

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2001–26; Introduction**

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

**ACTION:** Summary presentation of final rules and a technical amendment.

**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) 2001–26. 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 2001–26 and specific FAR case number(s). Interested parties may also visit our website at <http://www.acqnet.gov/far>.

Item	Subject	FAR case	Analyst
I .....	Electronic Representations and Certifications .....	2002–024	Zaffos.
II .....	Excluded Parties List System Enhancement .....	2002–023	Goral.
III .....	Special Emergency Procurement Authority .....	2003–022	Zaffos.
IV .....	Notification of Employee Rights Concerning Payment of Union Dues or Fees (Interim) .....	2004–010	Goral.
V .....	Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements .....	2003–010	Cundiff.
VI .....	Applicability of the Cost Principles and Penalties for Unallowable Costs .....	2001–018	Loeb.
VII .....	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 2001–26 amends the FAR as specified below:

**Item I—Electronic Representations and Certifications (FAR Case 2002–024)**

This final rule requires offerors to provide representations and certifications electronically via the BPN website; to update the representations and certifications as necessary, but at least annually, to keep them current, accurate and complete; and to make changes that affect only one solicitation by completing the appropriate sections of either paragraph (j) of FAR provision 52.212–3 or FAR provision 52.204–8, whichever is included in the solicitation. This change represents a conversion of a paper-based process to a more efficient electronic process to obtain offerors’ representations and certifications. It will also significantly reduce the paperwork burden for both offerors and contracting officers.

**Item II—Excluded Parties List System Enhancement (FAR Case 2002–023)**

This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA’s new searchable on-line electronic list of parties excluded from doing business with the Federal Government. The EPLS enables agencies to directly input data into this

system and obviates the need for the hard copy List of Parties Excluded from Federal Procurement and Nonprocurement Programs. The EPLS will provide more up-to-date and readily accessible information to the contracting officer on parties excluded from doing business with the Federal Government.

**Item III—Special Emergency Procurement Authority (FAR Case 2003–022)**

This rule finalizes the interim rule 2003–022 by including under FAR subpart 13.5 the acquisition of supplies and services that meet the definition of a commercial item in FAR 2.101, and which, as determined by the head of the agency, are to be used to support a contingency operation. This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and also incorporates the higher thresholds authorized by Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. This rule allows the contracting officer expanded use of Simplified Acquisition and Commercial Items procedures when acquiring supplies or services that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack.

**Item IV—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004–010) (Interim)**

This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

**Item V—Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements (FAR Case 2003–010)**

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of the Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies and to make some minor changes for clarification. This change is being made in order for DoD to streamline and

transform itself to more effectively achieve its mission.

**Item VI—Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001–018)**

This final rule increases the threshold at FAR 42.709(b) and FAR 42.709–6 from \$500,000 to \$550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement. The threshold was increased to reflect inflation and is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(l).

The rule is of importance to contracting officers and contractors who negotiate contracts and modifications, and determine costs in accordance with FAR Part 31 contract cost principles.

**Item VII—Technical Amendments**

Editorial changes are made at FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1), and in the introductory text of FAR provision 52.219–1 in order to update references.

Dated: December 9, 2004.

**Laura Auletta,**

*Director, Contract Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001–26 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 2001–26 is effective December 20, 2004, except for Item I, which is effective January 1, 2005, and Items II, III, V, and VI, which are effective January 19, 2005.

Dated: December 6, 2004.

**Deidre A. Lee,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: December 8, 2004.

**David A. Drabkin,**

*Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.*

Dated: December 2, 2004.

**Tom Luedtke,**

*Deputy Chief Acquisition Officer, National Aeronautics and Space Administration.*  
[FR Doc. 04–27632 Filed 12–17–04; 8:45 am]

**BILLING CODE 6820–EP–S**

**DEPARTMENT OF DEFENSE**

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**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 4, 14, 15, and 52**

**[FAC 2001–26; FAR Case 2002–024; Item I]**

**RIN 9000–AJ80**

**Federal Acquisition Regulation; Electronic Representations and Certifications**

**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 require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply.

**DATES:** *Effective Date:* January 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 501–6091. Please cite FAC 2001–26, FAR case 2002–024.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 4012, January 27, 2004. The 60-day comment period for the proposed rule ended March 29, 2004. Forty-five comments were received. Some of the comments merely agreed with the concept of ORCA; others pointed out typographical errors. The substantive comments are discussed below.

1. *Comment:* Should a contracting officer check for paper reps and certs and, failing to find them, check for electronic ones? Or, should a contracting officer only check for electronic ones if the offeror falls within a particular class of small business?

*Council's response:* The inclusion of the FAR provisions at 52.204–8 or 52.212–3(j) (as described in the final rule) in a solicitation would alert both the vendor and the contracting officer that the electronic completion of

representations and certifications on the Online Representations and Certifications Application (ORCA) module is required for the specific contracting action.

2. *Comment:* Without reps and certs, how would a Contracting Officer know what class of small business an offeror is?

*Council's response:* ORCA includes the socio-economic representations and certifications (such as FAR 52.219–1, Small Business Program Representations.) A vendor would revise its responses in either FAR 52.204–8 or 52.212–3(j) (as described in the final rule) if its responses in ORCA is incorrect for the present solicitation.

3. *Comment:* The possibility of parallel paper and electronic systems offers myriad chances for error. What if paper and electronic versions differ? What if an offeror from the class of small businesses not required to build an electronic record chooses to build an electronic record? What if someone required to build an electronic record submits paper reps and certs instead?

*Council's response:* The provisions at FAR 52.204–8 and 52.212–3(j) make it clear that vendors are required to complete the representations and certifications in ORCA. Those certifications and representations would take precedence over any other representations and certifications received (for the same provisions included in ORCA) for the specific contract action unless the offeror indicates he is amending those answers in accordance with the referenced provisions.

4. *Comment:* Since contractors are currently using the CCR database, the EEO database, PRO-Net, and EPLS (consolidated under “BPN.com”), will there be a future consideration for a contractor to have access and use the contractor's reps and certs rather than have the contractor continuing to request a new reps and certs package for the same sources that are on the “BPN” reps and certs database?

*Council's response:* Vendors will have access to ORCA. Please also note that the PRO-Net system has been retired, with its key capabilities being incorporated into CCR.

5. *Comment:* An additional clarification at FAR 12.301 is needed for oral solicitations. FAR 13.106–1(c) states the contracting officer shall solicit quotations orally to the maximum extent practicable. FAR 5.101(a)(2)(ii) exempts contracting officers from posting \$10K–\$25K requirements if oral solicitations are used. Otherwise, the requirement has to be posted for 10 days - a millennium in the customer's