

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 1, 2, 4, 12, and 52**

[FAC 2005–30; 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 (FPDS)****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 adopted as final, with one minor change, the interim rule amending the Federal Acquisition Regulation (FAR) to revise the process for reporting contract actions to the Federal Procurement Data System (FPDS). This final rule revises the definition of indefinite delivery vehicle at FAR 4.601.

**DATES:** *Effective Date:* February 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2004–038.

**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.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 73 FR 21773, on April 22, 2008. The interim rule established the Government's 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 public comment period closed on June 23, 2008. Four respondents submitted comments on the interim rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided below:

1. One respondent commented that FAR 4.602(a) through (c) contains little value for a reader consulting the FAR for guidance on what to do and when or how to do it. The respondent recommends deleting 4.602 and renumbering remaining paragraphs.

*Response:* The Councils disagree with the comment. FAR section 4.602 was added to provide general information about contract reporting. The section identifies FPDS as the Government's web-based tool for reporting contract actions. In addition, it provides a list of the many uses of the data provided by FPDS and cites the FPDS web site. The Councils consider this type of information to be very useful for the acquisition community and indicates the degree of importance placed on reporting contract actions. Language regarding procedures and reporting actions (what to do and when or how to do it) may be found at FAR 4.605 and 4.606. Therefore, FAR 4.602 remains unchanged.

2. One respondent commented that FAR 4.603(a) seemed to be needless and out of place. FPDS preceded Federal Funding and Transparency Act of 2006 (FFATA) by many years and does not meet the public access requirements articulated in FFATA. The respondent recommends deleting this section and renumbering remaining subparagraphs.

*Response:* The Councils disagree with the comment. FAR 4.603(a) is a Federal contract policy statement indicating that the FFATA requires that all Federal award data must be publicly accessible. FPDS data is made accessible to the public, satisfying the certain basic requirements of FFATA. Therefore, this paragraph remains unchanged.

3. One respondent stated that FAR 4.601 defines indefinite delivery vehicle (IDV). Since IDV is more encompassing than an indefinite delivery contract (IDC), the respondent recommends finding another word for "vehicle" or changing the definition to read "indefinite delivery vehicle (IDV) means an indefinite delivery contract or agreement that has one or more..."

*Response:* The Councils agree that the definition should be clarified. As indicated at FAR 4.606(a)(ii), examples

of IDVs, for the purposes of the FPDS, include task and delivery order contracts (including Governmentwide acquisition contracts and multi-agency contracts), GSA Federal supply schedules, Blanket Purchase Agreements, Basic Ordering Agreements, or any other agreement or contract against which individual orders or purchases may be placed. Accordingly, the Councils revised the definition of "indefinite delivery vehicle (IDV)" at FAR 4.601 to include the words "or agreement."

4. One respondent recommends that references to generic DUNS be removed from FAR 4.605(b)(1) and (2). To prevent generic DUNS abuse, the FPDS Change Control Board voted to not post generic DUNS on the FPDS website. Each Agency would be responsible for communicating what generic DUNS, if any, should be used.

*Response:* The Councils disagree with the comment. The Councils understand agencies responsibilities associated with deciding which generic DUNS number to use, however, a DUNS number is required to complete a contract action report in FPDS. FAR procedures at 4.605(b) permit the use of generic DUNS numbers and do not interfere with agency responsibilities, as agreed to by the FPDS Change Control Board. A generic DUNS number may be used under the circumstances referenced at FAR 4.605(b)(1). FAR procedures at 4.605(b) remain unchanged.

5. One respondent submitted a comment in reference to FAR Case 2005–040, Electronic Subcontracting Reporting System (eSRS).

*Response:* This comment is not relevant to FAR Case 2004–038 and was referred to the FAR Small Business Team for disposition.

6. One respondent submitted a comment in reference to the **Federal Register** notice, Background, paragraph 5, stating that reporting only the appropriated portions of contract actions would be extremely impractical and result in data mismatches between automated contracting writing systems and FPDS. The respondent indicated that they have many actions that have mixed funding and it would be difficult for contracting staff to identify whether funding was appropriated or non-appropriated. In order to comply with the rule, data would have to be manually entered into FPDS.

*Response:* The Councils disagree with the comment. FAR 4.606(b)(2) states that agencies may submit actions for any non-appropriated fund (NAF) or NAF portion of a contract action using a mix of appropriated and non-appropriated funding, after contacting the FPDS

Program Office. It should be noted that reporting non-appropriated funds may impact certain reports generated using FPDS data regarding appropriated funds. FAR language remains unchanged.

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.*, because contract reporting is not accomplished by the vendor community, only by Government contracting entities.

### 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 1, 2, 4, 12, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 1, 2, 4, 12, and 52, which was published in the **Federal Register** at 73 FR 21773, April 22, 2008, as a final rule with the following change:

### PART 4—ADMINISTRATIVE MATTERS

■ 1. The authority citation for 48 CFR part 4 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).

#### 4.601 [Amended]

■ 2. Amend section 4.601 by removing from the introductory paragraph of the definition “Indefinite delivery vehicle (IDV)” the word “contract” and adding “contract or agreement” in its place.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 3, 12, 23, 25, and 52

[FAC 2005-30; FAR Case 2000-305; Item II; Docket 2009-0001; Sequence 1]

RIN 9000-AJ55

#### Federal Acquisition Regulation; FAR Case 2000-305, Commercially Available Off-the-Shelf (COTS) Items

**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 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

**DATES:** *Effective Date:* February 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Jackson, Procurement Analyst, at (202) 208-4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-30, FAR case 2000-305.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 35 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 431) requires that the Federal Acquisition Regulation (FAR) include a list of provisions of law that are inapplicable to contracts for the acquisition of commercially available off-the-shelf (COTS) items. Certain laws cannot be exempt from the acquisition of COTS and they include laws that—

- Provide for criminal or civil penalties;
- Specifically refer to 41 U.S.C. 431 and the laws state that it applies to COTS;
- Provide for a bid protest procedure or small business preference listed at 41 U.S.C. 431(a)(3); or
- Are applicable because the Administrator of OFPP makes a written

determination that it would not be in the best interest of the United States to exempt such COTS contracts from the applicability of the laws.

In order to implement section 4203 of the Clinger-Cohen Act of 1996, DoD, GSA, and NASA published an advanced notice of proposed rule (ANPR) in the **Federal Register** at 68 FR 4874, January 30, 2003. The ANPR listed provisions that may be inapplicable to the acquisition of COTS items, and requested public comment. (A prior ANPR had been issued under FAR Case 96-308.) The Councils published a proposed rule at 69 FR 2448, January 15, 2004. The comment period closed on March 15, 2004. The Councils received comments from 56 respondents, of which 3 were duplicates. The comments were thoroughly examined by the FAR Acquisition Law Team, Civilian Agency Acquisition Council (CAAC), and Defense Acquisition Regulations Council (DARC).

##### B. Definition of COTS.

The Councils received several comments on the definition of COTS.

**1. Include services/IT in the definition.** One respondent suggested that the definition of COTS item should delete the words “of supply” from the definition. The respondent states that this is not part of the statutory definition. Further, three respondents commented that definition of COTS should specifically include services. Another respondent suggested additional language in the definition of COTS to address software and other information technology products.

**Response:** The statute defines “COTS item” as an item that “Is a commercial item as described in section 4(12)(A).” “Commercial item” is defined at 41 U.S.C. 403(12). Paragraph (A) of that definition reads as follows:

“Any item, other than real property, that is of a type customarily used by the general public or by non-governmental purposes, and that—

- (i) Has been sold, leased, or licensed to the general public; or
- (ii) Has been offered for sale, lease or license to the general public.”

Paragraphs (F) and (G) of the definition deal with commercial services. These paragraphs were not referenced in the statutory definition of a COTS item. Services are therefore necessarily excluded from the definition. To make the definition clearer, the reference to the definition of commercial item has been revised to point to the first paragraph of the definition of commercial item.

The Councils have clarified that the words “of supply” include