



Federal Register

**Friday,
June 18, 2004**

Part II

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

**48 CFR Chapter 1
Federal Acquisition Regulations; Final
Rules**

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Chapter 1

**Federal Acquisition Circular 2001–24;
Introduction**

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

ACTION: Summary presentation of final and interim rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–24. 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.acqnet.gov/far>.

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

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–24 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.acqnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Incentives for Use of Performance-Based Contracting for Services (Interim)	2004–004	Wise.
II	Definitions Clause	2002–013	Parnell.
III	Procurement Lists	2003–013	Nelson.
IV	Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA).	2004–009	Goral.
V	Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs).	1999–603	Nelson.
VI	Designated Countries—New European Communities Member States	2004–008	Davis.
VII	Buy American Act—Nonavailable Articles	2003–007	Davis.
VIII	Application of Cost Principles and Procedures and Accounting for Unallowable Costs.	2002–006	Loeb.
IX	Gains and Losses, Maintenance and Repair Costs, and Material Costs	2002–008	Loeb.
X	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

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

FAC 2001–24 amends the FAR as specified below:

Item I—Incentives for Use of Performance-Based Contracting for Services (Interim) (FAR Case 2004–004)

This interim rule amends the FAR to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 1431 enacts Governmentwide authority to treat performance-based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance-based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance-based terminology and to conform to the language added by Section 1431. Contracting officers will be able to use FAR Part 12, Acquisition of Commercial Items, and Subpart 37.6, Performance-Based Contracting, for non-commercial services and treat these services as commercial services when specific conditions are met. Agencies

will be required to report on performance-based contracts or task orders awarded using this authority.

Item II—Definitions Clause (FAR Case 2002–013)

This final rule revises FAR 2.201 and the clause at 52.202–1 to clarify the applicability of FAR definitions to solicitation provisions and contract clauses. The list of definitions in 52.202–1 is removed and replaced with policy stating that when a solicitation provision or contract clause uses a word or term that is defined in the FAR, the word or term has the meaning given in FAR 2.101 at the time the solicitation was issued. Certain exceptions to this policy are listed in FAR 52.202–1.

Item III—Procurement Lists (FAR Case 2003–013)

This final rule amends the FAR to clarify that the Javits-Wagner O’Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.

Item IV—Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA) (FAR Case 2004–009)

This final rule amends FAR 9.406–2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA) to include both the Attorney General of the United States and the Secretary of Homeland Security.

This rule implements Executive Order 13286 published March 5, 2003, which amended Section 4 of Executive Order 12989 published February 15, 1996.

Debarring officials may now debar a contractor based on a determination by the Secretary of Homeland Security or the Attorney General of the United States.

Item V—Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) (FAR Case 1999–603)

This final rule amends the FAR in order to incorporate policies and procedures for services under Federal Supply Schedules. The rule—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;

- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;
- Adds additional information regarding e-buy, GSA's electronic quote system for the schedules program;
- Clarifies that competition shall not be sought outside the Federal Supply Schedules;
- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value), the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information.
- Adds language stating that the performance period of Blanket Purchase Agreement (BPA) established under the schedules program may cross option periods on the base contracts;
- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review;
- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;
- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders;
- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;
- Reserves the ordering procedures for Mandatory Use Schedules section;
- Clarifies the procedures for termination for cause and convenience; and
- Reorganizes and revises the subpart text for ease of use.

Item VI—Designated Countries—New European Communities Member States (FAR Case 2004–008)

This final rule amends the FAR to implement a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (*i.e.*, the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA). This means that in acquisitions subject to the WTO GPA, the contracting officer can accept offers of eligible products from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia without application of the Buy American Act evaluation factor.

Item VII—Buy American Act—Nonavailable Articles (FAR Case 2003–007)

This final rule amends FAR 25.104(a) to add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

Item VIII—Application of Cost Principles and Procedures and Accounting for Unallowable Costs (FAR Case 2002–006)

This final rule amends the FAR by revising FAR 31.204, Application of principles and procedures, to improve clarity and structure. The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-

price incentive contracts, terminated contracts, or indirect cost rates.

Item IX—Gains and Losses, Maintenance and Repair Costs, and Material Costs (FAR Case 2002–008)

This final rule amends the FAR by deleting the cost principle at FAR 31.205–24, Maintenance and repair costs, because either Cost Accounting Standards (CAS) or Generally Accepted Accounting Practices (GAAP) adequately address these costs. The rule also revises the cost principles at FAR 31.205–7, Contingencies; FAR 31.205–26, Material costs; and FAR 31.205–44, Training and education costs, by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

Item X—Technical Amendments

This amendment makes editorial changes at 8.003(d), 11.102, and 11.202(b), and removes sections 53.301–254 and 53.301–255.

Dated: June 10, 2004.

Ralph J. De Stefano,
Acting Director, Acquisition Policy Division.

Federal Acquisition Circular

Number 2001–224

Federal Acquisition Circular (FAC) 2001–24 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–24 are effective July 19, 2004, except for Items I, IV, VI, and X, which are effective June 18, 2004.

Dated: June 9, 2004.

Deidre A. Lee,
Director, Defense Procurement and Acquisition Policy.

Dated: June 10, 2004.

David A. Drabkin,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: June 8, 2004.

Tom Luedtke,

Assistant Administrator for Procurement,
National Aeronautics and Space
Administration.

[FR Doc. 04-13617 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 12, 37, and 52

[FAC 2001-24; FAR Case 2004-004;
Item I]

RIN 9000-AJ97

Federal Acquisition Regulation; Incentives for Use of Performance- Based Contracting for Services

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 implement sections
1431 and 1433 of the National Defense
Authorization Act for Fiscal Year 2004
(Pub. L. 108-136). Section 1431 enacts
Governmentwide authority to treat
performance-based contracts or task
orders for services as commercial items
if certain conditions are met, and
requires agencies to report on
performance-based contracts or task
orders awarded using this authority.
Section 1433 amends the definition of
commercial item to add specific
performance-based terminology and to
conform to the language added by
section 1431.

DATES: *Effective Date:* June 18, 2004.

Comment Date: Interested parties
should submit comments to the FAR
Secretariat at the address shown below
on or before August 17, 2004, to be
considered in the formulation of a final
rule.

ADDRESSES: Submit printed comments
to General Services Administration,
FAR Secretariat (MVA), 1800 F Street,
NW., Room 4035, ATTN: Laurie Duarte,
Washington, DC 20405. Submit
electronic comments via the Internet to
the U.S. Government's Web site at <http://www.regulations.gov>, or to GSA's e-mailbox at farcase.2004-004@gsa.gov.

Please submit comments only and cite
FAC 2001-24, FAR case 2004-004, in
all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The
FAR Secretariat at (202) 501-4755, for
information pertaining to status or
publication schedules. For clarification
of content, contact Ms. Julia Wise,
Procurement Analyst, at (202) 208-
1168. Please cite FAC 2001-24, FAR
case 2004-004.

SUPPLEMENTARY INFORMATION:

A. Background

Section 1431 of the National Defense
Authorization Act for Fiscal Year 2004
(Pub. L. 108-136) enacts
Governmentwide authority to treat
certain performance-based contracts or
task orders for services as commercial
items if the—

(1) Value of the contract or task order
is estimated not to exceed \$25,000,000;

(2) Contract or task order sets forth
specifically each task to be performed
and, for each task—

a. Defines the task in measurable,
mission-related terms;

b. Identifies the specific end products
or output to be achieved; and

c. Contains firm, fixed prices for
specific tasks to be performed or
outcomes to be achieved; and

(3) Source of the services provides
similar services to the general public
under terms and conditions similar to
those offered to the Federal
Government.

Implementation of section 1431 also
requires agencies to collect and
maintain reliable data sufficient to
identify the contracts or task orders
treated as contracts for commercial
items using the authority of this section.
The data will be collected using the
Federal Procurement Data System-Next
Generation (FPDS-NG). By November
24, 2006, OMB will be required to report
to the Committees on Governmental
Affairs and on Armed Services of the
Senate and the Committees on
Government Reform and on Armed
Services of the House of Representatives
on the implementation of Section 1431.
The report shall include data on the use
of such authority both Governmentwide
and for each department and agency.
The authority of section 1431 expires on
November 24, 2013, ten years after
enactment. Section 1433 also amends
the definition of commercial services to
conform to the language added by
section 1431 by inserting performance-
based terms for clarification. The
implementation of sections 1431 and
1433 will—

• Revise the commercial items
definition in FAR 2.101 and 52.202-1;

• Add a new record requirement for
reporting commercial performance-
based contracts or task orders to FAR
4.601;

• Incorporate the conditions for using
FAR Part 12 for any performance-based
contract or task order for services in
FAR 12.102; and

• Add performance-based terms as
required by section 1433, and

• Add a cross reference to FAR
12.102(g) in FAR 37.601.

The reference to the definition of
performance-based contracting in the
proposed language is a change from the
statutory requirement. Section 1431
provides for a contract or task order to
be treated as a contract for commercial
items if: "The contract or task order sets
forth specifically each task to be
performed and for each task—defines
the task in measurable, mission-related
terms; identifies the specific end
products or output to be achieved; and
contains firm, fixed prices for specific
tasks to be performed or outcomes to be
achieved." However, the two
requirements of law regarding how
tasks, products, or outputs are described
are being implemented by requiring
contracts or task orders to meet the
definition of performance-based
contracting at FAR 2.101. This language
and that at 12.102 paragraphs (g)(1)(iv)
and (v) and in (g)(2) are to ensure
consistency with the overarching policy
in FAR 37.601 that applies to
performance-based contracting for
services.

Section 1431 recommends that the
Federal Procurement Data System
(FPDS) or other reporting mechanism
collect this data. The FPDS is the only
Governmentwide system that can
potentially collect this data. This system
currently tracks performance-based
contracts and task orders awarded. A
petition was made to the FPDS-NG
Change Control Board to incorporate a
change to report data on services treated
as commercial items under the
conditions stated in section 1431 when
using performance-based contracting
techniques.

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 changes may 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 we
have changed procedures for award and