

**FAC 2005-25 is summarized below and includes whether any DOE supplemental guidance will be issued.**

**Item I -- Federal Procurement Data System Reporting**

(FAR Case 2004-038) (Interim)

Effective date: April 22, 2008

Public comments due: June 23, 2008

This interim rule amends the Federal Acquisition Regulation (FAR) Subpart 4.6 to revise the process for reporting contract actions to the Federal Procurement Data System (FPDS). FPDS will allow agencies to obtain Federal procurement reports as well as several workload reports designed specifically for first-line supervisors. The use of the Federal reports will alleviate the need for individual agencies to collect, verify, and distribute statistics for a host of requirements such as the Small Business Goaling Report (SBGR), the Performance-Based Acquisition (PBA) report, the Central Contractor Registration (CCR), and the Resource Conservation and Recovery Act (RCRA) report. The rule provides questions and answers to facilitate the public's understanding of the changes proposed in the interim for reporting contract actions under FAR Subpart 4.6.

The DOE Acquisition Guide, Chapter 4.1, which contains procedures to implement statutory reporting requirements for collecting data on procurement and financial assistance actions, will be updated.

**Item II -- Electronic Subcontracting Reporting System (eSRS)**

(FAR Case 2005-040) (Interim)

Effective date: April 22, 2008

Public comments due: June 23, 2008

This interim rule amends the Federal Acquisition Regulation to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form 294 - Subcontract Report for Individual Contracts and Standard Form 295 - Summary Subcontract Report. The eSRS is a web-based system managed by the Integrated Acquisition Environment. The eSRS is intended to streamline the small business subcontracting program reporting process and provide the data to agencies in a manner that will enable them to more effectively manage the program.

In October 2005, the DOE Acquisition Letter AL-2006-01, Subject: Electronic Subcontracting Reporting System (eSRS), implemented eSRS policy in DOE. The interim FAR rule does modify the FAR clause 52.219-9, Small Business Subcontracting Plan (APR 2008), for eSRS. Use the new FAR April 2008 version of the clause instead of the sample attached to the AL. Subject to public comments and finalizing the rule, this AL still provides relevant implementation information and remains in effect. Steve Zvolensky is the point of contact for any questions regarding eSRS. His phone number is 202-287-1307 and his e-mail address is [Stephen.zvolensky@hq.doe.gov](mailto:Stephen.zvolensky@hq.doe.gov).

**Item III -- Revisions to the Defense Priorities and Allocations System (DPAS)**

(FAR Case 2006-033) (Final)

Effective date: April 22, 2008

This final rule amends the language in the Federal Acquisition Regulation (FAR) to reflect the President's delegation of the Defense Production Act's priorities and allocations authorities in Executive Order 12919, and the current provisions of the Defense Priorities and Allocations System (DPAS) regulations of the Department of Commerce in 15 CFR Part 700.

DOE has two parallel authorities. Under the Atomic Energy Act, there is authority for rated orders for contracts in support of atomic energy programs. Under amendments to the Defense Production Act, there is similar authority for projects which are for the purpose of maximizing domestic energy production. Coincidentally, DOE published a direct final rule on February 29, 2008 (which became effective April 29, 2008) which updates the authority for projects maximizing domestic energy supplies upon making certain "critical and essential" findings. The DOE revisions to 10 CFR and 48 CFR reflect the broader scope of the Defense Production Act Extension and Amendments of 1991 and Executive Order 12919. Specifically, the amendment expanded definitions, removed obsolete coverage, and updated certain parts of the DOE DPAS Regulations found in Titles 10 and 48 of the Code of Federal Regulations.

**Item IV -- Use of Products Containing Recovered Materials in Service and Construction Contracts**

(FAR Case 2005-039) (Final)

Effective date: May 22, 2008

This final rule amends the Federal Acquisition Regulation (FAR) to clarify language within the FAR regarding the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 "Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition." The rule also prescribes a new clause for use in service or construction contracts, to ensure that contractors deliver and make maximum use of products containing recovered material.

This change ensures that the contracting community knows that these requirements apply equally under service and construction contracts as they do under commodity contracts. The DOE Acquisition Guide, Chapter 23, which contains instructions for environmental solicitation provisions and contract clauses, will be updated to include the added and revised provisions and clauses contained in the FAC.

**Item V -- Representations and Certifications - Tax Delinquencies**

(FAR Case 2006-011) (Final)

Effective date: May 22, 2008

This final rule amends the Federal Acquisition Regulation (FAR) to add conditions regarding refusal to pay delinquent Federal taxes to standards of contractor responsibility, causes for suspension and debarment, and the certifications regarding debarment, suspension, and proposed debarment. The changes are intended to add clarity regarding the specific circumstances under which tax delinquencies are so serious that suspension or debarment should be considered. The changes originated in response to a request from the Senate Permanent Subcommittee on Investigations.

**Item VI -- Enhanced Access for Small Business**

(FAR Case 2006-031) (Final)

Effective date: May 22, 2008

This final rule creates a different, higher dollar ceiling enabling small businesses to use the small claims procedure for appealing a contracting officer's final decision. Section 857 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) changed the ceiling under the Contract Disputes Act from \$50,000 or less to \$150,000 or less for small businesses. The ceiling remains at \$50,000 or less for other types of businesses. The change to 41 U.S.C. 608 is a ceiling change only.

**Item VII -- Technical Amendment --** An editorial change is made at FAR 1.603-1.

Effective date: April 22, 2008

This amendment revised the Office of Federal Procurement Policy (OFPP) Policy Letter from 92-3 to 05-01, Developing and Managing the Acquisition Workforce, April 15, 2005.



# Federal Register

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**Tuesday,  
April 22, 2008**

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**Part III**

**Department of Defense  
General Services  
Administration**

**National Aeronautics and  
Space Administration**

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**48 CFR Chapter 1; and Parts 1, 2, 4, 12,  
52 et al.**

**Federal Acquisition Regulations; Final  
Rule and Small Entity Compliance Guide**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR–2008–0003, Sequence 1]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005–25; 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) 2005–25. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

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

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–25 and the specific FAR case number(s). For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**LIST OF RULES IN FAC 2005–25**

Item	Subject	FAR case	Analyst
I .....	Federal Procurement Data System Reporting (Interim) .....	2004–038	Woodson.
II .....	Electronic Subcontracting Reporting System (eSRS) (Interim) .....	2005–040	Cundiff.
III .....	Revisions to the Defense Priorities and Allocations System (DPAS) .....	2006–033	Davis.
IV .....	Use of Products Containing Recovered Materials in Service and Construction Contracts .....	2005–039	Clark.
V .....	Representations and Certifications - Tax Delinquencies .....	2006–011	Murphy.
VI .....	Enhanced Access for Small Business .....	2006–031	Murphy.
VII .....	Technical Amendment. ....		

**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 2005–25 amends the FAR as specified below:

**Item I—Federal Procurement Data System Reporting (FAR Case 2004–038) (Interim)**

This interim rule amends the Federal Acquisition Regulation (FAR) Subpart 4.6 to revise the process for reporting contract actions to the Federal Procurement Data System (FPDS). FPDS will allow agencies to obtain Federal procurement reports as well as several workload reports designed specifically for first-line supervisors. The use of the Federal reports will alleviate the need for individual agencies to collect, verify, and distribute statistics for a host of requirements such as the Small Business Goaling Report (SBGR), the Performance-Based Acquisition (PBA) report, the Central Contractor Registration (CCR), and the Resource Conservation and Recovery Act (RCRA) report. The rule provides questions and answers to facilitate the public’s understanding of the changes proposed in the interim for reporting contract actions under FAR Subpart 4.6.

**Item II—Electronic Subcontracting Reporting System (eSRS) (FAR Case 2005–040) (Interim)**

This interim rule amends the Federal Acquisition Regulation to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form 294 - Subcontract Report for Individual Contracts and Standard Form 295 - Summary Subcontract Report. The eSRS is a web-based system managed by the Integrated Acquisition Environment. The eSRS is intended to streamline the small business subcontracting program reporting process and provide the data to agencies in a manner that will enable them to more effectively manage the program.

**Item III—Revisions to the Defense Priorities and Allocations System (DPAS) (FAR Case 2006–033)**

This final rule amends the language in the Federal Acquisition Regulation (FAR) to reflect the President’s delegation of the Defense Production Act’s priorities and allocations authorities in Executive Order 12919, and the current provisions of the Defense Priorities and Allocations System (DPAS) regulations of the Department of Commerce in 15 CFR Part 700.

FAR changes incorporated in parts 2, 11, 18, 52, and 53 benefit both the Government and industry in the

receiving of timely and proper delivery of industrial resources. Contracting officers should take notice of the changes in the FAR especially the changes to the Standard Form (SF) 26, Award/Contract and SF 1447, Solicitation/Contract, and use the revised SF 26 and SF 1447 that reflects the 15 CFR 700 citation and 2008 edition date change.

**Item IV—Use of Products Containing Recovered Materials in Service and Construction Contracts (FAR Case 2005–039)**

This final rule amends the Federal Acquisition Regulation (FAR) to clarify language within the FAR regarding the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.” The rule also prescribes a new clause for use in service or construction contracts, to ensure that contractors deliver and make maximum use of products containing recovered material.

**Item V—Representations and Certifications - Tax Delinquencies (FAR Case 2006–011)**

This final rule amends the Federal Acquisition Regulation (FAR) to add conditions regarding refusal to pay delinquent Federal taxes to standards of

contractor responsibility, causes for suspension and debarment, and the certifications regarding debarment, suspension, and proposed debarment. The changes are intended to add clarity regarding the specific circumstances under which tax delinquencies are so serious that suspension or debarment should be considered. The changes originated in response to a request from the Senate Permanent Subcommittee on Investigations.

#### Item VI—Enhanced Access for Small Business (FAR Case 2006–031)

This final rule creates a different, higher dollar ceiling enabling small businesses to use the small claims procedure for appealing a contracting officer's final decision. Section 857 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) changed the ceiling under the Contract Disputes Act from \$50,000 or less to \$150,000 or less for small businesses. The ceiling remains at \$50,000 or less for other types of businesses. The change to 41 U.S.C. 608 is a ceiling change only.

#### Item VII—Technical Amendment

An editorial change is made at FAR 1.603–1.

Dated: April 4, 2008.

#### Al Matera,

Director, Office of Acquisition Policy.

#### Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–25 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–25 is effective April 22, 2008, except for Items IV, V, and VI which are effective May 22, 2008.

Dated: April 10, 2008.

#### Shay D. Assad,

Director, Defense Procurement and Acquisition Policy, and Strategic Sourcing.

Dated: April 7, 2008.

#### David A. Drabkin,

Acting Chief Acquisition Officer & Senior Procurement Executive, Office of the Chief Acquisition Officer, U.S. General Services Administration.

Dated: April 3, 2008.

#### William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E8–8402 Filed 4–21–08; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 1, 2, 4, 12, and 52

[FAC 2005–25; FAR Case 2004–038; Item I; Docket 2008–0001, Sequence 6]

RIN 9000–AK94

#### Federal Acquisition Regulation; FAR Case 2004–038, Federal Procurement Data System Reporting

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to revise the process for reporting contract actions to the Federal Procurement Data System (FPDS).

**DATES:** *Effective Date:* April 22, 2008.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before June 23, 2008 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–25, FAR case 2004–038, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2004–038” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2004–038. Follow the instructions provided to complete the “Public Comment and Submission Form”.

Please include your name, company name (if any), and “FAR Case 2004–038” on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4035, ATTN: Diedra Wingate, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAC 2005–25, FAR case 2004–038, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any

personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–25, FAR case 2004–038. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

As of October 2003, all agencies were to begin reporting FAR-based contract actions to the modified system. During Fiscal Year 2004, members of the interagency Change Control Board, as well as departmental teams working on the migration of data from the old to new system, recognized both the opportunity to standardize reporting processes and the need to revise the FAR to provide current and clear reporting requirements.

In this interim rule, the Government is establishing its commitment for Federal Procurement Data System (FPDS) data to serve as the single authoritative source of all procurement data for a host of applications and reports, such as the Central Contractor Registration (CCR), the Electronic Subcontracting Reporting System (eSRS), the Small Business Goaling Report (SBGR), and Resource Conservation and Recovery Act (RCRA) data.

The enhanced FPDS was put into production on October 1, 2003 by implementing newer technology to report contract actions. The old system had 48 data elements; the new system has 145+ elements, including who funds the contract. The new system has the ability to receive data and provide data to other applications used in the procurement community, allowing the Government to give “credit” to the agency that funds the contract action. The system is also an enabler ensuring that metrics are consistent when comparing one department, service, or organization to another.

Small agencies that do not have the staff or resources necessary to purchase the automated contract writing application necessary for reporting contract actions as required by this interim rule are encouraged to partner with a large agency and become a subscriber on their system. For information about frequently asked questions, see <https://www.fpds.gov>.

The rule amends the FAR by:

1. Revising FAR 1.106 to change the FAR segment 4.602 to 4.605, and 4.603 to 4.607.

2. Revising FAR 2.101 to add a definition for “Chief Acquisition Officer” and revising the definition for “Data Universal Numbering System number” to include that it is the identification number for Federal contractors.

3. Renaming FAR 4.601 “Definitions” and revising the section to add definitions for “assisted acquisition,” “contract action,” “contract action report (CAR),” “definitive contract,” “direct acquisition,” “entitlement program,” “generic DUNS number,” “indefinite-delivery vehicle (IDV),” “requesting agency,” and “servicing agency” as they pertain to FPDS.

4. Renaming FAR section 4.602 “General” and revising to describe the general characteristics of FPDS and identify data that will and will not be maintained in FPDS.

5. Renaming FAR section 4.603 “Policy” and revising the section to: describe the use of FPDS to maintain publicly available information about contract actions; require agencies to report actions subject to the FAR and using appropriated funds; require agencies performing assisted or direct acquisitions to report such actions; encourage agencies exempt from the FAR or using non-appropriated funds to report such actions; and require agencies awarding contracts using a mix of appropriated and non-appropriated funds to only report the full appropriated portion of the action.

6. Adding a new FAR section 4.604, Responsibilities. The new section: describes the responsibility of the Senior Procurement Executive (SPE) and head of the contracting activity for developing and monitoring a process to ensure timely and accurate reporting of contractual actions to FPDS describes the responsibility of the contracting officer for the submission and accuracy of the contract action report; describes how and when the contract action report is to be submitted to FPDS when a contract writing system is or is not integrated with FPDS or when the contract action is awarded pursuant to FAR 6.302–2 or in accordance with the authorities listed at FAR Subpart 18.2; and indicates the date that the Chief Acquisition Officer of each agency reporting to FPDS must submit an annual certification of the agency’s reported actions.

7. Adding a new FAR section 4.605, Procedures. The new section describes: the Procurement Instrument Identifier; and the Data Universal Numbering System (DUNS).

8. Adding a new FAR section 4.606, Reporting Data. The new section will describe: the mandatory actions

agencies must report to FPDS; the use of FPDS “Express Reporting;” the reporting requirements for agencies participating in the Small Business Competitiveness Demonstration Program; and the responsibility of the GSA Purchase Card Management to provide purchase card data to FPDS; how agencies may report other actions not specified in the subpart; and actions not to be reported to FPDS, including imprest funds transactions below the micro-purchase threshold, orders from GSA Stock and Global Supply Programs, orders against certain indefinite-delivery vehicles, purchases made using Javits-Wagner-O’Day service stores, and purchases made using non-appropriated fund activity cards, chaplain cards, individual Government personnel training orders, and Defense Printing.

9. Renumbering the existing FAR 4.603 as 4.607.

**B. The Councils have developed the following list of questions and answers to facilitate the public’s understanding of the changes proposed in FAR Case 2004–038 for reporting contract actions under the Federal Acquisition Regulation (FAR), Subpart 4.6.**

*Question 1:* What is the Federal Procurement Data System (FPDS)?

FPDS is a comprehensive mechanism for assembling, organizing, and presenting contract procurement data for the Federal Government. The system collects, processes, and disseminates official statistical data on Federal contracting. The data is used to generate reports for the three branches of Government and the general public.

*Question 2:* Why are we changing the way the Federal Government collects procurement data?

The way the Federal Government collects procurement data is being enhanced to satisfy the Government’s compelling need to manage and understand how and where your tax dollars are spent. Collecting data about Government procurements provides a broad picture of the overall Federal acquisition process. The ability to look at all contracts across many agencies, in greater detail, is a key component in establishing transparency, trust in our Government, and credibility in the professionals who use and perform these contracts. With an enhanced view of Federal spending we can conduct analyses to structure strategic procurements and save money, improve Governmentwide management, and establish interoperability with other Governmentwide data systems.

*Question 3:* What impact will the enhancements have on errors in FPDS?

Government procurement executives realize that contracts are written for extended periods of time and that modifications are routinely made to these contracts, even if just to exercise an option. As a result of inputting data regarding these contracts into FPDS, some errors will end up in FPDS. Additionally, as long as there are data elements in a contract writing system that are released to FPDS without validation, errors will continue. Regardless of the reason it happens, if we continue to allow the data to be input in FPDS without validation, the professionalism and credibility of the acquisition community is called into question. The FPDS enhancements provide the capability to correct any information that is incorrect or outdated.

*Question 4:* What level of effort is expected of contracting personnel in eliminating errors in procurement reported to FPDS?

We anticipate minimal effort is required of the contracting officer or contracting specialist to ensure that the data reported to FPDS is current, accurate, and complete. It is incumbent on contracting officers and agencies to assure the accuracy of all information submitted. It is also certain that if care is taken to record the data correctly the first time, it will reduce the burden to make corrections. To draw attention to the criticality of this information, the Office of Federal Procurement Policy (OFPP) will require each agency, beginning in December 2007, to certify annually that all data is accurate and complete. See [http://www.whitehouse.gov/omb/procurement/memo/fpds\\_itr\\_030907.pdf](http://www.whitehouse.gov/omb/procurement/memo/fpds_itr_030907.pdf).

*Question 5:* Why is it important for procurement data to be accurate and timely?

(a) Timely and accurate procurement data ensures that the recurring and special reports to the President, Congress, the Government Accountability Office, and the general public on the expenditure of taxpayer dollars are reliable, useful, realistic, and serve as a rational basis for assessing—

- The effect of Federal contracting on our Nation’s economy and the extent to which small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, women-owned small business concerns, and nonprofit agencies operating under the Javits-Wagner-O’Day Act are sharing in Federal contracts; and

- Measuring the impact of other Federal procurement policies and management initiatives.

(b) In addition to the above, a list of purposes for which this business information is used, includes but is not limited to the following:

- Decisions on organization structure.
- Decisions related to staffing.
- Decisions related to training.
- Assessments on the extent to which awards are made to businesses in the various socio-economic categories.
- Assessments of the impact of competition on the acquisition process.

(c) FPDS also provides the following—

- An authoritative source of information;
- Discipline in the reporting process;
- Confidence in Government acquisition practices, and reports; and
- Standardized means for collecting contract data.

*Question 6:* Does FPDS contain non-procurement data? If so, do we use these contracts in our statistics?

It is true several agencies have used FPDS to account for other types of awards that were not FAR based contracts. Once these actions are identified, the Government subtracts the dollars and actions from the total of FAR based actions prior to calculating totals or establishing goals.

*Question 7:* Why should FPDS collect non-FAR based actions?

Many agencies are already collecting other business data that is non-FAR based. In the future, FPDS will be able to accurately discern what is FAR based and non-FAR based actions. Agencies that desire internal business information and have a bona fide need for this information can request a modification to FPDS. In these cases, the business data may or may not be accessible to the public.

*Question 8:* What additional responsibilities will contracting officers have as a result of the FPDS enhancements?

Contracting officers will have the following additional responsibilities:

- a. The submission and accuracy of the individual contract action report (CAR), and validating the CAR prior to transmittal of the data.
- b. The review of their own CAR information as well as all FPDS information created by subordinates within their organization.

(1) Whenever a contract writing system is integrated with FPDS, confirming the CAR for accuracy prior to release of the contract award.

(2) Ensuring that the CAR is submitted within 3 business days after contract award whenever an automated contract writing system is not used.

(3) Ensuring that the CAR is submitted to FPDS within 30 days after

contract award for any actions done following FAR 6.302–2 or FAR Subpart 18.2.

(4) Including a code to identify the source of funds being used to procure needed supplies or services. Emphasis is not just on the contracting office awarding the contract, but also on reporting accurate funding information to include the funding office code of the customer agency for whom the contract, delivery order, or task order is issued, and submitting the correct information to FPDS.

*Question 9:* Why should the contracting officer be responsible for data reported to FPDS?

The contracting officer is ultimately responsible for the solicitation and award of a contract action and by virtue of that responsibility, the contracting officer is also responsible for all actions through close-out of the contract. The CAR is a part of the contract file documentation and as such, its accurate and timely completion rests with the contracting officer.

*Question 10:* How will contract specialists or other acquisition staff be affected by the enhancement to FPDS?

The enhancements will provide for data collection to be more automated. Where data collection is not automated, contracting officers will be required to approve or validate fewer elements. Overall, the enhancements will facilitate better accuracy.

*Question 11:* Why is there an emphasis on Indefinite Delivery Vehicles (IDV) in FPDS?

IDV's provide agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. They are emphasized because of their increased use in every agency and in interagency contracting.

*Question 12:* What needs are satisfied by making procurement data publicly accessible in FPDS?

Making procurement data publicly accessible provides the public—

- a. Important information about acquisitions awarded by the Federal Government;
- b. The ability to fully understand how tax dollars are spent;
- c. An understanding where and how competition is conducted; and
- d. Information on where and with whom business opportunities exist.

Additionally, collecting data about Government procurements provides a broad picture of the overall Federal acquisition process. Having the ability to look at Federal contracts across many agencies, in greater detail, is a key ingredient to establishing trust in our Government and credibility in the

professionals who award and administer these contracts. With a transparent view of Federal spending, analyses may be conducted to structure procurements strategically and save taxpayer dollars; improve Governmentwide management; ensure appropriate small business participation; and establish interoperation with other Governmentwide data systems. This information will enable service-wide, department-wide, or Governmentwide strategic sourcing.

*Question 13:* Which agencies must report to FPDS and why?

Executive departments and agencies are responsible for collecting and reporting procurement data to FPDS as required by Federal Acquisition Regulations (FAR).

In addition, the recent passage of The Federal Funding Accountability and Transparency Act of 2006 has established that all officials who make Federal awards of any type have a duty to report their activities to the public. Therefore, reporting procurement data applies to the entire United States Government.

As previously stated, all levels of the Government use the reported data.

*Question 14:* What is the FPDS Express Reporting Application?

FPDS's Express Reporting Application allows users to report a single record for a single vendor for multiple contract actions.

*Question 15:* Will agencies be able to see their data just like the public can see it?

Yes. FPDS will provide the official Federal reports as well as several workload reports designed specifically for first-line supervisors and contract managers.

The use of Federal reports will alleviate the need for individual agencies to collect, verify, and distribute statistics for a host of requirements such as the Small Business Goaling Report (SBGR), the Performance-Based Acquisition (PBA) report, and the Resource Conservation and Recovery Act (RCRA) Report just to name a few.

*Question 16:* Does FPDS contain contract data from non-FAR agencies?

Some agencies which are not subject to the FAR may be required by other authority, statute, or at the Office of Management and Budget's direction to report non-FAR based contract action data into FPDS. For example, the Federal Funding Accountability and Transparency Act of 2006 requires a searchable website that provides public access to information about Federal expenditures.

This is not a significant regulatory action and, therefore, was not subject to

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

C. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because contract reporting is not accomplished by the vendor community, only by Government contracting entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 2, 4, 12, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, et seq. (FAC 2005-25, FAR case 2004-038), in correspondence.

D. Paperwork Reduction Act

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

E. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the applicable procedures in the rule are necessary to inform Federal agencies and the public when and how Federal procurement data must be reported. The action is not expected to have any impact on the vendor community. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 2, 4, 12, and 52

Government procurement.

Dated: April 4, 2008.

Al Matera, Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 4, 12, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 2, 4, 12, and 52 continues to read as follows:

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

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106 in the table following the introductory paragraph by removing FAR segments "4.602" and "4.603" and adding "4.605" and "4.607" in their place, respectively.

PART 2—DEFINITIONS OF WORDS AND TERMS

3. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition "Chief Acquisition Officer"; and revising the definition "Data Universal Numbering System (DUNS) number" to read as follows:

2.101 Definitions.

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

Chief Acquisition Officer means an executive level acquisition official responsible for agency performance of acquisition activities and acquisition programs created pursuant to the Services Acquisition Reform Act of 2003, Section 1421 of Public Law 108-136.

*	*	*	*	*
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Data Universal Numbering System (DUNS) number means the 9-digit number assigned by Dun and Bradstreet, Inc. (D&B), to identify unique business entities, which is used as the identification number for Federal contractors.

*	*	*	*	*
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PART 4—ADMINISTRATIVE MATTERS

4. Revise Subpart 4.6 to read as follows:

Subpart 4.6—Contract Reporting

Sec.	
4.600	Scope of subpart.
4.601	Definitions.
4.602	General.
4.603	Policy.
4.604	Responsibilities.
4.605	Procedures.
4.606	Reporting Data.
4.607	Solicitation Provisions.

4.600 Scope of subpart.

This subpart prescribes uniform reporting requirements for the Federal Procurement Data System (FPDS).

4.601 Definitions.

As used in this subpart—

Assisted acquisition means a contract, delivery or task order awarded by a servicing agency on behalf of a requesting agency. The agency providing the assistance may also administer the contract action.

Contract action means any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications to these actions regardless of dollar value. Contract action does not include grants, cooperative agreements, other transactions, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions.

Contract action report (CAR) means contract action data required to be entered into the Federal Procurement Data System (FPDS).

Definitive contract means any contract that must be reported to FPDS other than an indefinite delivery vehicle. This definition is only for FPDS, and is not intended to apply to Part 16.

Direct acquisition means an order awarded directly by the requesting agency against the servicing agency's contract. In a direct acquisition, the servicing agency awards and administers the contract but does not participate in the placement of an order.

Entitlement program means a Federal program that guarantees a certain level of benefits to persons or other entities who meet requirements set by law, such as Social Security, farm price supports, or unemployment benefits.

Generic DUNS number means a DUNS number assigned to a category of vendors not specific to any individual or entity.

Indefinite delivery vehicle (IDV) means an indefinite delivery contract that has one or more of the following clauses:

- (1) 52.216-18, Ordering.
- (2) 52.216-19, Order Limitations.
- (3) 52.216-20, Definite Quantity.
- (4) 52.216-21, Requirements.
- (5) 52.216-22, Indefinite Quantity.
- (6) Any other clause allowing ordering.

Requesting agency means the agency that has the requirement for an interagency acquisition.

Servicing agency means the agency that will conduct an assisted acquisition on behalf of the requesting agency.

**4.602 General.**

(a) The FPDS provides a comprehensive web-based tool for agencies to report contract actions. The resulting data provides—

(1) A basis for recurring and special reports to the President, the Congress, the Government Accountability Office, Federal executive agencies, and the general public;

(2) A means of measuring and assessing the effect of Federal contracting on the Nation's economy and the extent to which small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, women-owned small business concerns, and nonprofit agencies operating under the Javits-Wagner-O'Day Act, are sharing in Federal contracts; and

(3) A means of measuring and assessing the effect of other policy and management initiatives (e.g., performance based acquisitions and competition).

(b) FPDS does not provide reports for certain acquisition information used in the award of a contract action (e.g., subcontracting data, funding data, or accounting data).

(c) The FPDS Web site, <https://www.fpds.gov>, provides instructions for submitting data. It also provides—

(1) A complete list of departments, agencies, and other entities that submit data to the FPDS;

(2) Technical and end-user guidance;

(3) A computer-based tutorial; and

(4) Information concerning reports not generated in FPDS.

**4.603 Policy.**

(a) In accordance with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. No. 109-282), all Federal award data must be publicly accessible.

(b) Except as provided in 4.606(a)(2), executive agencies shall use FPDS to maintain publicly available information about all contract actions exceeding the micro-purchase threshold, and any modifications to those actions that change previously reported contract action report data, regardless of dollar value.

(c) Agencies awarding assisted acquisitions or direct acquisitions must report these actions and identify the Funding Agency Code from the applicable agency codes maintained by the National Institute of Standards and Technology (NIST) using NIST Special Publication 800-87, "Codes for the Identification of Federal and Federally Assisted Organizations," at <http://csrc.nist.gov/publications/nistpubs/800-87/sp800-87-Final.pdf>.

(d) Agencies exempt from the FAR are encouraged to report contract actions in FPDS.

(e) Agencies awarding contract actions with a mix of appropriated and nonappropriated funding shall only report the full appropriated portion of the contract action in FPDS.

**4.604 Responsibilities.**

(a) The Senior Procurement Executive in coordination with the head of the contracting activity is responsible for developing and monitoring a process to ensure timely and accurate reporting of contractual actions to FPDS.

(b)(1) The responsibility for the submission and accuracy of the individual contract action report (CAR) resides with the contracting officer who awarded the contract action.

(2) When a contract writing system is integrated with FPDS, the CAR must be confirmed for accuracy prior to release of the contract award.

(3) When a contract writing system is not integrated with FPDS, the CAR must be submitted to FPDS within three business days after contract award.

(4) For any action awarded in accordance with FAR 6.302-2 or pursuant to any of the authorities listed at FAR Subpart 18.2, the CAR must be submitted to FPDS within 30 days after contract award.

(5) When the contracting office receives written notification that a contractor has changed its size status in accordance with the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, the contracting officer must submit a modification contract action report to ensure that the updated size status is entered in FPDS-NG.

(c) The chief acquisition officer of each agency required to report its contract actions must submit to the General Services Administration (GSA), in accordance with FPDS guidance, by January 5, an annual certification of whether, and to what degree, agency CAR data for the preceding fiscal year is complete and accurate.

**4.605 Procedures.**

(a) *Procurement Instrument Identifier (PIID)*. Agencies must have in place a process that ensures that each PIID reported to FPDS is unique, Governmentwide, and will remain so for at least 20 years from the date of contract award. Agencies must submit their proposed identifier format to the FPDS Program Management Office, which maintains a registry of the agency unique identifiers on the FPDS website, and must validate their use in all transactions. The PIID shall consist of alpha characters in the first positions to

indicate the agency, followed by alphanumeric characters identifying bureaus, offices, or other administrative subdivisions. Other pertinent PIID instructions can be found at <https://www.fpds.gov>.

(b) *Data Universal Numbering System (DUNS)*. The contracting officer must identify and report a DUNS number (Contractor Identification Number) for the successful offeror on a contract action. The DUNS number reported must identify the successful offeror's name and address as stated in the offer and resultant contract, and as registered in the Central Contractor Registration (CCR) database in accordance with the clause at 52.204-7, Central Contractor Registration. The contracting officer must ask the offeror to provide its DUNS number by using either the provision at 52.204-6, Data Universal Numbering System (DUNS) Number, the clause at 52.204-7, Central Contractor Registration, or the provision at 52.212-1, Instructions to Offerors—Commercial Items.

(1) Notwithstanding the inclusion of the provision at 52.204-6 in the associated solicitation or except as provided in paragraph (b)(2) of this section, the contracting officer shall use one of the generic DUNS numbers identified in CCR to report corresponding contract actions if the contract action is—

(i) With contractors located outside the United States and its outlying areas as defined in 2.101 who do not have a DUNS number, and the contracting officer determines it is impractical to obtain a DUNS number;

(ii) With students who do not have DUNS numbers;

(iii) With dependents of veterans, Foreign Service Officers, and military members assigned overseas who do not have DUNS numbers; or

(iv) For classified or national security.

(2) In accordance with agency procedures, authorized generic DUNS numbers found at <https://www.fpds.gov> may be used to report contract actions when—

(i) Specific public identification of the contracted party could endanger the mission, contractor, or recipients of the acquired goods or services; or

(ii) The agency determines it is impractical to obtain a DUNS number.

**4.606 Reporting Data.**

(a) *Actions required to be reported to FPDS*. (1) As a minimum, agencies must report the following contract actions over the micro-purchase threshold, regardless of solicitation process used, and agencies must report any modification to these contract actions

that change previously reported contract action data, regardless of dollar value:

(i) Definitive contracts, including purchase orders and imprest fund buys over the micro-purchase threshold awarded by a contracting officer.

(ii) Indefinite delivery vehicle (identified as an "IDV" in FPDS).

Examples of IDVs include the following:

(A) Task and Delivery Order Contracts (see Subpart 16.5), including—

(1) Government-wide acquisition contracts.

(2) Multi-agency contracts.

(B) GSA Federal supply schedules.

(C) Blanket Purchase Agreements (see 13.303).

(D) Basic Ordering Agreements (see 16.703).

(E) Any other agreement or contract against which individual orders or purchases may be placed.

(iii) All calls and orders awarded under the indefinite delivery vehicles identified in paragraph (a)(1)(ii) of this section.

(2) Agencies participating in the Small Business Competitiveness Demonstration Program (see Subpart 19.10) shall report as a contract action each award in the designated industry groups, regardless of dollar value.

(3) The GSA Office of Charge Card Management will provide the Government purchase card data, at a minimum annually, and GSA will incorporate that data into FPDS for reports.

(4) Agencies may use the FPDS Express Reporting capability for consolidated multiple action reports for a vendor when it would be overly burdensome to report each action individually. When used, Express Reporting should be done at least monthly.

(b) *Reporting Other Actions.* Agencies may submit actions other than those listed at paragraph (a)(1) of this section, and must contact the FPDS Program Office at [integrated.acquisition@gsa.gov](mailto:integrated.acquisition@gsa.gov) if they desire to submit any of the following types of activity:

(1) Transactions at or below the micro-purchase threshold, except as provided in paragraph (a)(2) of this section.

(2) Any non-appropriated fund (NAF) or NAF portion of a contract action using a mix of appropriated and nonappropriated funding.

(3) Lease and supplemental lease agreements for real property.

(4) Resale activity (*i.e.*, commissary or exchange activity).

(5) Revenue generating arrangements (*i.e.*, concessions).

(6) Training expenditures not issued as orders or contracts.

(7) Grants and entitlement actions.

(8) Interagency agreements, also known as interservice level agreements, memoranda of understanding, or memoranda of agreement.

(9) Letters of obligation used in the A-76 process.

(c) *Actions not reported.* The following types of contract actions are not to be reported to FPDS:

(1) Imprest fund transactions below the micro-purchase threshold, including those made via the Government purchase card (unless specific agency procedures prescribe reporting these actions).

(2) Orders from GSA stock and the GSA Global Supply Program.

(3) Purchases made at GSA or JWOD service stores, as these items stocked for resale have already been reported by GSA.

(4) Purchases made using non-appropriated fund activity cards, chaplain fund cards, individual Government personnel training orders, and Defense Printing orders.

(d) Agencies not subject to the FAR may be required by other authority (*e.g.*, statute or OMB) to report certain information to FPDS.

#### 4.607 Solicitation Provisions.

(a) Insert the provision at 52.204-6, Data Universal Numbering System (DUNS) Number, in solicitations that—

(1) Are expected to result in a requirement for the generation of a CAR (see 4.606(a)(1)); and

(2) Do not contain the clause at 52.204-7, Central Contractor Registration.

(b) Insert the provision at 52.204-5, Women-Owned Business (Other Than Small Business), in all solicitations that—

(1) Are not set aside for small business concerns;

(2) Exceed the simplified acquisition threshold; and

(3) Are for contracts that will be performed in the United States or its outlying areas.

#### 4.805 [Amended]

■ 5. Amend section 4.805 in paragraph (b)(9) by removing "4.601" and adding "4.603" in its place.

### PART 12—ACQUISITION OF COMMERCIAL ITEMS

#### 12.301 [Amended]

■ 6. Amend section 12.301 in paragraph (b)(2) by removing the words "that are expected to exceed the threshold at 4.601(a)".

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

#### 52.204-5 [Amended]

■ 7. Amend section 52.204-5 by removing from the introductory text "4.603(b)" and adding "4.607(b)" in its place.

■ 8. Amend section 52.204-6 by—

■ a. Removing from the introductory text "4.603(a)" and adding "4.607(a)" in its place;

■ b. Revising the date of the provision;

■ c. Removing from paragraph (a) the word "parent";

■ d. Revising paragraph (b)(1)(i); and

■ e. Adding a sentence to the end of paragraph (b)(1)(ii).

The revised and added text reads as follows:

#### 52.204-6 Data Universal Numbering System (DUNS) Number.

\* \* \* \* \*  
DATA UNIVERSAL NUMBERING  
SYSTEM (DUNS) NUMBER (APR 2008)

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Via the Internet at <http://fedgov.dnb.com/webform> or if the offeror does not have internet access, it may call Dun and Bradstreet at 1-866-705-5711 if located within the United States; or

(ii) \* \* \* The offeror should indicate that it is an offeror for a U.S. Government contract when contacting the local Dun and Bradstreet office.

\* \* \* \* \*

(End of provision)

■ 9. Amend section 52.204-7 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), in the definition "Data Universal Numbering System +4 (DUNS+4) number", by removing the word "parent";

■ c. Revising paragraph (c)(1)(i); and

■ d. Adding a sentence to the end of paragraph (c)(1)(ii).

The revised and added text reads as follows:

#### 52.204-7 Central Contractor Registration.

\* \* \* \* \*  
CENTRAL CONTRACTOR  
REGISTRATION (APR 2008)

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Via the Internet at <http://fedgov.dnb.com/webform> or if the offeror does not have internet access, it may call Dun and Bradstreet at 1-866-705-5711 if located within the United States; or

(ii) \* \* \* The offeror should indicate that it is an offeror for a U.S. Government contract when contacting the local Dun and Bradstreet office.

\* \* \* \* \*

(End of clause)

■ 10. Amend section 52.212-1 by—

- a. Revising the date of the provision; and
- b. In paragraph (j), by removing the word “parent”; removing “<http://www.dnb.com>” and adding “<http://fedgov.dnb.com/webform>” in its place; and adding a sentence to the end of the paragraph to read as follows:

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

\* \* \* \* \*  
INSTRUCTIONS TO OFFERORS—  
COMMERCIAL ITEMS (APR 2008)  
\* \* \* \* \*

(j) \* \* \* The offeror should indicate that it is an offeror for a Government contract when contacting the local Dun and Bradstreet office.

\* \* \* \* \*

(End of provision)

[FR Doc. E8-8447 Filed 4-21-08; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 1, 4, 19, 52, and 53

[FAC 2005-25; FAR Case 2005-040; Item II; Docket 2008-0001, Sequence 01]

RIN 9000-AK95

#### Federal Acquisition Regulation; FAR Case 2005-040, Electronic Subcontracting Reporting System (eSRS)

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form (SF) 294 - Subcontract Report for Individual Contracts and Standard Form 295 - Summary Subcontract Report.

**DATES:** *Effective Date:* April 22, 2008.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before June 23, 2008 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-25, FAR case 2005-040, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2005-040” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2005-040. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2005-040” on your attached document.

- Fax: 202-501-4067.
- Mail: General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4035, ATTN: Diedra Wingate, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-25, FAR case 2005-040, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044 for clarification of content. Please cite FAC 2005-25, FAR case 2005-040. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule amends the Federal Acquisition Regulation to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form 294 - Subcontract Report for Individual Contracts and Standard Form 295 - Summary Subcontract Report. The eSRS is a web-based system managed by the Integrated Acquisition Environment. The eSRS is intended to streamline the small business subcontracting program reporting process and provide the data to agencies in a manner that will enable them to more effectively manage the program.

This rule implements in the FAR the use of eSRS to fulfill small business subcontracting reporting requirements. It further amends FAR 19.7 and related clauses to clarify existing small business subcontracting program requirements. The interim rule:

1. Implements the use of eSRS by—
  - Deleting references to Standard Forms 294 and 295 from Parts 1, 19, 52,

and 53 and, where appropriate, replacing them with eSRS.

- Incorporating general instructions from Standard Forms 294 and 295 into the clause at FAR 52.219-9. The language in FAR 52.219-9 differs from the SF 295 general instruction for submitting summary subcontract reports on contracts awarded by the National Aeronautics and Space Administration (NASA) in that the clause requires that the reports be submitted semiannually, rather than annually. This change reflects what NASA currently requires under its own regulations and does not impose a new burden on contractors.

- Adding a requirement that a contractor provide its prime contract number and DUNS number to its subcontractors with subcontracting plans and require that each of its subcontractors with a subcontracting plan provide the prime contract number and its own DUNS number to its subcontractors with subcontracting plans. This is necessary in order for the Government to have insight into all of the subcontracting done under a prime contract. Access to this information will enable the Government to more effectively manage the small business subcontracting program.

- Identifying what individuals/entities are responsible for acknowledging that a report has been received or rejecting the report if it has not been adequately completed.

- Revising FAR 52.219-9 to reflect use of the Year-End Supplementary Report for Small Disadvantaged Businesses in eSRS to provide the information, already required by the clause, on subcontract awards to Small Disadvantaged Businesses. Currently, the clause requires that the information be submitted along with the year-end Summary Subcontract Report. The interim rule provides for a 90-day extension beyond the date when the year-end Summary Subcontract Report is submitted.

- Revising FAR 52.219-25 to allow the report currently required by that clause to be submitted using the Small Disadvantaged Business Participation Report in eSRS, or continuing to use either the Optional Form 312 or the contractor's format.

2. Makes revisions to clarify that—
  - A contractor should have only one commercial plan in place at a time.
  - A contract may have only one subcontracting plan. When a modification is issued that would require a subcontracting plan, if the contract already has a subcontracting plan, that plan should be revised to incorporate the goals associated with the modification. A separate

subcontracting plan should not be submitted.

- The goals in a subcontracting plan should be updated when options are exercised.

- Subcontracting plans are not required for subcontractors when the prime contract contains the clause at FAR 52.212-5 or the subcontractor provides a commercial item subject to the clause at FAR 52.244-6.

3. Makes these editorial changes—

- Replaces references to PRO-Net with Central Contractor Registration (CCR) since PRO-Net is an obsolete system and the former PRO-Net functionality being referenced is incorporated in CCR.

- Replaces the acronym “ISR” in Subpart 4.4 with Industrial Security Regulation so that “ISR” will only be used in the FAR to mean Individual Subcontract Report.

The Councils request specific comment on what period the year-end Summary Subcontract Report should cover. The interim rule retains the current FAR requirement (reflected in SF 295) that the report cover subcontracting done during the Government’s fiscal year. However, the eSRS, which is currently being used by some agencies, indicates that the year-end Summary Subcontract Report for a commercial subcontracting plan should reflect subcontracting performed during the contractor’s fiscal year. Therefore, some contractors who are using eSRS and have commercial plans may be reporting subcontracts awarded during their own fiscal year, whereas other contractors are reporting subcontracts awarded during the Government’s fiscal year. The Councils request comment on what period the year-end Summary Subcontract Report should cover, the Government’s fiscal year or the contractor’s fiscal year, with a rationale for the period recommended. In addition, the councils may consider adding further coverage in the FAR to mirror the instructions that are currently in SFs 294 and 295.

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

## B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it concerns reporting

requirements that only apply to other than small businesses.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 4, 19, 52, and 53 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 2005-25, FAR case 2005-040), in correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the interim rule contains information collection requirements. The information collection requirement subsumes the approved information collection for semi-annual summary subcontract reports on contracts awarded by NASA. Accordingly, the FAR Secretariat will forward a request for approval of the revised information collection requirement concerning OMB Control No. 9000-0006, Subcontracting Plans/ Subcontracting Reporting for Individual Contracts, and OMB Control Number 9000-0007, Summary Subcontract Report, to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request will be invited through this notice.

### *Annual Reporting Burden:*

The annual reporting burden for OMB No. 9000-0006 is estimated as follows:

*Respondents:* 103,908

*Responses per respondent:* 3

*Total annual responses:* 311,724

*Preparation hours per response:* 11.90

*Total response burden hours:*

3,709,515; and

The annual reporting burden for OMB No. 9000-0007 is estimated as follows:

*Respondents:* 103,908

*Responses per respondent:* 1

*Total annual responses:* 103,908

*Preparation hours per response:* 12.4

*Total response burden hours:*

1,288,459.

## D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 23, 2008 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR,

and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VPR), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control No. 9000-0006, Subcontracting Plans/Subcontracting Reporting for Individual Contracts, and/or OMB Control Number 9000-0007, Summary Subcontract Report, in all correspondence.

## E. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Electronic Subcontracting Reporting System has already replaced the SFs 294 and 295 as the mechanism for submitting small business subcontracting data. This rule updates the FAR to show the current usage of the eSRS. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

## List of Subjects in 48 CFR Parts 1, 4, 19, 52, and 53

Government procurement.

Dated: April 4, 2008.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 19, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 19, 52, and 53 continues to read as follows:

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

**PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM****1.106 [Amended]**

■ 2. Amend section 1.106 by removing from FAR Segment 19.7 OMB Control Number “9000–0006”, and adding “9000–0006 and 9000–0007” in its place; removing from FAR Segment 52.219–9 OMB Control Number “9000–0006”, and adding “9000–0006 and 9000–0007” in its place; and removing FAR Segments “SF 294” with OMB Control Number “9000–0006”, and “SF 295” with OMB Control Number “9000–0007”.

**PART 4—ADMINISTRATIVE MATTERS****4.402 [Amended]**

■ 3. Amend section 4.402 in paragraph (b)(2) by removing “(ISR)”.

**4.403 [Amended]**

■ 4. Amend section 4.403 in paragraph (c)(1) by removing “ISR” and adding “Industrial Security Regulation” in its place.

**PART 19—SMALL BUSINESS PROGRAMS**

■ 5. Amend section 19.701 by adding, in alphabetical order, the definition “Electronic Subcontracting Reporting System (eSRS)” to read as follows:

**19.701 Definitions.**

\* \* \* \* \*

“*Electronic Subcontracting Reporting System (eSRS)*” means the Governmentwide, electronic, web-based system for small business subcontracting program reporting.

\* \* \* \* \*

■ 6. Amend section 19.704 by—

■ a. Revising paragraphs (a)(10)(iii) and (a)(10)(iv);

■ b. Adding paragraphs (a)(10)(v) and (a)(10)(vi);

■ c. Revising paragraphs (d) introductory text and (d)(2);

■ d. Amending paragraph (d)(1) by removing “; and” and adding “;” in its place; and

■ e. Adding paragraphs (d)(3) and (d)(4).

■ The revised and added text reads as follows:

**19.704 Subcontracting plan requirements.**

(a) \* \* \*

(10) \* \* \*

(iii) Submit the Individual Subcontract Report (ISR), and the Summary Subcontract Report (SSR) using the Electronic Subcontracting Reporting System (eSRS) (<http://www.esrs.gov>), following the instructions in the eSRS;

(iv) Ensure that its subcontractors with subcontracting plans agree to

submit the ISR and/or the SSR using the eSRS;

(v) Provide its prime contract number and its DUNS number and the e-mail address of the Government or Contractor official responsible for acknowledging or rejecting the reports, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their reports; and

(vi) Require that each subcontractor with a subcontracting plan provide the prime contract number and its own DUNS number, and the e-mail address of the Government or Contractor official responsible for acknowledging or rejecting the reports, to its subcontractors with subcontracting plans.

\* \* \* \* \*

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. Once a contractor’s commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item. The contractor shall—

\* \* \* \* \*

(2) Submit a new commercial plan, 30 working days before the end of the Contractor’s fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan;

(3) When the new commercial plan is approved, provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan; and

(4) Comply with the reporting requirements stated in paragraph (a)(10) of this section by submitting one SSR in eSRS, for all contracts covered by its commercial plan. This report will be acknowledged or rejected in eSRS by the contracting officer who approved the plan. The report shall be submitted within 30 days after the end of the Government’s fiscal year.

■ 7. Amend section 19.705–2 by adding paragraph (e) to read as follows.

**19.705–2 Determining the need for a subcontracting plan.**

\* \* \* \* \*

(e) A contract may have no more than one plan. When a modification meets

the criteria in 19.702 for a plan, or an option is exercised, the goals associated with the modification or option shall be added to those in the existing subcontract plan.

■ 8. Amend section 19.705–6 by adding paragraph (h) to read as follows.

**19.705–6 Postaward responsibilities of the contracting officer.**

\* \* \* \* \*

(h) Acknowledging receipt of or rejecting the ISR and the SSR in the eSRS. Acknowledging receipt does not mean acceptance or approval of the report. The report shall be rejected if it is not adequately completed. Failure to meet the goals of the subcontracting plan is not a valid reason for rejecting the report.

**19.705–7 [Amended]**

■ 9. Amend section 19.705–7 in paragraph (d) last sentence by removing “a failure to submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms or as provided in agency regulations;” and adding “a failure to submit the ISR, or the SSR, using the eSRS, or as provided in agency regulations;” in its place.

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

■ 10. Amend section 52.212–5 by revising the date of the clause, and paragraphs (b)(8)(i) and (b)(12) 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 (APR 2008)

\* \* \* \* \*

(b) \* \* \*

\_\_\_\_ (8)(i) 52.219–9, Small Business Subcontracting Plan (APR 2008) (15 U.S.C. 637(d)(4).

\* \* \* \* \*

\_\_\_\_ (12) 52.219–25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (APR 2008) (Pub. L. 103–355, section 7102, and 10 U.S.C. 2323).

\* \* \* \* \*

■ 11. Amend section 52.219–9 by—

■ a. Revising the date of the clause;

■ b. Adding in paragraph (b) the definition “Electronic Subcontracting Reporting System”;

■ c. Revising paragraph (d)(5);

- d. Amending paragraph (d)(9) by adding “with further subcontracting possibilities” after “facility”;
- e. Revising paragraphs (d)(10)(iii) and (d)(10)(iv);
- f. Adding paragraphs (d)(10)(v) and (d)(10)(vi);
- g. Amending paragraph (d)(11)(i) by removing “PRO-Net” and adding “CCR” in its place;
- h. Revising paragraph (g); and
- i. Redesignating paragraphs (i) and (j) as paragraphs (k) and (l), adding new paragraphs (i) and (j), and revising the newly designated paragraph (l).
- The revised and added text reads as follows:

**52.219-9 Small Business Subcontracting Plan.**

\* \* \* \* \*

SMALL BUSINESS SUBCONTRACTING PLAN (APR 2008)

\* \* \* \* \*

(b) \* \* \*

*Electronic Subcontracting Reporting System (eSRS)* means the Governmentwide, electronic, web-based system for small business subcontracting program reporting. The eSRS is located at <http://www.esrs.gov>.

\* \* \* \* \*

(d) \* \* \*

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Central Contractor Registration database (CCR), veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in CCR as an accurate representation of a concern’s size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of CCR as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

\* \* \* \* \*

(10) \* \* \*

(iii) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions. Reporting shall be

in accordance with this clause, or as provided in agency regulations;

(iv) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using eSRS;

(v) Provide its prime contract number, its DUNS number, and the e-mail address of the Government or Contractor official responsible for acknowledging or rejecting the reports, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their reports; and

(vi) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and the e-mail address of the Government or Contractor official responsible for acknowledging or rejecting the reports, to its subcontractors with subcontracting plans.

\* \* \* \* \*

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the offeror’s planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Once the Contractor’s commercial plan has been approved, the Government will not require another subcontracting plan from the same Contractor while the plan remains in effect, as long as the product or service being provided by the Contractor continues to meet the definition of a commercial item. A Contractor with a commercial plan shall comply with the reporting requirements stated in paragraph (d)(10) of this clause by submitting one SSR in eSRS for all contracts covered by its commercial plan. This report shall be acknowledged or rejected in eSRS by the Contracting Officer who approved the plan. This report shall be submitted within 30 days after the end of the Government’s fiscal year.

\* \* \* \* \*

(i) A contract may have no more than one plan. When a modification meets the criteria in 19.702 for a plan, or an option is exercised, the goals associated with the modification or option shall be added to those in the existing subcontract plan.

(j) Subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, or when the subcontractor provides a commercial item subject to the clause at 52.244-6, Subcontracts for Commercial Items, under a prime contract.

\* \* \* \* \*

(l) The Contractor shall submit ISRs and SSRs using the web-based eSRS at <http://www.esrs.gov>. Purchases from a corporation, company, or subdivision that is an affiliate of the prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime Contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business

or small disadvantaged business credit from an ANC or Indian tribe.

(1) *ISR*. This report is not required for commercial plans. The report is required for each contract containing an individual subcontract plan and shall be submitted to the Administrative Contracting Officer (ACO) or Contracting Officer, if no ACO is assigned.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period.

(ii) When a subcontracting plan contains separate goals for the basic contract and each option, as prescribed by FAR 19.704(c), the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(iii) The authority to acknowledge receipt or reject the ISR resides—

(A) In the case of the prime Contractor, with the Contracting Officer; and

(B) In the case of a subcontract with a subcontracting plan, with the entity that awarded the subcontract.

(2) *SSR*.

(i) Reports submitted under individual contract plans—

(A) This report encompasses all subcontracting under prime contracts and subcontracts with the awarding agency, regardless of the dollar value of the subcontracts.

(B) The report may be submitted on a corporate, company or subdivision (e.g. plant or division operating as a separate profit center) basis, unless otherwise directed by the agency.

(C) If a prime Contractor and/or subcontractor is performing work for more than one executive agency, a separate report shall be submitted to each executive agency covering only that agency’s contracts, provided at least one of that agency’s contracts is over \$550,000 (over \$1,000,000 for construction of a public facility) and contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime Contractors. However, for construction and related maintenance and repair, a separate report shall be submitted for each DoD component.

(D) For DoD and NASA, the report shall be submitted semi-annually for the six months ending March 31 and the twelve months ending September 30. For civilian agencies, except NASA, it shall be submitted annually for the twelve month period ending September 30. Reports are due 30 days after the close of each reporting period.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The authority to acknowledge or reject SSRs in eSRS, including SSRs submitted by subcontractors with subcontracting plans, resides with the Government agency awarding the prime contracts.

(ii) Reports submitted under a commercial plan—

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year.

(B) The report shall be submitted annually, within thirty days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency from which contracts for commercial items were received.

(D) The authority to acknowledge or reject SSRs for commercial plans resides with the Contracting Officer who approved the commercial plan.

(iii) All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a Year-End Supplementary Report for Small Disadvantaged Businesses. The report shall include subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. If the data are not available when the year-end SSR is submitted, the prime Contractor and/or subcontractor shall submit the Year-End Supplementary Report for Small Disadvantaged Businesses within 90 days of submitting the year-end SSR. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.  
(End of clause)

- 12. Amend section 52.219–25 by—
- a. Revising the date of the clause; and
- b. Revising paragraphs (a) last sentence and (b);
- The revised and added text reads as follows:

**52.219–25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.**

\* \* \* \* \*

**SMALL DISADVANTAGED BUSINESS PARTICIPATION PROGRAM—DISADVANTAGED STATUS AND REPORTING (APR 2008)**

(a) \* \* \* The Contractor shall confirm that a joint venture partner, team member, or subcontractor representing itself as a small disadvantaged business concern is a small disadvantaged business concern certified by the Small Business Administration by using the Central Contractor Registration database or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

(b) *Reporting requirement.* If this contract contains SDB participation targets, the Contractor shall report on the participation of SDB concerns at contract completion, or as otherwise provided in this contract. Reporting may be on Optional Form 312,

Small Disadvantaged Business Participation Report, in the Contractor's own format providing the same information, or accomplished through using the Electronic Subcontracting Reporting System's Small Disadvantaged Business Participation Report. This report is required for each contract containing SDB participation targets. If this contract contains an individual Small Business Subcontracting Plan, reports shall be submitted with the final Individual Subcontract Report at the completion of the contract.

(End of clause)

**PART 53—FORMS**

- 13. Revise section 53.219 to read as follows.

**53.219 Small business programs.**

The following form may be used in reporting small disadvantaged business contracting data: *OF 312 (10/00), Small Disadvantaged Business Participation Report.* (See Subpart 19.12.)

**53.301–294 and 53.301–295 [Removed]**

- 14. Remove sections 53.301–294 and 53.301–295.

[FR Doc. E8–8449 Filed 4–21–08; 8:45 am]

**BILLING CODE 6820–EP–S**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 11, 18, 52 and 53**

[FAC 2005–25; FAR Case 2006–033; Item III; Docket 2008–0001; Sequence 7]

**RIN 9000–AK93**

**Federal Acquisition Regulation; FAR Case 2006–033, Revisions to the Defense Priorities and Allocations System (DPAS)**

**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 reflect the President's delegation of the Defense Production Act's priorities and allocations authorities in Executive Order 12919, and to reflect the current provisions of the Defense Priorities and Allocations System (DPAS) regulations

of the Department of Commerce outlined in 15 CFR Part 700.

**DATES:** *Effective Date:* April 22, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–25, FAR case 2006–033.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Under Title I of the Defense Production Act (50 U.S.C. App. 2061, *et seq.*), the President is authorized to require preferential acceptance and performance of contracts or orders supporting certain approved national defense and energy programs, and to allocate materials, services, and facilities in such a manner to promote these approved programs. Additional priorities authority is found in section 18 of the Selective Service Act of 1948 (50 U.S.C. App. 468), 10 U.S.C. 2538, and 50 U.S.C. 82.

The President delegated the priorities and allocations authorities of the Defense Production Act in E.O. 12919, as amended. The President has delegated the authority to approve a program for priorities and allocations support to the Secretaries of Defense, Energy, and Homeland Security. As part of that delegation, the President designated the Secretary of Commerce to administer the Defense Priorities and Allocations System (DPAS). The Defense Production Act authority has also been extended to support emergency preparedness activities under Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195, *et seq.*), and critical infrastructure protection and restoration.

The FAR is revised as follows:

- Subpart 2.101 revised the definition of “national defense” to include a reference to the DPAS definition, which includes critical infrastructure protection and restoration.

- Subpart 11.6, Priorities and Allocations, is revised to reflect the President's delegation of the Defense Production Act's priorities and allocations authorities in Executive Order 12919, and the current provisions of the DPAS regulations of the Department of Commerce (see 15 CFR Part 700).

- Parts 18 and 52 are revised to include the emergency acquisition text.

- Subpart 53.3 is revised to add changes to Standard Form 26 and 1447.

The Councils are publishing this rule as a final rule without comment under

41 U.S.C. 418b, because it implements the President's delegable authorities outlined in the Defense Production Act in Executive Order 12919, amended, which are not subject to negotiation. The FAR changes will not have significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure, or form, or have a significant administrative impact on contractors or offerors.

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 Pub. L. 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Parts 2, 11, 18, 52, and 53, 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 2005-25, FAR case 2006-033), 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, 11, 18, 52, and 53

Government procurement.

Dated: April 4, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 11, 18, 52 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 11, 18, 52 and 53 continues to read as follows:

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

### PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by revising the definition "National defense" to read as follows:

#### 2.101 Definitions.

\* \* \* \* \*

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

*National defense* means any activity related to programs for military or atomic energy production or construction, military assistance to any foreign nation, stockpiling, or space, except that for use in Subpart 11.6, see the definition in 11.601.

\* \* \* \* \*

### PART 11—DESCRIBING AGENCY NEEDS

■ 3. Revise sections 11.600 through 11.603 to read as follows:

#### 11.600 Scope of subpart.

This subpart implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce regulation in support of approved national defense, emergency preparedness, and energy programs (see 15 CFR part 700).

#### 11.601 Definitions.

As used in this subpart—

*Approved program* means a program determined as necessary or appropriate for priorities and allocations support to promote the national defense by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security, under the authority of the Defense Production Act, the Stafford Act, and Executive Order 12919, or the Selective Service Act and related statutes and Executive Order 12742.

*Delegate Agency* means a Government agency authorized by delegation from the Department of Commerce to place priority ratings on contracts or orders needed to support approved programs.

*National defense* means programs for military and energy production or construction, military assistance to any foreign nation, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration. (50 U.S.C. App. § 2152).

*Rated order* means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of the DPAS regulation (15 CFR part 700).

#### 11.602 General.

(a) Under Title I of the Defense Production Act of 1950 (50 U.S.C. App. 2061, *et seq.*), the President is authorized to require preferential acceptance and performance of

contracts and orders supporting certain approved national defense and energy programs and to allocate materials, services, and facilities in such a manner as to promote these approved programs.

(b) The President delegated the priorities and allocations authorities of the Defense Production Act in Executive Order 12919. As part of that delegation, the President designated the Secretary of Commerce to administer the DPAS. For more information, check the DPAS website at: [www.bis.doc.gov/dpas](http://www.bis.doc.gov/dpas).

#### 11.603 Procedures.

(a) There are two levels of priority for rated orders established by the DPAS, identified by the rating symbols "DO" and "DX". All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated and unrated orders (see 15 CFR 700.11). The DPAS regulation contains provisions concerning the elements of a rated order (see 15 CFR 700.12); acceptance and rejection of rated orders (see 15 CFR 700.13); preferential scheduling (see 15 CFR 700.14); extension of priority ratings (flowdown) (see 15 CFR 700.15); changes or cancellations of priority ratings and rated orders (see 15 CFR 700.16); use of rated orders (see 15 CFR 700.17); and limitations on placing rated orders (see 15 CFR 700.18).

(b) The Delegate Agencies have been given authority by the Department of Commerce to place rated orders in support of approved programs (see Schedule I of the DPAS). Other U.S. Government agencies, Canada, and foreign nations may apply for priority rating authority.

(c) Rated orders shall be placed in accordance with the provisions of the DPAS.

(d) Agency heads shall ensure compliance with the DPAS by contracting activities within their agencies.

(e) Agency heads shall provide contracting activities with specific guidance on the issuance of rated orders in support of approved agency programs, including the general limitations and jurisdictional limitations on placing rated orders (see 15 CFR 700.18 and Executive Order 12919).

(f) Contracting officers shall follow agency procedural instructions concerning the use of rated orders in support of approved agency programs.

(g) Contracting officers, contractors, or subcontractors at any tier, that experience difficulty placing rated orders, obtaining timely delivery under

rated orders, locating a contractor or supplier to fill a rated order, ensuring that rated orders receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, should promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 700.50–700.55 and 700.80).

(h) The Department of Commerce may take specific official actions (Ratings Authorizations, Directives, Letters of Understanding, Administrative Subpoenas, Demands for Information, and Inspection Authorizations) to implement or enforce the provisions of the DPAS (see 15 CFR 700.60–700.71).

(i) Contracting officers shall report promptly any violations of the DPAS in accordance with agency procedures to the Office of Strategic Industries and Economic Security, U.S. Department of Commerce, Room 3876, Washington, DC 20230, Ref: DPAS; telephone: (202) 482–3634 or fax: (202) 482–5650.

#### **11.604 [Amended]**

■ 4. Amend section 11.604 by removing from paragraph (a) the words “Defense Use” and adding “Defense, Emergency Preparedness, and Energy Program Use” in its place.

### **PART 18—EMERGENCY ACQUISITIONS**

■ 5. Revise section 18.109 to read as follows:

#### **18.109 Priorities and allocations.**

The Defense Priorities and Allocations System (DPAS) supports approved national defense, emergency preparedness, and energy programs and was established to facilitate rapid industrial mobilization in case of a national emergency. (See Subpart 11.6.)

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

■ 6. Amend section 52.211–14 by revising the section heading, provision heading and date, and provision to read as follows:

#### **52.211–14 Notice of Priority Rating for National Defense, Emergency Preparedness, and Energy Program Use.**

\* \* \* \* \*

NOTICE OF PRIORITY RATING FOR NATIONAL DEFENSE, EMERGENCY PREPAREDNESS, AND ENERGY PROGRAM USE (APR 2008)

Any contract awarded as a result of this solicitation will be [ ] DX rated order; [ ] DO rated order certified for national defense, emergency preparedness, and energy program use under the Defense Priorities and

Allocations System (DPAS) (15 CFR 700), and the Contractor will be required to follow all of the requirements of this regulation. [Contracting Officer check appropriate box.] (End of provision)

#### **52.211–15 [Amended]**

■ 7. Amend section 52.211–15 by revising the date of the clause to read (APR 2008); and by removing from the clause the words “defense use” and adding “defense, emergency preparedness, and energy program use” in its place.

### **PART 53—FORMS**

#### **53.214 [Amended]**

■ 8. Amend section 53.214 by removing from paragraph (a) “(4/85)” and adding “(APR 2008)” in its place; and by removing from paragraph (d) “(Rev. 3/2005)” and adding “(APR 2008)” in its place.

#### **53.215–1 [Amended]**

■ 9. Amend section 53.215–1 by removing from paragraph (a) “(Rev. 4/85)” and adding “(APR 2008)” in its place.

■ 10. Revise section 53.301–26 to read as follows:

#### **53.301–26 Award/Contract.**

<b>AWARD/CONTRACT</b>		1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)		RATING	PAGE OF PAGES		
2. CONTRACT (Proc. Inst. Ident.) NO.		3. EFFECTIVE DATE		4. REQUISITION/PURCHASE REQUEST/PROJECT NO.			
5. ISSUED BY		CODE	6. ADMINISTERED BY (If other than Item 5)		CODE		
7. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)				8. DELIVERY			
				<input type="checkbox"/> FOB ORIGIN <input type="checkbox"/> OTHER (See below)			
9. DISCOUNT FOR PROMPT PAYMENT				10. SUBMIT INVOICES (4 copies unless otherwise specified) TO THE ADDRESS SHOWN IN			
				ITEM			
CODE		FACILITY CODE					
11. SHIP TO/MARK FOR		CODE	12. PAYMENT WILL BE MADE BY		CODE		
13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:			14. ACCOUNTING AND APPROPRIATION DATA				
<input type="checkbox"/> 10 U.S.C. 2304(c) (      ) <input type="checkbox"/> 41 U.S.C. 253(c) (      )							
15A. ITEM NO.	15B. SUPPLIES/SERVICES	15C. QUANTITY	15D. UNIT	15E. UNIT PRICE	15F. AMOUNT		
<b>15G. TOTAL AMOUNT OF CONTRACT</b>					\$		
<b>16. TABLE OF CONTENTS</b>							
(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES			
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS		PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.			
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING		PART IV - REPRESENTATIONS AND INSTRUCTIONS			
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					
<b>CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE</b>							
17. <input type="checkbox"/> CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return _____ copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. (Attachments are listed herein.)				18. <input type="checkbox"/> AWARD (Contractor is not required to sign this document.) Your offer on Solicitation Number _____ including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the terms listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.			
19A. NAME AND TITLE OF SIGNER (Type or Print)				20A. NAME OF CONTRACTING OFFICER			
19B. NAME OF CONTRACTOR		19C. DATE SIGNED		20B. UNITED STATES OF AMERICA		20C. DATE SIGNED	
BY _____ (Signature of person authorized to sign)				BY _____ (Signature of Contracting Officer)			

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**STANDARD FORM 26** (REV. 4/2008)  
Prescribed by GSA - FAR (48 CFR) 53.214(a)

■ 11. Revise section 53.301-1447 to read as follows:

**53.301-1447 Solicitation/Contract.**

<b>SOLICITATION/CONTRACT</b>				1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)		RATING	PAGE OF	
BIDDER/OFFEROR TO COMPLETE BLOCKS 11, 13, 15, 21, 22, & 27								
2. CONTRACT NO.		3. AWARD/EFFECTIVE DATE	4. SOLICITATION NUMBER		5. SOLICITATION TYPE <input type="checkbox"/> SEALED BIDS (IFB) <input type="checkbox"/> NEGOTIATED (RFP)		6. SOLICITATION ISSUE DATE	
7. ISSUED BY			CODE	8. THIS ACQUISITION IS <input type="checkbox"/> UNRESTRICTED OR <input type="checkbox"/> SET ASIDE:    % FOR: <input type="checkbox"/> SMALL BUSINESS <input type="checkbox"/> EMERGING SMALL BUSINESS <input type="checkbox"/> HUBZONE SMALL BUSINESS <input type="checkbox"/> SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS <input type="checkbox"/> 8(A)				
9. (AGENCY USE) NO COLLECT CALLS								
10. ITEMS TO BE PURCHASED (BRIEF DESCRIPTION) <input type="checkbox"/> SUPPLIES <input type="checkbox"/> SERVICES								
11. IF OFFER IS ACCEPTED BY THE GOVERNMENT WITHIN _____ CALENDAR DAYS (60 CALENDAR DAYS UNLESS OFFEROR INSERTS A DIFFERENT PERIOD) FROM THE DATE SET FORTH IN BLOCK 9 ABOVE, THE CONTRACTOR AGREES TO HOLD ITS OFFERED PRICES FIRM FOR THE ITEMS SOLICITED HEREIN AND TO ACCEPT ANY RESULTING CONTRACT SUBJECT TO THE TERMS AND CONDITIONS STATED HEREIN.				12. ADMINISTERED BY				CODE
13. CONTRACTOR OFFEROR		CODE	FACILITY CODE		14. PAYMENT WILL BE MADE BY			CODE
TELEPHONE NUMBER _____ DUNS NUMBER _____ <input type="checkbox"/> CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER				15. PROMPT PAYMENT DISCOUNT				16. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION <input type="checkbox"/> 10 U.S.C. 2304 ( ) <input type="checkbox"/> 41 U.S.C. 253 ( )
17. ITEM NO.	18. SCHEDULE OF SUPPLIES/SERVICES	19. QUANTITY	20. UNIT	21. UNIT PRICE	22. AMOUNT			
23. ACCOUNTING AND APPROPRIATION DATA						24. TOTAL AWARD AMOUNT (FOR GOVERNMENT USE ONLY)		
25. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY CONTINUATION SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.				26. AWARD OF CONTRACT: YOUR OFFER ON SOLICITATION NUMBER SHOWN IN BLOCK 4 INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:				
27. SIGNATURE OF OFFEROR/CONTRACTOR				28. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)				
NAME AND TITLE OF SIGNER (TYPE OR PRINT)		DATE SIGNED		NAME OF CONTRACTING OFFICER		DATE SIGNED		

NO RESPONSE FOR REASONS CHECKED			
	CANNOT COMPLY WITH SPECIFICATIONS		CANNOT MEET DELIVERY REQUIREMENT
	UNABLE TO IDENTIFY THE ITEM(S)		DO NOT REGULARLY MANUFACTURE OR SELL THE TYPE OF ITEMS INVOLVED
OTHER ( <i>Specify</i> )			
<input type="checkbox"/> WE DO	<input type="checkbox"/> WE DO NOT, DESIRE TO BE RETAINED ON THE MAILING LIST FOR FUTURE PROCUREMENT OF THE TYPE OF ITEMS INVOLVED		
NAME AND ADDRESS OF FIRM ( <i>Include Zip Code</i> )		SIGNATURE	
		TYPE OR PRINT NAME AND TITLE OF SIGNER	
<p style="margin-top: 0;">FROM: <span style="float: right;">AFFIX STAMP HERE</span></p> <p style="margin-top: 100px; margin-left: 150px;">TO:</p> <p style="margin-top: 100px;">SOLICITATION NO. _____</p> <p style="margin-top: 10px;">DATE AND LOCAL TIME _____</p>			

**STANDARD FORM 1447** (REV. 4/2008) **BACK**

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 4, 12, 13, 23, and 52**

[FAC 2005–25; FAR Case 2005–039; Item IV; Docket 2007–0001; Sequence 2]

RIN 9000–AK69

**Federal Acquisition Regulation; FAR Case 2005–039, Use of Products Containing Recovered Materials in Service and Construction Contracts**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify language within the FAR on the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.”

**DATES:** *Effective Date:* May 22, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Clark, Procurement Analyst, at (202) 219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–25, FAR case 2005–039.

**SUPPLEMENTARY INFORMATION:****A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 24554, May 3, 2007, to clarify language within the FAR regarding the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.” This rule revises Subpart 23.4 and associated provisions and clauses in Part 52, with conforming changes in FAR Parts 4, 12, and 13, to—

(1) Provide for consistency when referring to products containing recovered materials;

(2) Clarify that the requirement for products containing recovered materials

applies (a) when agencies require the delivery or specify the use of Environmental Protection Agency (EPA)-designated items, and (b) when agencies award contracts for services or construction unless the service or construction contract will not involve the use of such items;

(3) Prescribe a new clause for use in service and construction contracts when appropriate; and

(4) Revise the Recovered Material Certification provision to reflect the changes of this rule.

No comments were received for the proposed rule.

Note: Since the publication of the proposed rule, the FAR has already been amended to include a number of the changes proposed under this rule (see FAR Case 2004–032, Biobased Products Preference Program, (72 FR 63040, November 7, 2007)).

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. Small business concerns and other interested parties were invited to submit comments concerning the affected FAR Parts. No comments were received. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

This final rule amends and clarifies language within the FAR on the use of products containing recovered materials pursuant to the Resource Conservation and Recovery Act (RCRA) of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition. Although the statute applies to all contracts, the Office of the Federal Environmental Executive advised that language at FAR Subpart 23.4 has not been consistently implemented by Government agencies in service and construction acquisitions. The Councils recognize that the rule may affect small entities performing contracts for those agencies that have not fully implemented the program in service and construction contracts; the number of entities affected, and the extent to which they will be affected, may be significant. The rule may affect the types of products these businesses use during contract performance. Assistance is available to all firms at the Environmental Protection Agency (EPA) Comprehensive Procurement Guidelines website, <http://www.epa.gov/cpg>. EPA provides guidance on identifying products containing recovered materials, including Product Fact Sheets and a Supplier Database. Options to comply with the requirements of the rule can be as simple as

purchasing products made with recovered materials to be used in service and construction contracts. The rule does not impose new requirements that impose a burden on contractors.

The rule revises text at FAR Subpart 23.4 to clarify that the requirement for use of products containing recovered materials applies when agencies purchase EPA-designated items, and when purchasing services (including construction) that could include the use of such items. The objective of this rule is to ensure that contractors deliver and make maximum use of products containing recovered materials in contracts for services and construction.

This final rule applies to all small business entities that contract with the Federal Government for delivery of EPA-designated items or performance of services or construction contracts that involve the use of EPA-designated items. The final rule allows for procurement exemptions.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

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 apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0134.

**List of Subjects in 48 CFR Parts 4, 12, 13, 23, and 52**

Government procurement.

Dated: April 4, 2008.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 12, 13, 23, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 12, 13, 23, and 52 continues to read as follows:

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

**PART 4—ADMINISTRATIVE MATTERS**

■ 2. Amend section 4.1202 by removing from paragraph (t) “Products” and adding “Items” in its place.

**PART 12—ACQUISITION OF  
COMMERCIAL ITEMS**

■ 3. Amend section 12.301 by revising paragraph (e)(3) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(e) \* \* \*

(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of products containing recovered materials and biobased products when appropriate for the item being acquired.

\* \* \* \* \*

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

**13.006 [Amended]**

■ 4. Amend section 13.006 by removing from paragraph (g) "Products" and adding "Items" in its place.

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

**23.000 [Amended]**

■ 5. Amend section 23.000 by removing from paragraph (d) "that use" and adding "containing" in its place.

■ 6. Amend section 23.401 by revising paragraph (a)(2) to read as follows:

**23.401 Definitions.**

\* \* \* \* \*

(a) \* \* \*

(2) For which EPA has provided purchasing recommendations in a related Recovered Materials Advisory Notice (RMAN) (available at <http://www.epa.gov/epaoswer/non-hw/procure/backgrnd.htm>).

\* \* \* \* \*

**23.405 [Amended]**

■ 7. Amend section 23.405 by removing from paragraph (a)(1) "<http://www.epa.gov/cpg/>" and adding "<http://www.epa.gov/cpg/products.htm>" in its place.

■ 8. Amend section 23.406 by revising paragraphs (c) and (d), and adding paragraph (e) to read as follows:

**23.406 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(c) Insert the provision at 52.223-4, Recovered Material Certification, in solicitations that—

(1) Require the delivery or specify the use of EPA-designated items; or

(2) Include the clause at 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

(d) Insert the clause at 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-designated Items, in solicitations and contracts exceeding \$100,000 that are for, or specify the use of, EPA-designated items

containing recovered materials. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

(e) Insert the clause at 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts, in service or construction solicitations and contracts unless the contract will not involve the use of EPA-designated items.

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

■ 9. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(25) 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 2008)

\* \* \* \* \*

(b) \* \* \*

(25)(i) Estimate of Percentage of Recovered Material Content for EPA-Designated Items (MAY 2008) (42 U.S.C. 6962(c)(3)(A)(ii)).

(ii) Alternate I (MAY 2008) of 52.223-9 (42 U.S.C. 6962(i)(2)(C)).

\* \* \* \* \*

■ 10. Amend section 52.223-4 by revising the date of the provision and the provision to read as follows:

**52.223-4 Recovered Material Certification.**

\* \* \* \* \*

RECOVERED MATERIAL CERTIFICATION (MAY 2008)

As required by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6962(c)(3)(A)(i)), the offeror certifies, by signing this offer, that the percentage of recovered materials content for EPA-designated items to be delivered or used in the performance of the contract will be at least the amount required by the applicable contract specifications or other contractual requirements.

(End of provision)

■ 11. Amend section 52.223-9 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of clause;

■ c. Revising paragraph (b)(1); and

■ d. In Alternate I by—

■ 1. Revising the date of Alternate I; and

■ 2. Revising the introductory paragraph of the certification in paragraph (b).

■ The revised text reads as follows.

**52.223-9 Estimate of Percentage of Recovered Material Content for EPA-Designated Items.**

\* \* \* \* \*

ESTIMATE OF PERCENTAGE OF RECOVERED MATERIAL CONTENT FOR EPA-DESIGNATED ITEMS (MAY 2008)

\* \* \* \* \*

(b) \* \* \*

(1) Estimate the percentage of the total recovered material content for EPA-designated item(s) delivered and/or used in contract performance, including, if applicable, the percentage of post-consumer material content; and

\* \* \* \* \*

Alternate I (MAY 2008). \* \* \*

(b) \* \* \*

**CERTIFICATION**

I, \_\_\_\_\_ (name of certifier), am an officer or employee responsible for the performance of this contract and hereby certify that the percentage of recovered material content for EPA-designated items met the applicable contract specifications or other contractual requirements.

\* \* \* \* \*

■ 12. Add section 52.223-17 to read as follows:

**52.223-17 Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.**

As prescribed in 23.406(e), insert the following clause:

AFFIRMATIVE PROCUREMENT OF EPA-DESIGNATED ITEMS IN SERVICE AND CONSTRUCTION CONTRACTS (MAY 2008)

(a) In the performance of this contract, the Contractor shall make maximum use of products containing recovered materials that are EPA-designated items unless the product cannot be acquired—

(1) Competitively within a timeframe providing for compliance with the contract performance schedule;

(2) Meeting contract performance requirements; or

(3) At a reasonable price.

(b) Information about this requirement is available at EPA's Comprehensive Procurement Guidelines web site, <http://www.epa.gov/cpg/>. The list of EPA-designated items is available at <http://www.epa.gov/cpg/products.htm>.

(End of clause)

[FR Doc. E8-8471 Filed 4-21-08; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 4, 9, and 52**

[FAC 2005–25; FAR Case 2006–011; Item V; Docket 2008–0001; Sequence 8]

RIN 9000–AK73

**Federal Acquisition Regulation; FAR  
Case 2006–011, Representations and  
Certifications – Tax Delinquencies****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 add conditions regarding violation of Federal criminal tax laws and delinquent Federal taxes to standards of contractor responsibility, causes for debarment and suspension, and the certifications regarding debarment, suspension, proposed debarment, and other responsibility matters.

**DATES:** *Effective Date:* May 22, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–25, FAR case 2006–011.

**SUPPLEMENTARY INFORMATION:****A. Background**

This final rule was opened to consider adding conditions regarding violation of tax laws and delinquent taxes to standards of contractor responsibility, causes for debarment and suspension, and the certifications regarding debarment, suspension, proposed debarment, and other responsibility matters. The case was initiated in response to a request from the Senate Permanent Subcommittee on Investigations (PSI), which requested implementation of the following:

“To identify noncompliance with tax law . . . the Government should be asking potential contractors, not whether they have been indicted or convicted of tax evasion, but whether they have had any criminal tax law

violation in the last three years, whether they have any outstanding tax indebtedness more than one year old, or whether they have any outstanding unresolved federal or state tax lien.”

The Councils published a proposed rule in the **Federal Register** at 72 FR 15093, March 30, 2007. The comment period closed on May 29, 2007. The Councils received comments from nine respondents.

In drafting the final rule, the Councils have made the following changes from the proposed rule:

1. Violating Federal criminal tax laws.

Change “violating tax laws, failing to pay taxes” to “violating Federal criminal tax laws” (9.406–2(a)(3), 9.407–2(a)(3), 52.209–5(a)(1)(i)(B), and 52.212–3(h)(2)).

2. Federal tax delinquency in an amount that exceeds \$3,000.

a. Change “tax delinquency” to “Federal tax delinquency in an amount that exceeds \$3000” (9.104–5(a)(2)).

b. Change “delinquent taxes or unresolved tax liens” to “delinquent Federal taxes in an amount that exceeds \$3,000” and provide detailed definition of delinquent Federal taxes (which includes unresolved tax liens), with examples (9.406–2(b)(1)(v), 9.407–2(a)(7), and comparable changes to the clauses at 52.209–5(a)(1)(i)(D) and (E) and 52.212–3(h)(4) and (5)).

3. Other matters of responsibility.

a. Move 9.408 and 9.409(a) to 9.104–5 and 9.104–6, respectively.

b. Modify the new 9.104–5(a)(1) to require the offeror to provide the information it deems necessary to demonstrate its responsibility.

c. Change the title of 52.209–5 from “Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters” to “Certification Regarding Responsibility Matters”.

In accordance with FAR 1.107 and Section 29 of the Office of Federal Procurement Policy (OFPP) Act, approval was requested to revise and extend the existing two non-statutory certification requirements at FAR 52.209–5, Certification Regarding Responsibility Matters, and FAR 52.212–3(h), Offeror Representations and Certifications—Commercial Items. The Administrator for Federal Procurement Policy approved the request on January 16, 2008. The basis for each change and analysis of all public comments follows.

**1. General support for the rule.**

*Comments:* Three respondents express general support for the proposed rule.

*Response:* None required.

**2. Broad arguments against inclusion of tax delinquency as debarment criteria.****a. Historical.**

*Comments:* Two respondents comment on the inclusion of tax delinquency as a cause for debarment. One respondent notes that the Office of Management and Budget (OMB) objected to the inclusion of tax debts as a cause for debarment in 1988, when the Nonprocurement-Common Rule was finalized, on the basis that the Internal Revenue Service (IRS) had sufficient power and authority to collect taxes without using the suspension and debarment tool. The respondent suggests that it would be prudent for OMB to reconcile the philosophical/policy differences underpinning the proposed FAR case here with those pronounced under the Nonprocurement-Common Rule in 1988.

*Response:* Since 1988, the Government Accountability Office (GAO) has issued various reports highlighting the fact that Federal contractors fail to pay their taxes, *e.g.*,

- Financial Management: Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence. GAO–05–637 (June 2005).
- Tax Compliance: Thousands of Federal Contractors Abuse the Federal Tax System. GAO–07–742T (April 2007).

The GAO concluded that contractors’ failure to pay payroll taxes provided them with an unfair advantage in pricing their contracts.

The letter from the Senate PSI specifically requests that the Federal Acquisition Regulations include criminal tax law violations and outstanding tax indebtedness or outstanding unresolved tax liens as causes for debarment.

**b. No relationship to present responsibility.**

*Comment:* One respondent expresses concern about using the suspension and debarment process as an enforcement mechanism for violations that have no relationship to a contractor’s present responsibility to perform Government contracts.

*Response:* A contractor’s present responsibility to perform includes financial responsibility, as well as integrity. The rule is not intended as a tool to collect taxes for the IRS, but to provide information to the contracting officer on issues that may affect the contractor’s responsibility.

**3. Conflict with Nonprocurement-Common Rule.**

*Comment:* One respondent notes that the OMB Interagency Suspension and

Debarment Committee was established by E.O. 12549 to monitor implementation of the Nonprocurement-Common Rule and as a vehicle of coordination of Federal suspension and debarment policies and practices. If the FAR rule is finalized, it will place the two near mirror image rules in conflict with one another.

*Response:* Upon issuance of this final rule, the Councils believe that the OMB Interagency Suspension and Debarment Committee will consider similar changes to the Nonprocurement-Common Rule to keep the two rules parallel.

#### **4. Other information available to the Government.**

##### **a. Government already has the necessary information.**

*Comment:* One respondent comments that most of the information requested by the rule is already available to the Federal Government. The respondent provides examples of ready access to IRS information, including the Central Contractor Registration (CCR) Taxpayer Identification Number (TIN) match program, Federal Payment Levy Program, and a recent DoD final rule requiring the contractor to notify the contracting officer if any tax withholding would jeopardize performance of a contract.

*Response:* Various Federal agencies have access to some information originating with the IRS and regarding prospective contractors. This information, including a verified Taxpayer Identification Number disclosed to the CCR and levy information disclosed to the Financial Management Service in the Federal Payment Levy Program process, is not the same information that offerors are requested to certify under this rule. Contracting officers making responsibility determinations would not be able to deduce from a TIN, levy, or tax withholding whether a prospective contractor has, within a 3-year period preceding the offer, been convicted of or had a civil judgment rendered against them for violating Federal criminal tax law, or been notified of any delinquent Federal taxes in an amount that exceeds \$3,000. To a large extent, the information already released to Federal agencies involved in the procurement process would not provide the facts important to making responsibility determinations.

Furthermore, to the extent the IRS information has been disclosed to other Federal agencies, disclosure has been made under specific statutory authority allowing disclosure of the information, and use of the information once disclosed, to specifically identified

recipients for specifically identified purposes. This generally does not allow the redisclosure or reuse of this information by the recipient for reasons other than that for which it was originally received. Likewise, the information in the IRS' control cannot be disclosed or used unless specifically authorized by the Internal Revenue Code (I.R.C.) (Title 26 of the United States Code). There are both civil and criminal penalties attached to the unauthorized disclosure of this information by the IRS or, in many cases, authorized recipients. Thus even to the extent some information is in the hands of other Federal agencies, it cannot be used in making responsibility determinations.

##### **b. Use of other electronic systems for verification.**

*Comment:* One respondent states that the proposed rule needs to be supported by a strong system of verifications. The electronic tools are already in place, or could be easily modified so that the certifications would be more than words on paper, and this could be done without imposing an additional burden on law-abiding companies doing business with the Government. This respondent recommends that the Councils back up the certifications using verifications between the systems of flags being created in the CCR and the representations in the Online Representations and Certifications Application, so that contracting officers are immediately alerted to any discrepancies.

*Response:* The respondent proposes the verification enhancement of requiring the contracting officer to compare and make consistent the CCR debt flag and the offeror's proposal certification regarding tax delinquencies. The Councils do not agree with this suggestion for several reasons. There will be numerous circumstances under which the two properly would be inconsistent. First, the debt flag system is designed to cover all types of Federal debt, not just tax delinquencies. Further, even if the debt flag in CCR were related to a Federal tax debt, it would give a contracting officer no indication whether an affirmative certification was required with regard to violation of Federal criminal tax law or Federal tax delinquency. Also, the Councils have relocated the former FAR 9.408 to 9.104-5, where its requirements to ask for additional information from the offeror and refer anomalies to the suspension and debarment official will be a regular part of the determination of present responsibility, thus better serving the respondent's purpose.

##### **5. Certification issues.**

##### **a. Subject to additional criminal penalties.**

*Comment:* One respondent states that each certification makes the business and the individual who signs it subject to criminal penalties. The company is also subject to Civil False Claims Act (CFCA) double and treble damages, even if the violations were unintended, as the Government does not need to show intent to defraud; also, the standard of proof is only a "preponderance of evidence". An innocent mistake under another statute could lead to a CFCA violation, which could then lead to a determination of nonresponsibility under the new certification, followed by debarment and suspension proceedings.

*Response:* The certification is not whether the contractor violated another statute, but whether the contractor has been convicted or had a civil judgment rendered against it, or received certain notifications.

##### **b. S Corporations or partnerships.**

*Comment:* One respondent states that the certification could be problematic for companies that are organized as S corporations or partnerships, because it is unclear under the proposed rule whether each shareholder or partner would be required to certify that neither they nor their fellow shareholders or partners has a tax delinquency. Given that S corporations do not file corporate tax returns, but instead report the company's tax liability on the individual tax returns on the S corporation partners, the rule could impose a significant level of personal information sharing among business partners.

*Response:* The rule does not change the existing procedures for the certification. The existing certification at 52.209-5 and 52.212-3(h) is that "(a)(1) The Offeror certifies, to the best of its knowledge and belief, that— (i) The Offeror and/or any of its Principals . . .". The definition of principals is found at FAR 52.209-5, and includes owners and partners. The offeror already has to certify to whether it or its principals are debarred, suspended, proposed for debarment, convicted of or charged with or had a civil judgment for certain offenses. Individual certifications from each owner and each partner are not required.

##### **c. Application to commercial items.**

*Comment:* One respondent objects to the certification being imposed on commercial item procurements. 41 U.S.C. 430 prohibits the imposition of any certification for a commercial item that is not required to implement a statute or executive order unless the FAR Council has made a determination to impose the certification. The FAR

Council has not done so. Therefore, Part 12 acquisitions should be exempted.

*Response:* 41 U.S.C. 430 is the statute regarding laws inapplicable to acquisition of commercial items. It requires a covered law enacted after October 13, 1994, to be included on the list of laws inapplicable to commercial items, unless the FAR Council makes a written determination. This statute does not apply, as this regulation is not based on statute. This statute does not prohibit application of this rule to acquisitions of commercial items.

41 U.S.C. 425 is the certification statute. It forbids including a contractor certification in the FAR unless it is specifically imposed by statute, or a written justification is provided by the FAR Council to the Administrator of OFPP, and the Administrator approves the inclusion. This statute does apply. The FAR Council has obtained approval from the Administrator of OFPP for inclusion of this nonstatutory certification in the FAR.

**d. Best knowledge and belief.**

*Comment:* One respondent recommends that the certifications should include the phrase “best knowledge and belief”.

*Response:* The certifications already do include this phrase in the current FAR in paragraphs 52.209–5(a)(1) and 52.212–3(h). Because no change was proposed to these prefaces, they were not republished in the proposed rule.

**e. Date certain.**

*Comment:* One respondent recommends that the contractor be allowed to add a date certain, such as the end of the last calendar quarter, to the certification.

*Response:* The Councils have elected not to add a “date certain” requirement to the certification regarding notification of delinquent taxes because such an addition would require more, not less, work by offerors. Adding a “date certain” requirement would effectively require offerors to perform a “sweep” prior to each certification. Absent a “date certain” requirement, offerors certify to their best knowledge and belief. With the additional clarifications regarding finality and Federal tax delinquency, offerors should be able to certify with confidence without having to conduct an internal “sweep.”

**6. New causes of suspension and debarment and required certification.**  
**a. Inclusion of “any” (Federal, State, local, and foreign) tax law violation or delinquency.**

*Comments:* The U.S. Small Business Administration, Office of Advocacy (SBA-OA) comments that the proposed rule would require a contractor to certify that it does or does not have a tax

liability not just for Federal, State or local, but also foreign jurisdictions.

Another respondent comments that the rule should clearly state whether the phrase “tax laws” refers to “any and all” tax laws. Innumerable State, local, and foreign tax statutes may be applicable to an offeror, depending on the size of the business, the number of divisions or subsidiaries, nature, and location of work being performed. A contractor who frequently submits proposals may not know on a real time basis whether any notice has been received relating to all the tax areas. The respondent recommends limiting the rule to Federal income and payroll taxes.

Another respondent comments that because a multi-state company can be under audit by hundreds of Federal, State, and local taxing authorities at one time, such a company would find it virtually impossible to comply with the proposed rule. This respondent recommends that the rule be limited to Federal entities.

*Response:* The Councils concur with the respondents and have narrowed the scope of the final rule to Federal tax delinquency and violation of Federal criminal tax laws, except for tax evasion, which applies to evasion of any tax, not just Federal. This should limit an offeror’s need to know on a real-time basis whether any notice has been received relating to other than Federal tax areas (*i.e.*, State, local, and foreign jurisdictions).

The Councils’ decision to remove State, local, and foreign tax violations (except for tax evasion) from the scope of this rule is because their inclusion would unduly burden the offerors and the contracting officer, who would potentially face uncertainty when assessing the impact of multi-jurisdictional tax violations on the award process.

Although the Councils do agree to limiting to Federal criminal tax law violations and Federal tax delinquency, they have not specifically limited the final rule to address just Federal income and payroll taxes, although such taxes certainly constitute the bulk of Federal taxes. Any violation of Federal criminal tax law or Federal tax delinquency can affect the contractor’s responsibility, regardless of the specific tax involved. Tracking of all Federal criminal tax violation or Federal tax delinquency (even if other than income or payroll) does not increase the complexity of the certification, but simplifies it.

**b. Tax evasion, violating tax law, failing to pay taxes.**

*Comment:* One respondent comments that the proposed rule transforms the

precisely defined FAR Subpart 9.4, “Debarment, Suspension and Ineligibility,” inclusive of a well-defined tax code definition of tax evasion, into an undefined infraction called a tax liability for any tax law.

Another respondent recommends deletion of the term “tax evasion” as a basis for suspension or disbarment, because “tax evasion” is covered by the new causes: “violating tax laws” and “failing to pay taxes”.

*Response:* The Councils agree that the term “tax evasion” is covered by the proposed phrases “violating tax laws”, and “failing to pay taxes”, although those phrases cover a much broader range of circumstances. However, the Councils also concur that the term “tax evasion” is a precisely-defined well-understood term, applicable to all types of taxes (Federal, state, local, and foreign) and therefore have retained the term. The final rule has been drafted so that the term “tax evasion” is no longer totally a subset of the subsequent terms.

The term “violating tax laws” has been made more specific to cover only the violation of “Federal criminal tax laws” (*e.g.*, willful failure to file). The FAR sections 9.406–2(a) and 9.407–2(a)(3) are intended to focus on criminal violations. The letter from the Permanent Subcommittee on Investigations specifically requested that the FAR should require certification with regard to criminal tax law violation. The decision to limit the cause for debarment/suspension to Federal criminal tax law violation was also based on the conclusion that violation of other than criminal tax laws probably has less bearing on contractor responsibility. Because the certification with regard to criminal tax law violation is restricted to Federal criminal tax law, it is necessary to retain “tax evasion” as well, which applies to evasion of any tax, not just Federal taxes.

The broad circumstance covered by the phrase “failing to pay taxes” is not necessarily a criminal offense, and the Councils have therefore deleted it from the specified paragraphs. The non-criminal failure to pay taxes is subsequently covered in the rule using a more precisely defined term “delinquent taxes”.

**c. Delinquent taxes – need definition.**

*Comment:* One respondent recommends a clear definition of “delinquent taxes”, which allows for due process to dispute the tax liability without penalty of debarment or suspension.

Another respondent states that use of the term “delinquent taxes” significantly lowers the standard from tax evasion. Because the IRS does not

have a clear definition of “delinquent taxes”, it is difficult to ensure compliance with the new standard. It is unclear how this definition accommodates taxpayers who are disputing tax liability.

Another respondent recommends that the certification provide that an installment agreement or offer-in-compromise not be considered a “delinquent” tax subject to reporting requirements. The respondent recommends the term “notice of delinquency” be deleted or defined to reflect the adjudication of a tax liability after due process.

A fourth respondent recommends that the definition of “delinquent taxes” be revised to specify that all avenues of appeal have been closed, to allow for due process in disputing the tax liability.

*Response:* The Councils agree that the definitions of “delinquent taxes” and “tax delinquency” need clarification. For purposes of the FAR rule, the definition should have two components. First, the tax liability should be finally determined (e.g., it is not a proposed liability subject to further administrative or judicial challenge and it has been assessed (“finality” element)). Second, the taxpayer must have neglected or refused to pay a liability that has become due (“delinquent” element).

The Councils considered, as a starting point, whether the definition of “delinquent taxes” used in certain provisions of the I.R.C. might be useful in defining the term for purposes of this rule. For example, I.R.C. section 7524 requires an annual notice of tax delinquency be provided to a taxpayer with a “tax delinquent account”. I.R.C. section 6103(l)(3) allows disclosure of return information to a Federal agency where an applicant for a Federal loan has a “tax delinquent account”. See also Internal Revenue Manual 11.3.29.6(8). A “tax delinquent account” for purposes of these provisions, however, is an account which shows up as being unpaid on the IRS computer systems. These provisions do not allow for the possibility for further dispute of the liability, for IRS error, or for whether the taxpayer is currently required to pay the liability. While for purposes of these provisions, this definition may be adequate, we agree that for purposes of this FAR rule a different definition is warranted.

#### **i. Finality.**

This definition should apply only to tax liabilities that are finally determined, not proposed or under valid dispute. For example, this would not apply to proposed deficiencies shown on a statutory notice of

deficiency which a taxpayer is entitled to contest in Tax Court. The liabilities should have been assessed and should generally be subject to enforced collection action, such as a tax lien or levy (although there may be something precluding the IRS from taking enforced collection action, as further discussed below).

There should be no pending administrative or judicial challenge to the underlying liability. An administrative or judicial challenge could include a refund claim, collection due process lien or levy hearing, deficiency case, interest or penalty abatement case, etc. In the case of a judicial challenge to the liability, there would be no finality until all judicial appeal rights have been exhausted.

The Councils considered whether it would provide helpful information to the contracting officer for offerors to report in the certification tax liabilities that had no remaining administrative challenge, but might still have open avenues of judicial challenge. The Councils decided that to provide due process, it would be more useful to the contracting officer and suspending and debarring official (SDO) to focus on unpaid taxes for which there is no pending administrative or judicial challenge to the underlying liability.

#### **ii. Delinquency.**

If there is a finally determined tax liability, a taxpayer should be deemed “delinquent” for purposes of this definition only if that taxpayer has refused or neglected to pay that liability when full payment is due and required.

For example, some respondents suggested that a taxpayer who has entered into an installment agreement or offer-in-compromise should not be considered to be “delinquent”. The Councils agree. A taxpayer who has entered into such an agreement with the IRS is not currently required to make full payment of the liability.

A taxpayer is also not delinquent in cases where the IRS is precluded from taking collection action, because in those cases payment from the taxpayer is also not currently due and required. For example, a taxpayer who has filed for bankruptcy protection should not be considered to be delinquent for purposes of this definition. (As discussed above, the IRS may also be precluded from taking enforced collection action in cases where the tax liability is not finally determined).

#### **d. Unresolved tax liens.**

*Comment:* One respondent states that the term “received notice of a tax lien” is too expansive or ambiguous because the notice could be mistaken and the lien filing could be contested. Another

respondent states that all avenues of appeal should be allowed to dispute a filed notice of tax lien.

*Response:* The Councils agree with these comments, but have deleted the references to “unresolved tax liens” and “received notice of a tax lien” from the final rule. It is superfluous to have separate certification/contractor responsibility requirements for delinquent taxes and for tax liens, especially since the final rule more precisely defines “delinquent taxes”.

#### **e. Minimum threshold for reporting.**

*Comments:* Three respondents propose minimum thresholds. The respondents suggest that the wide range in amounts of tax issues and the various stages of administration with various authorities suggest the establishment of a threshold for disclosure to contracting officers.

- One respondent states that the value of actionable information to contracting officials in assessing a contractor’s responsibility would be improved by establishing a minimum threshold level below which reporting would be unnecessary. The respondent points out that companies receive a variety of notices, often for minor amounts that by any reasonable standard would not call into question a contractor’s present responsibility. They propose \$25,000 as the threshold.

- Another respondent uses the term “materiality” in their comments and expresses a concern that a tax dispute of \$100 requires the same certification as \$1,000,000 dispute. Consequently, the respondent suggests use of threshold equal to the greater of \$100,000 or 1% of the contract bid amount.

- The SBA-OA suggests a minimum threshold of \$2,500.

*Response:* The Councils agree that both contractors and contracting officers will be unnecessarily burdened by the proposed rule with numerous disclosures that do not have a direct bearing on responsibility. To mitigate such a result, the Councils have set a minimum threshold of \$3,000, consistent with the legislation that was favorably reported on May 9, 2007 by the Subcommittee on Government Management, Organization and Procurement of the House Oversight and Government Reform Committee (HR 1870, Towns Substitute Amendment), but recognizing the recent inflationary adjustment to the micro-purchase threshold.

#### **f. Increase scope of certification.**

*Comment:* One respondent comments that the certifications should be revised to address potentially criminal behavior before it is identified by the IRS, by asking for simple certification that the

company has been paying its taxes. The respondent suggests the additional certification should be added to both FAR 52.209-5 and 52.212-3, which would read: "Have , have not , paid all payroll and corporate taxes due." These certifications would require that the contractor affirm that it is following the law, not simply that the IRS hasn't caught the company breaking the law.

*Response:* While the purpose of the additional proposed certification is well-intended, such a "have paid" certification would only present the contractor's position or perspective regarding its tax situation, and would not account for situations where a taxing authority and the contractor may be in dispute over whether or not the contractor has paid all taxes due. Therefore, such a certification would not provide the information pertinent to a responsibility determination. Furthermore, should a contractor check the "have not" box, it would be the other certifications that would provide more specific information regarding violation of Federal criminal tax laws or delinquent Federal taxes. Therefore, we do not believe such an additional certification would add any important information.

#### **7. What do contracting officers do upon receipt of a positive certification? Will "de facto" debarment result?**

##### **a. Lack of clear guidance to contracting officers.**

*Comment:* The Small Business Administration Office of Advocacy (SBA-OA) indicates that small businesses are concerned that the lack of clear guidance to contracting officers, particularly after the contractor has certified that the company has a tax liability, will create widely varying interpretations of rule.

*SBA-OA raised several questions:*

- Does the affirmation of a tax liability mean the lack of contractor responsibility?
- Does the affirmation of a tax liability also mean the initiation of debarment and/or suspension provisions of the FAR?

- Is the contracting officer the only decision maker in this contract determination/award process?

Another respondent comments that additional guidance is needed at FAR 9.408(a) to provide criteria by which contracting officers can assess whether a potential tax issue is of sufficient magnitude to deny award. The guidance should provide examples.

*Response:* There is already specific guidance to the contracting officer in the FAR. FAR 9.103 prohibits any acquisition unless the contracting officer makes an affirmative

determination of responsibility. The FAR provides the standards that the contracting officer is required to consider when determining contractor responsibility. This rule does not in any way change the process for determination of responsibility, just adds one more factor to consider.

FAR 9.408 provides specific direction to the contracting officer as to the appropriate procedures to follow when an offeror provides an affirmative response to paragraph (a)(1) of the certification at 52.209-5 or paragraph (h) of the provision 52.212-3. The contracting officer must—

- Request such additional information from the offeror as the contracting officer deems necessary in order to demonstrate the offeror's responsibility to the contracting officer; and
- Notify, prior to proceeding with award, in accordance with agency procedures, the agency official responsible for initiating debarment or suspension action, when an offeror indicates the existence of an indictment, charge, conviction, or civil judgment (now the Councils have also added Federal tax delinquency in an amount greater than \$3,000).

In order to more clearly associate these procedures to the responsibility determination required in FAR Subpart 9.1, these procedures, as well as the clause prescription for the certifications, have been moved to FAR 9.104.

Furthermore, the Councils have modified the requirement to request such additional information as the contracting officer deems necessary. The Councils specify that the request should be made promptly, upon receipt of offers, so as not to delay the procurement, and has placed the burden upon the offeror to provide the information it deems necessary to demonstrate its responsibility. When an offeror has made an affirmative response to the certification, the offeror is in a better position to know what evidence is available to mitigate the response and demonstrate its responsibility.

Several of the other revisions to the final rule, as already discussed, better define and limit the circumstances that require reporting and will eliminate many extraneous affirmations that may have little bearing on contractor responsibility.

- The broad phrases "violating tax laws, failing to pay taxes" have been replaced with "violation of Federal criminal tax law".

- Notification of "delinquent" taxes is restricted to delinquent Federal taxes in an amount that exceeds \$3,000, and "delinquent" is clearly defined, limiting applicability to tax liability that has

been finally determined and which the taxpayer has not paid when it has become due, with several examples provided.

In specific response to the SBA-OA questions—

- The affirmation of a tax liability does not necessarily mean the lack of contractor responsibility. A tax liability is just one of many factors to be evaluated by the contracting officer and, as appropriate, the SDO.

- The affirmation of a tax liability does not necessarily mean the initiation of debarment and/or suspension provisions of the FAR. If the contracting officer forwards information to the SDO, the SDO will further investigate and evaluate before deciding to initiate suspension or debarment proceedings.

- The contracting officer may consult with the SDO. The SDO may determine in advance of contract award that the contractor is presently responsible, although not with regard to the award of a particular contract.

##### **b. Certificate of Competency.**

*Comment:* SBA-OA was concerned that the unintended result of the rule may be denial of a Certificate of Competency (COC) ruling from SBA to an otherwise qualified small business.

*Response:* The policy at FAR 9.103(b) is clear with regard to making responsibility determinations involving small businesses. If the prospective contractor is a small business concern, the contracting officer shall comply with Subpart 19.6, Certificates of Competency and Determinations of Responsibility. If the contracting officer determines that an apparent successful small business lacks certain elements of responsibility, the contracting officer must refer the matter to the SBA. The final rule does not change this policy or make any exceptions to compliance with Subpart 19.6, if the contracting officer determines that a small business lacks certain elements of responsibility based upon affirmative responses to the certifications. SBA's COC regulations currently state that if a small business concern is debarred from Federal procurement, proposed or suspended from Federal procurement pending debarment to protect the Government's interests, SBA will find that small business ineligible for COC consideration.

##### **c. De facto debarment.**

*Comment:* One respondent states that to subject a potential contractor to an informal blacklisting or a formal contracting officer decision of nonresponsibility repeatedly for the same condition may subject the Government to a legal challenge on the basis of de facto debarment. Generally,

these matters should be referred to agency suspending and debarment officials. The respondent recommends additional regulatory or guidance language to the contracting officer.

SBA-OA questions whether the lack of clarity of the rule can result in the unintended de-facto denial of a contract to a small business bidder.

Another respondent comments that the proposed rule is not de facto debarment, but simply a good way to further ensure that contractors are indeed responsible.

*Response:* The Councils concur that this rule will not cause de facto debarment. This rule does not change the process at all, but just adds information for consideration in the determination of a contractor's responsibility. A contracting officer is required to make an affirmative determination of responsibility in accordance with the standards in the FAR. The rule requires the contracting officer to consider the new certifications relating to taxes in the certification at 52.209-5 or 52.212-3(h), among other information when making responsibility determinations.

- An affirmative response to one of the certifications does not necessarily mean that the contractor is not responsible. Even if the contractor is determined to be not responsible, that does not constitute a de facto debarment.

- A contracting officer is required to request additional information, and notify, prior to proceeding with award, in accordance with agency procedures, the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds \$3,000.

- Making a single determination of nonresponsibility does not constitute de facto debarment, as long as the contracting officer refers the matter to the SDO, so that the Government will not continue to deny awards to the offeror without the due process of the suspension and debarment process.

**d. Incentive for contacting officer to assume guilt.**

*Comment:* One respondent comments that while the proposed rule would not instantaneously debar a contractor nor expressly prohibit a contracting officer from awarding a contract to a company that informs the Government of the delinquent tax or unresolved tax lien notifications, there would be a strong incentive for the contracting officer to assume guilt and award the contract to another company.

*Response:* The respondent does not present any evidence that there would be a strong incentive for contracting officers to assume guilt and award a contract to another company when a contractor provides an affirmative response to the certification at 52.209-5 or 52.212-3(h). The contracting officer is required to follow the regulations at FAR Subpart 9.1 when making a responsibility determination. In fact, the Councils find that a contracting officer has strong incentive not to assume guilt and find an offeror nonresponsible, as such irresponsible action would be highly likely to result in a law suit.

However, in order to further prevent contracting officers from assuming anything, the final rule has been narrowed to exclude the need to certify with regard to unpaid taxes until there has been a final determination, and there are not further avenues of administrative or judicial appeal. This will protect offerors from having to report unresolved tax disputes, which may still be resolved in their favor.

**8. Small business issues.**

**a. Impact on small businesses.**

**i. Will hurt small businesses.**

*Comments:* One respondent states that because the regulations are unclear, and because some small businesses do not have the financial resources to employ lawyers or tax accountants, small businesses will simply certify they have a tax liability. SBA-OA was also concerned that without a factual basis for the certification, it is impossible for the approximately 300,000 small business registered in the CCR to fully evaluate the economic impact of the proposed regulation.

One respondent comments that this certification could hurt companies that have owned up to their mistakes and paid their relevant tax liability, interest, and penalties, a standard which particularly hurts small businesses.

*Response:* The basis for a certification is clearly delineated in the final rule. A small business can tell without hiring a tax accountant or lawyer whether they have been convicted of violation of Federal criminal tax law or have received a notice from the IRS regarding delinquent Federal taxes.

If the tax liability has been satisfied, then the notification need not be reported in the certification. If an offeror has been convicted of violation of Federal criminal tax law or received notification of delinquent taxes for which the liability has not been satisfied, then that information will be evaluated on a case-by-case basis to determine whether the notification of delinquent taxes or conviction of violation of Federal criminal tax law is

an indication that the offeror is not presently responsible.

**ii. The proposed rule will help small businesses.**

*Comment:* One respondent states that the organizations they represent vigorously support the Councils' efforts to better enforce the responsibility requirement for all Federal contractors. The respondent believes that further strengthening the electronic systems and FAR 9.408 will help small businesses compete.

*Response:* No response required.

**b. Need reasonable alternatives for small business compliance.**

*Comment:* SBA-OA states that it welcomes the efforts of the Councils to increase corporate tax accountability, but cautions this with the statement that several areas of the proposed regulation require a more balanced approach for small businesses. The SBA-OA urges the Councils to give careful consideration to the need for reasonable alternatives for small business compliance with the proposed regulation. As one alternative, the respondent recommends a minimum threshold of \$2,500.

*Response:* As previously stated, the Councils have revised the final rule to make it less burdensome for all respondents, including small businesses:

- Limit to Federal tax delinquency and violation of Federal criminal tax laws (except for tax evasion).

- Clearly define "delinquent taxes," limiting applicability to tax liability that has been finally determined and which the taxpayer has not paid when it has become due. To make it even clearer, examples are provided.

- Set a minimum threshold of \$3,000 (adjusted for inflation).

**c. Need Initial Regulatory Flexibility Analysis.**

*Comment:* SBA-OA stated that an Initial Regulatory Flexibility Analysis is required by Section 603 of the Regulatory Flexibility Act when a Federal rule is expected to have a significant economic impact on a substantial number of small entities. The Councils stated in the preamble to the proposed rule that they did not expect the rule to have such a significant impact on a substantial number of small entities. SBA-OA commented that the Councils did not provide a factual basis for this assessment. SBA-OA stated that the rule is likely to increase the cost of doing business with the Government, and that due to the lack of clarity in the regulation, those increased costs could be significant.

*Response:* The Councils worked with SBA-OA to make the impact of the rule

on small business minimal. Small businesses must already complete the certification at 52.209-5, including information on tax evasion. The new certification only requires the offeror to certify whether it has, or has not, within a three-year period preceding the offer, been convicted of violating Federal criminal tax laws or been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied. This is a very clearly defined certification, and a small business should not have difficulty identifying the correct response, especially after limiting it to delinquent Federal taxes of which it has received notice. The small business is not required to assess whether there are any unpaid tax liabilities of which it has not been notified (as some respondents requested). Either it got such notice or it did not. If it got the notice of delinquent Federal taxes, either it satisfied the liability or it did not.

After review of the final rule, SBA-OA is satisfied that the final rule achieves a more balanced approach for small business, and that a Regulatory Flexibility Analysis is not required.

**9. Ways to further improve: Waiver of privacy rights; FCTCTF to resolve issues; use DCAA to monitor.**

*Comments:* One respondent comments that the tax certification is an excellent idea and should also carry a waiver of privacy rights under I.R.C. section 6103 to permit expedited access to contractor tax records, parallel to the TIN matching process. The respondent also suggests that the joint Federal Contactor Tax Compliance Task Force (FCTCTF) is the perfect forum to resolve issues, and that the Defense Contract Audit Agency could monitor tax compliance.

*Response:* No waiver of privacy rights is required, because this certification creates no need for Government contracting officers to access any IRS or other tax records or submissions. Indeed, it would be improper for contracting officers to do so. The function of the certification is to provide contracting officers with information on an aspect of a prospective contractor's present responsibility (as required by FAR Subpart 9.1). Contracting officers should not, and cannot, become involved in any aspect of a tax delinquency (e.g., collection, adjudication).

The Councils cannot agree with the suggestion regarding the Federal Contactor Tax Compliance Task Force because that body's charter does not include resolving tax issues. Similarly, it is not part of Defense Contract Audit

Agency's mission to monitor tax compliance.

**10. Intersection with Public Law 109-222.**

*Comments:* One respondent references the law (presumably referring to Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. 109-222) requiring Federal, State and certain local contracting entities to withhold 3% of each payment made after December 31, 2010. The respondent states that it strongly opposes this arbitrary payment withholding provision and looks forward to commenting on the implementing federal regulations, while simultaneously seeking a repeal of the law.

Another respondent expresses its appreciation for the Councils seeking to address the issue of delinquent taxpayers receiving Federal contracts through certifications rather than the punitive withholding envisioned by Section 511 of Pub. L. 109-222. This respondent urges the Councils to seize this opportunity to make the FAR strong enough to obviate the need for the draconian provisions of Pub. L. 109-222, which affect all contractors, regardless of their compliance practices. This respondent points out that the construction industry, where there is already a practice of retainage, will suffer in particular from the impact of the 3% withhold. Certifications and enforcement provide a much more surgical approach to the problem of the tax gap. Tax collection should be left to the tax enforcement professionals, rather than contracting personnel.

*Response:* While the respondents may prefer the certifications proposed by this rule to the withholding requirements of Pub. L. 109-222, this rule is not an alternative to those 3% withholding requirements, which are statutory. Any discussion of implementation of that statute is outside the scope of this case.

**11. Relocation of FAR 9.408 and 9.409.**

The Councils have moved two sections, FAR 9.408 and 9.409, out of FAR Subpart 9.4, Debarment, Suspension, and Ineligibility, to FAR Subpart 9.1, Responsible Prospective Contractors, for several reasons.

First, locating the material at FAR 9.408 does not appear to be the most logical placement. The Councils have moved these directions to the contracting officer as to what to do when an offeror makes a positive response to one of the certifications under FAR 52.209-5 to 9.104-5, under the section on standards for determining the responsibility of prospective contractors.

Second, the certification no longer relates solely, or primarily, to suspension or debarment. It relates to broader considerations of an offeror's general responsibility. Thus, while certain responses on the certification could result in a referral to the Suspending and Debarment Official, the main purpose of the clause is to provide information that a contracting officer should use in the mandatory pre-award determination of an offeror's present responsibility for the purpose of awarding a contract only to such responsible offerors, the subject of Subpart 9.1. In addition, the title of the clause at FAR 52.209-5 has been shortened to the broader, and more accurate, "Certification Regarding Responsibility Matters."

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.* The Councils worked with SBA-OA to make the impact of the rule on small business minimal. Small businesses must already complete the certification at FAR 52.209-5, including information on tax evasion. The new certification only requires the offeror to certify whether it has, or has not, within a 3-year period preceding the offer, been convicted of violating Federal criminal tax laws or been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied. This is a very clearly defined certification, and a small business should not have difficulty identifying the correct response, especially after limiting it to delinquent Federal taxes of which it has received notice. The small business is not required to assess whether there are any unpaid tax liabilities of which it has not been notified (as some respondents requested). Either it got such notice or it did not. If it got the notice of delinquent Federal taxes, either it satisfied the liability or it did not.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply; however, these changes to the

FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0094 and 9000-0136.

#### List of Subjects in 48 CFR Parts 4, 9, and 52

Government procurement.

Dated: April 4, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 9, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 9, and 52 continues to read as follows:

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

#### PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.1202 by revising paragraph (e) to read as follows:

##### 4.1202 Solicitation provision and contract clause.

\* \* \* \* \*

(e) 52.209-5, Certification Regarding Responsibility Matters.

\* \* \* \* \*

#### PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Add sections 9.104-5 and 9.104-6 to read as follows:

##### 9.104-5 Certification regarding responsibility matters.

(a) When an offeror provides an affirmative response in paragraph (a)(1) of the provision at 52.209-5, Certification Regarding Responsibility Matters, or paragraph (h) of provision 52.212-3, the contracting officer shall—

(1) Promptly, upon receipt of offers, request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds \$3,000.

(b) Offerors who do not furnish the certification or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible.

##### 9.104-6 Solicitation provision.

The contracting officer shall insert the provision at 52.209-5, Certification Regarding Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

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

##### 9.105-1 Obtaining information.

\* \* \* \* \*

(c) \* \* \*

(3) The prospective contractor—including bid or proposal information (including the certification at 52.209-5 or 52.212-3(h) (see 9.104-5)), questionnaire replies, financial data, information on production equipment, and personnel information.

\* \* \* \* \*

■ 5. Amend section 9.406-2 by removing from paragraph (a)(3) “tax evasion,” and adding “tax evasion, violating Federal criminal tax laws,” in its place; and by adding paragraph (b)(1)(v) to read as follows:

##### 9.406-2 Causes for debarment.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(v) Delinquent Federal taxes in an amount that exceeds \$3,000.

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(1) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(B) *Examples.* (1) The taxpayer has received a statutory notice of deficiency, under I.R.C. § 6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(2) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C.

§ 6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(3) *The taxpayer has entered into an installment agreement pursuant to I.R.C. § 6159.* The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(4) *The taxpayer has filed for bankruptcy protection.* The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

\* \* \* \* \*

■ 6. Amend section 9.407-2 by—

■ a. Removing from paragraph (a)(3) “tax evasion,” and adding “tax evasion, violating Federal criminal tax laws,” in its place;

■ b. Removing from the end of paragraph (a)(6) the word “or”;

■ c. Redesignating paragraph (a)(7) as paragraph (a)(8); and

■ d. Adding a new paragraph (a)(7) to read as follows:

##### 9.407-2 Causes for suspension.

(a) \* \* \*

(7) Delinquent Federal taxes in an amount that exceeds \$3,000. See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent; or

\* \* \* \* \*

##### 9.408 [Removed and reserved]

■ 7. Remove and reserve section 9.408.

■ 8. Amend section 9.409 by revising the section heading; by removing paragraph (a); and by removing the paragraph designation (b). The revised heading reads as follows:

##### 9.409 Contract clause.

\* \* \* \* \*

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

■ 9. Amend section 52.209-5 by—

■ a. Revising the section heading;

■ b. Removing from the introductory paragraph “9.409(a)” and adding “9.104-6” in its place;

- c. Revising the clause heading and the date;
- d. Removing from paragraph (a)(1)(i)(B) “tax evasion, or receiving stolen property; and” and adding “tax evasion, violating Federal criminal tax laws, or receiving stolen property;” in its place; and
- e. Removing from the end of paragraph (a)(1)(i)(C) the period and adding “; and” in its place; and
- f. Adding paragraph (a)(1)(i)(D) to read as follows:

#### 52.209-5 Certification Regarding Responsibility Matters.

\* \* \* \* \*

#### CERTIFICATION REGARDING RESPONSIBILITY MATTERS (MAY 2008)

(a)(1) \* \* \*

(i) \* \* \*

(D) Have , have not , within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied.

(1) Federal taxes are considered delinquent if both of the following criteria apply:

(i) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(ii) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(2) Examples. (i) The taxpayer has received a statutory notice of deficiency, under I.R.C. § 6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(ii) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. § 6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(iii) The taxpayer has entered into an installment agreement pursuant to I.R.C. § 6159. The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(iv) The taxpayer has filed for bankruptcy protection. The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

\* \* \* \* \*

#### ■ 10. Amend section 52.212-3 by—

- a. Revising the date of the clause;
- b. Removing from paragraph (h) “*Debarment, Suspension or Ineligibility for Award*” and adding “*Responsibility Matters*” in its place;
- c. Removing from the end of paragraph (h)(1) the word “and”;
- d. Removing from paragraph (h)(2) “tax evasion, or receiving stolen property; and” and adding “tax evasion, violating Federal criminal tax laws, or receiving stolen property;” in its place;
- e. Removing from paragraph (h)(3) “offenses.” and adding “offenses enumerated in paragraph (h)(2) of this clause; and” in its place; and
- f. Adding paragraph (h)(4) to read as follows:

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

\* \* \* \* \*

#### OFFER REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (MAY 2008)

\* \* \* \* \*

(h) \* \* \*

(4)  Have,  have not, within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied.

(i) Taxes are considered delinquent if both of the following criteria apply:

(A) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(B) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(ii) *Examples.* (A) The taxpayer has received a statutory notice of deficiency, under I.R.C. § 6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(B) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. § 6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is

entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(C) The taxpayer has entered into an installment agreement pursuant to I.R.C. § 6159. The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(D) The taxpayer has filed for bankruptcy protection. The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

[FR Doc. E8-8508 Filed 4-21-08; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 33

[FAC 2005-25; FAR Case 2006-031; Item VI; Docket 2008-0001; Sequence 9]

RIN 9000-AK79

#### Federal Acquisition Regulation; FAR Case 2006-031, Enhanced Access for Small Business

**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 857 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

**DATES:** *Effective Date:* May 22, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-25, FAR case 2006-031.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 72 FR 46950 on August 22, 2007. No

public comments were received in response to the proposed rule. This final rule makes no change to the proposed rule.

Section 857 creates a different, higher dollar ceiling to enable small businesses to use the small claims procedure to appeal a contracting officer's final decision. This rule amends the FAR to add the ceiling at 33.211(a)(4)(v).

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, General Services Administration, and National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it does not change the rules for buying and does not add an information collection requirement. It will have a small positive impact because small businesses will be able to more easily use the special contract appeals procedure.

### 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 33

Government procurement.

Dated: April 4, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 33 as set forth below:

### PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 1. The authority citation for 48 CFR part 33 continues to read as follows:

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

■ 2. Amend section 33.211 by revising paragraph (a) to read as follows:

#### 33.211 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that shall include—

(i) A description of the claim or dispute;

(ii) A reference to the pertinent contract terms;

(iii) A statement of the factual areas of agreement and disagreement;

(iv) A statement of the contracting officer's decision, with supporting rationale;

(v) Paragraphs substantially as follows:

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or

(2) Accelerated procedure for claims of \$100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

(vi) Demand for payment prepared in accordance with 32.610(b) in all cases where the decision results in a finding that the contractor is indebted to the Government.

\* \* \* \* \*

[FR Doc. E8-8427 Filed 4-21-08; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 1

[FAC 2005-25; Item VII; Docket FAR-2008-0001; Sequence 10]

### Federal Acquisition Regulation; Technical Amendment

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

**ACTION:** Final rule.

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

**DATES:** *Effective Date:* April 22, 2008.

**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 2005-25, Technical Amendment.

#### SUPPLEMENTARY INFORMATION:

#### List of Subjects in 48 CFR Part 1

Government procurement.

Dated: April 4, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 1 as set forth below:

### PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

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

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

■ 2. Amend section 1.603-1 by revising the last sentence to read as follows:

#### 1.603-1 General.

\* \* \* These selections and appointments shall be consistent with Office of Federal Procurement Policy's (OFPP) standards for skill-based training in performing contracting and purchasing duties as published in OFPP Policy Letter No. 05-01, Developing and Managing the Acquisition Workforce, April 15, 2005.

[FR Doc. E8-8422 Filed 4-21-08; 8:45 am]

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