

information technology services, unless—

1. The contracting officer first determines that the needs of the agency cannot be met without such requirement; or
2. The needs of the agency require the use of a type of contract other than a performance-based contract.

Public comments were received from two sources. The comments were considered in developing the final rule. The interim rule is converted to a final rule without change.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) and it is summarized as follows

This rule amends Part 39 of the Federal Acquisition Regulation to implement Section 813 of the Floyd D. Spence National Defense Authorization Act for fiscal year 2001 (Pub. L. 106-398). The objective of this rule is to revise the FAR to address the use of requirements regarding the experience and education of contractor personnel when acquiring information technology services. The rule prohibits the use of minimum experience or education requirements for contractor personnel in solicitations for the acquisition of information technology services, unless the contracting officer first determines the needs of the agency cannot be met without that requirement; or the needs of the agency require the use of a type of contract other than a performance-based contract.

The rule will apply to all large and small entities that seek award of Federal information service contracts. In fiscal year 2000, we estimated that Federal agencies awarded approximately 14,578 contracts totaling approximately \$3.4 billion to small entities for information technology services. The rule should have a positive economic impact on small businesses because it will make it easier for them to hire employees to work on information technology service contracts, as well as increase their business opportunities in obtaining Federal contracts.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Part 39

Government procurement.

Dated: December 5, 2001.

Al Matera,
Director, Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR part 39, which was published in the **Federal Register** on May 2, 2001 (66 FR 22084), as a final rule without change.

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

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001-02 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001-02 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

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

LIST OF RULES IN FAC 2001-02

Item	Subject	FAR case	Analyst
I	Definitions of "Component" and "End Product"	2000-015	Davis.
II	Energy Efficiency of Supplies and Services	1999-011	Smith.
III	Prompt Payment and the Recovery of Overpayment	1999-023	Olson.
IV *	Javits-Wagner-O'Day Act Subcontract Preference Under Service Contracts.	1999-017	Nelson.
V	Discussion Requirements	1999-022	DeStefano.
VI	Definition of Subcontract in FAR Subpart 15.4	2000-017	Olson.
VII	North American Industry Classification System	2000-604	Cundiff.
VIII	Iceland—Newly Designated Country under Trade Agreements Act	2001-025	Davis.
IX *	Contractor Personnel in the Procurement of Information Technology Services.	2000-609	Nelson.

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.

Federal Acquisition Circular 2001-02 amends the FAR as specified below:

Item I—Definitions of “Component” and “End Product” (FAR Case 2000-015)

This final rule amends the FAR to restore the unique Part 25 definitions of “component” and “end product” for acquisition of supplies. In addition, the Councils have made minor revisions to the definitions of “component” and “cost of components” for acquisition of construction. These definitions are used by offerors to determine whether offered end products or construction material meet the requirements of the Buy American Act and Balance of Payments Program or trade agreements.

Item II—Energy Efficiency of Supplies and Services (FAR Case 1999-011)

This final rule amends the FAR to implement Executive Order 13123, Greening the Government through Efficient Energy Management. The rule—

- Requires contracting officers, when acquiring energy-using products, to buy energy-efficient products if life-cycle cost-effective and available;
- Directs contracting officers to Internet sources for more detailed information on ENERGY STAR and other energy-efficient products; and
- Provides guidance on energy-savings performance contracts (ESPCs), including—
 - An explanation of what they are and when they should be used; and
 - Procedures for the solicitation and award of ESPCs, and the evaluation of unsolicited proposals for ESPCs.

The rule will only affect contracting officers that—

- Acquire energy-using products or services;—Contract for design, construction, renovation, or maintenance of a public building that will include energy-using products; or
- Use an energy-savings performance contract to reduce energy use and cost in an agency’s facilities or operations.

Item III—Prompt Payment and the Recovery of Overpayment (FAR Case 1999-023)

This final rule revises prompt payment policies at FAR Part 32, Contract Financing, and related contract provisions at FAR Part 52. The rule is applicable to—

- Government payment offices and contractors since it revises the information that must be on an invoice for the document to be considered a proper invoice with respect to the prompt payment provisions of the FAR;

- Contracting officers and contractors since it establishes the requirement in the prompt payment clauses for contractors to notify the contracting officer if the contractor becomes aware of an overpayment of an invoice; and

- All Government contracts (including contracts at or below the simplified acquisition threshold) except contracts with payment terms and late payment penalties established by other governmental authority (e.g., tariffs).

Item IV—Javits-Wagner-O’Day Act Subcontract Preference Under Service Contracts (FAR Case 1999-017)

This final rule amends the FAR to add a new preference for award of subcontracts under service contracts to nonprofit workshops designated by the Committee for Purchase From People Who Are Blind or Severely Disabled (Javits-Wagner-O’Day Act (JWOD) (41 U.S.C. 48)). The final rule applies to all service contracts. The rule—

- Requires that contractors that provide services for the Government’s use and subcontract for those services must give preference in awarding subcontracts to nonprofit workshops, if the services are on the Committee for Purchase From People Who Are Blind or Severely Disabled procurement list;

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

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

Item V—Discussion Requirements (FAR Case 1999-022)

The rule amends FAR 15.306(d) to clarify that, although the contracting officer must discuss deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond and is encouraged to discuss other aspects of the offeror’s proposal, the contracting officer is not required to discuss every area where the proposal could be improved. This clarifies the existing policy that any discussions

beyond the minimum elements stated in the FAR are a matter of contracting officer judgment.

Item VI—Definition of Subcontract in FAR Subpart 15.4 (FAR Case 2000-017)

This final rule amends FAR 15.401 to exclude section 15.407-2, Make-or-buy programs, from application of the expanded definition of “subcontract” at FAR 15.401. This rule is a clarification and does not change any policy in Subpart 15.4, Contract Pricing.

Item VII—North American Industry Classification System (FAR Case 2000-604)

This rule finalizes, with minor changes, the interim rule which amended the FAR to convert size standards and other programs in the FAR that were based on the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS). NAICS is a new system that classifies establishments according to how they conduct their economic activity. It is a significant improvement over the SIC system because it more accurately identifies industries. Since October 1, 2000, NAICS is to be used to establish the size standards for acquisitions. In addition, the designated industry groups in FAR 19.1005 have been converted to NAICS and contract actions will be reported using the NAICS code rather than the SIC code.

Item VIII—Iceland—Newly Designated Country Under Trade Agreements Act (FAR Case 2001-025)

This final rule amends the definition of “Designated country” at FAR 25.003, and the clause at 52.225-5, Trade Agreements, and the clause at 52.225-11, Buy American Act—Balance of Payments Program—Construction Materials under Trade Agreements, to add Iceland to the list of designated countries under the Trade Agreements Act (TAA). Contracting officers may now consider offers of end products or construction materials from Iceland in acquisitions subject to the TAA. The current TAA threshold for acquisition of supplies is \$177,000 and for acquisition of construction is \$6,806,000.

In addition, if the TAA applies, Executive Order 13126 of June 12, 1999, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, does not apply to contracts for the acquisition of products from foreign countries that are party to the Agreement on Government Procurement. Therefore, this final rule also adds Iceland to the list of excepted countries of origin at 22.1503(b)(4) and

the associated clause at 52.222-19, Child Labor—Cooperation with Authorities and Remedies.

Item IX—Contractor Personnel in the Procurement of Information Technology Services (FAR Case 2000-609)

This final rule converts the interim rule published in FAC 97-25, in the **Federal Register** at 66 FR 22084, May 2, 2001, to a final rule without change. The

rule added a new section to Subpart 39.1 to implement Section 813 of the Floyd D. Spence National Defense Authorization Act for fiscal year 2001 (Pub. L. 106-398). Section 813 prohibits the use of minimum experience or education requirements for contractor personnel in solicitations for the acquisition of information technology services, unless (1) the contracting officer first determines that the needs of

the agency cannot be met without such requirement; or (2) the needs of the agency require the use of a type of contract other than a performance-based contract.

Dated: December 5, 2001.

Al Matera,

Director, Acquisition Policy Division.

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