

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 12, 32, 47, and 52**

[FAR Case 1999-024]

RIN 9000-AI97

**Federal Acquisition Regulation;
Preference for U.S.-Flag Vessels**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) regarding the applicability of statutory requirements for use of U.S.-flag vessels in the transportation of supplies by sea. The FAR presently waives these requirements for subcontracts for the acquisition of commercial items.

DATES: Interested parties should submit comments in writing on or before January 8, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to: farcase.1999-024@gsa.gov.

Please submit comments only and cite FAR case 1999-024 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Klein, Procurement Analyst, at (202) 501-3775. Please cite FAR case 1999-024.

SUPPLEMENTARY INFORMATION:**A. Background**

10 U.S.C. 2631 and 46 U.S.C. 1241(b) provide a preference for use of U.S.-flag vessels for ocean transportation of supplies purchased under Government contracts. FAR Part 12 presently waives the requirements of 46 U.S.C. 1241(b) for subcontracts for the acquisition of commercial items. This rule proposes to

amend FAR Part 12 by adding 10 U.S.C. 2631 to the list of laws inapplicable to subcontracts for the acquisition of commercial items, since civilian agencies may buy supplies for use of military departments. However, this rule modifies FAR Parts 12, 47, and associated clauses, to limit the types of subcontracts for which the waiver of cargo preference statutes is applicable. The rule is intended to ensure compliance with cargo preference statutes if ocean cargoes are clearly destined for Government use, while avoiding disruption of commercial delivery systems.

This rule also deletes the existing Alternate II of the clause, 52.247-64, as unnecessary and replaces it with a new Alternate II. The rule adds two definitions, *i.e.*, "contingency operation" and "humanitarian or peacekeeping operation" to define terms used in the definition of "simplified acquisition threshold", Part 32, Subpart 47.5, and the clause at 52.247-64. These changes are consistent with previously issued guidance from OFPP.

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 Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most entities providing ocean transportation are not small business concerns. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 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.* (FAR case 1999-024), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule will increase the flowdown of FAR clause 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, to certain commercial subcontracts. This information collection requirement is currently approved by the Office of Management and Budget under OMB Control Number

9000-0061, which also covers other transportation related information collection requirements. We anticipate an increase of 9,000 responses per year as a result of this proposed rule, and a corresponding increase of 900 burden hours per year.

Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average .05 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 65,000.

Responses per respondent: 21.

Total annual responses: 1,385,990.

Preparation hours per response: .05 hours.

Total response burden hours: 65,870.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than January 8, 2001 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVR), 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 (MVR), Room 4035, Washington, DC 20405, telephone (202) 208-7312. Please cite OMB Control Number 9000-0061, FAR Case 1999-024, Preference for U.S.-Flag Vessels, in all correspondence.

List of Subjects in 48 CFR Parts 2, 12, 32, 47, and 52

Government procurement.

Dated: November 2, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 12, 32, 47, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 2, 12, 32, 47, and 52 continues to read as follows:

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

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding the definitions “Contingency operation” and “Humanitarian or peacekeeping operation”, and by revising the definition “Simplified acquisition threshold” to read as follows:

2.101 Definitions.

* * * * *

Contingency operation means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under 10 U.S.C. 688, 12301(a), 12302, 12304, 12305, or 12406; chapter 15 of 10 U.S.C.; or any other provision of law during a war or during a national emergency declared by the President or Congress (10 U.S.C. 101(a)(13)).

* * * * *

Humanitarian or peacekeeping operation means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing (10 U.S.C. 2302(8) and 41 U.S.C. 259(d)(2)(B)).

* * * * *

Simplified acquisition threshold means \$100,000, except that in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means \$200,000.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.504 by redesignating paragraphs (a)(1) through (a)(11) as (a)(2) through (a)(12), respectively; by adding a new paragraph (a)(1); and by revising newly designated paragraph (a)(11) to read as follows:

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) * * *

(1) 10 U.S.C. 2631, Transportation of Supplies by Sea (except for the types of subcontracts listed at 47.504(d)).

* * * * *

(11) 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see subpart 47.5) (except for the types of subcontracts listed at 47.504(d)).

* * * * *

PART 32—CONTRACT FINANCING

32.1103 [Amended]

4. Amend section 32.1103 in paragraph (e) by removing “10 U.S.C. 101(a)(13)” and adding “2.101” in its place.

PART 47—TRANSPORTATION

5. Amend section 47.504 by revising paragraph (d) to read as follows:

47.504 Exceptions.

* * * * *

(d) Subcontracts for the acquisition of commercial items or commercial components (see 12.504(a)(1) and (a)(11)). This exception does not apply to—

(1) Grants-in-aid shipments, such as agricultural and food-aid shipments;

(2) Shipments covered under 46 App. U.S.C. 1241–1, such as those generated by Export-Import Bank loans or guarantees;

(3) Subcontracts under—
(i) Government contracts or agreements for ocean transportation services; or

(ii) Construction contracts; or
(4) Shipments of commercial items that are—

(i) Items the contractor is reselling or distributing to the Government without adding value (see FAR 12.501(b)). Generally, the contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment; or

(ii) Shipped in direct support of U.S. military—
(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic

Treaty Organization humanitarian or peacekeeping operations.

6. Revise section 47.507 to read as follows:

47.507 Contract clauses.

(a)(1) Insert the clause at 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a)(3), 47.503(a), and 47.504.)

(2) If an applicable statute requires, or if it has been determined under agency procedures, that the supplies to be furnished under the contract must be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.502(a)(1) and 47.503(b)), use the clause with its Alternate I.

(3) Except for contracts or agreements for ocean transportation services or construction contracts, use the clause with its Alternate II if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military—

(i) Contingency operations;

(ii) Exercises; or

(iii) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(b) The contracting officer may insert in solicitations and contracts, under agency procedures, additional appropriate clauses concerning the vessels to be used.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 52.212–5 by revising the date of the clause, the introductory text of paragraph (e), and paragraph (e)(4) to read as follows:

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

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Date)

* * * * *

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c), and (d) of this clause, the Contractor is not required to include any FAR clause, other than those listed below (and as may be required by addenda to this paragraph to establish the reasonableness of prices under part 15), in a subcontract for commercial items or commercial components—

* * * * *

(4) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241 and 10 U.S.C. 2631). (Flowdown

required in accordance with paragraph (d) of the clause in the contract entitled "Preference for Privately Owned U.S.-Flag Commercial Vessels" (FAR 52.247-64); and
* * * * *
(End of clause)

8. Amend section 52.244-6 by revising the date of the clause and paragraph (c)(4) to read as follows:

52.244-6 Subcontracts for Commercial Items and Commercial Components.

* * * * *
Subcontracts for Commercial Items and Commercial Components (Date)

* * * * *
(c) * * *
(4) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241 and 10 U.S.C. 2631). (Flowdown required in accordance with paragraph (d) of the clause in this contract entitled "Preference for Privately Owned U.S.-Flag Commercial Vessels" (FAR 52.247-64).)
* * * * *
(End of clause)

9. Amend section 52.247-64 by—
a. Revising the date of the clause;
b. Removing "The" from the beginning of the introductory text of paragraph (a) and adding "Except as provided in paragraph (e) of this clause, the" in its place;
c. Removing the period at the end of paragraph (d) and adding ", except those described in paragraph (e)(4)." in its place;
d. Removing "and" at the end of paragraph (e)(2);
e. Removing the period at the end of paragraph (e)(3) and adding "; and" in its place;
f. Adding paragraph (e)(4); and
g. Revising Alternates I and II to read as follows:

52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels.

* * * * *
Preference for Privately Owned U.S.-Flag Commercial Vessels (Date)

- * * * * *
(e) * * *
(4) Subcontracts or purchase orders for the acquisition of commercial items unless—
(i) This contract is—
(A) A contract or agreement for ocean transportation services; or
(B) A construction contract; or
(ii) The supplies being transported are—
(A) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or
(B) Shipped in direct support of U.S. military—
(1) Contingency operations;
(2) Exercises; or
(3) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.
* * * * *

Alternate I (Date). As prescribed in 47.507(a)(2), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:
(a) Except as provided in paragraphs (b) and (e) of this clause, the Contractor shall use privately owned U.S.-flag commercial vessels, and no others, in the ocean transportation of any supplies to be furnished under this contract.
(b) If such vessels are not available for timely shipment at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels, the Contractor shall notify the Contracting Officer and request (1) authorization to ship in foreign-flag vessels, or (2) designation of available U.S.-flag vessels. If the Contractor is authorized in writing by the Contracting Officer to ship the supplies in foreign-flag vessels, the contract

price shall be equitably adjusted to reflect the difference in costs of shipping the supplies in privately owned U.S.-flag commercial vessels and in foreign-flag vessels.

Alternate II (Date). As prescribed in 47.507(a)(3), substitute the following paragraph (e) for paragraph (e) of the basic clause:
(e) The requirement in paragraph (a) does not apply to—
(1) Cargoes carried in vessels of the Panama Canal Commission or as required or authorized by law or treaty;
(2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353);
(3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels; and
(4) Subcontracts or purchase orders under this contract for the acquisition of commercial items unless the supplies being transported are—
(i) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or
(ii) Shipments in direct support of U.S. military—
(A) Contingency operations;
(B) Exercises; or
(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations. (Note: This contract requires shipment of commercial items in direct support of U.S. military contingency operations, exercises, or forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.)
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