terminates the stay and adopts the May 16, 2001, interim rule as final without change. The rule amends FAR parts 17, 22, and 36 to implement Executive Order 13202, as amended by Executive Order 13208. Contracting officers, or any construction manager acting on behalf of the Government, may not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to project labor agreements with one or more labor organizations. It also permits agency heads to exempt a project from the requirements of the Executive order under special circumstances, but the exemption may not be related to the possibility of, or an actual, labor dispute.

**Item III—Caribbean Basin Country End Products (FAR Case 2000–306)**

The interim rule published in the **Federal Register** as Item V of FAC 2001–04 (67 FR 6116, February 8, 2002), is converted to a final rule with changes. The interim rule implemented the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. It also implemented Section 211 of the United States—Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under that Act. However, on July 12, 2002, the USTR published a notice in the **Federal Register** to reinstate the treatment on Government procurement of products from Honduras. The notice stated that products of Honduras shall be treated as eligible products for purposes of section 1–101 of Executive Order 12260. Such treatment shall not apply to products originating in Honduras that are excluded from duty-free treatment under 19 U.S.C. 2703(b). The determination to reinstate Honduras as published by the USTR has been incorporated in this final rule.

**Item IV—Financing Policies (FAR Case 2000–007)**

This final rule revises certain financing policies at FAR part 32, Contract Financing, and related contract provisions at FAR part 52. The rule—

- Removes the restriction on use of performance-based payments on fixed-price contracts prior to definitization; and
- Permits large businesses, in their billings to the Government, to include certain vendor and subcontractor costs that have been incurred, but not actually paid, provided that, ordinarily, they pay the subcontractor within 30 days.

**Item V—Technical Amendments**

These amendments update references and make editorial changes at FAR 7.105(b)(4)(i) and 19.502–2(a).

Dated: November 12, 2002.

**Al Matera,**

*Director, Acquisition Policy Division.*

[FR Doc. 02–29094 Filed 11–21–02; 8:45 am]

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