

compliance at the start of contract performance.

**Item IV—Least Developed Countries that are Designated Countries (FAR Case 2008–021)**

This final rule amends the Federal Acquisition Regulation (FAR) to revise the definition of designated country, adding Liberia and removing Cape Verde. Least Developed Countries form a subset of designated countries. The list of Least Developed Countries is derived from a United Nations list of Least Developed Countries. The United States Trade Representative has updated the list of Least Developed Countries that are treated as designated countries. In acquisitions that are covered by the World Trade Organization Government Procurement Agreement, contracting officers must acquire only U.S.-made or designated country end products, or U.S. or designated-country services, unless offers of such end products or services are not received or are insufficient to fulfill the requirement (FAR 25.403(c)).

**Item V—Federal Food Donation Act of 2008 (Pub. L. 110–247) (FAR Case 2008–017) (Interim)**

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 26, 31, and 52 to encourage executive agencies and their contractors to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States. This change implements the Federal Food Donation Act of 2008 (Pub. L. 110–247) which encourages executive agencies and their contractors, in contracts for the provision, service, or sale of food to encourage the contractors, to the maximum extent practicable and safe, to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States. The rule is effective for all solicitations and contracts greater than \$25,000 for the provision, service, or sale of food in the United States issued on or after the effective date of the rule.

**Item VI—Technical Amendments**

Editorial changes are made at FAR 3.503–2, 47.103–1, and 52.225–11.

Dated: March 13, 2009

**Al Matera,**

*Director, Office of Acquisition Policy.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-31 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 2005-31 is effective March 19, 2009, except for Items I and III, which are effective April 20, 2009.

Dated: March 12, 2009.

**Amy G. Williams,**

*Acting Deputy Director, Defense Procurement and Acquisition Policy (Defense Acquisition Regulations System).*

Dated: March 11, 2009.

**Rodney P. Lantier,**

*Acting Senior Procurement Executive & Acting Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, U.S. General Services Administration.*

Dated: March 11, 2009.

**William P. McNally,**

*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*

[FR Doc. E9–5874 Filed 3–18–09; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 4, 17, 19, and 52**

**[FAC 2005–31; FAR Case 2006–032; Item I; Docket 2007–0002; Sequence 11]**

**RIN 9000–AK78**

**Federal Acquisition Regulation; FAR Case 2006–032, Small Business Size Rerepresentation**

**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 the Small Business Administration's (SBA) final rule published on November 15, 2006 (71 FR 66434) entitled, Small Business Size Regulations; Size for Purposes of Governmentwide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status

Determinations. The purpose of the SBA rule is to improve the accuracy of small business size status reporting over the life of certain contracts.

**DATES:** *Effective Date:* April 20, 2009.

*Applicability date:* This rule applies to solicitations issued and contracts awarded on or after April 20, 2009. All long-term contracts as defined in this rule, awarded to small business concerns prior to June 30, 2007, that have not yet been modified to include FAR 52.219–28, must be modified to include FAR 52.219–28 within 90 days after the effective date of this final rule.

**FOR FURTHER INFORMATION CONTACT:** Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–31, FAR case 2006–032.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 72 FR 36852 on July 5, 2007, to implement the Small Business Administration's (SBA) final rule published on November 15, 2006 (71 FR 66434) entitled, Small Business Size Regulations; Size for Purposes of Governmentwide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations.

Four commenters submitted comments on the interim rule. The comments recommend substantive changes to the rule, request clarification, and recommend editorial changes to the language for clarity and consistency. A discussion of these comments and the changes made to the rule as a result of them is provided below:

*Comment:* One commenter states that the interim rule is ineffective at preventing ongoing misrepresentation and miscoding on individual contracts because it does not impose a time limit on when existing contracts have to be modified in order to incorporate the small business rerepresentation requirements. This time period could easily be several years, until the time that the base period runs out and the agency must face the choice to exercise options. The commenter recommends that the rule be modified to impose a reasonable period of 30–90 days requiring all contracts to be modified for inclusion of the rerepresentation requirements, and further provide that these requirements will be included by

operation of law regardless of whether the contracts were modified.

*Response:* The interim rule was effective on June 30, 2007. The Councils' expectation was that the process of modifying long-term contracts awarded to small businesses prior to June 30, 2007, to include the FAR clause at 52.219-28, Post-Award Small Business Program Rerepresentation, would begin immediately and would be completed within a reasonable period of time. It was also expected that other contracts awarded prior to June 30, 2007, to small businesses, would be modified to include the clause at the time an option is exercised. To make the Councils' expectation more clear, the preamble to this **Federal Register** notice states that all long-term contracts awarded to small businesses prior to June 30, 2007, that have not yet been modified to include FAR 52.219-28, must be modified within 90 days after the effective date of this final rule.

The Councils do not concur with the recommendation to add language to the final rule stating that the rerepresentation requirements will be included by operation of law regardless of whether the contracts were modified. This is a matter to be determined by the courts and not addressed by the Councils.

*Comment:* One commenter states that the interim rule does not make it clear that companies that have been acquired by large businesses must recertify their small business status (or lack thereof) within 30 days as well as in connection with individual task orders.

*Response:* The Councils believe the interim rule is clear and changes are not necessary. Contractors are required to complete rerepresentation of their size status at the prime contract level in accordance with FAR 19.301-2 and 52.219-28 within 30 days after execution of a novation agreement, or within 30 days after a merger or acquisition that does not require a novation agreement. Further, as set forth at FAR 19.301-2(d) of the final rule, after a contractor rerepresents it is other than small, and the contracting officer modifies the contract to reflect the rerepresentation, the agency no longer includes the value of options exercised, modifications issued, orders issued, or purchases made under blanket purchase agreements on that contract in its small business prime contracting goal achievements.

*Comment:* One commenter recommends that the interim rule be modified to clearly require certification by merged or acquired firms for purposes of bidding on task orders.

*Response:* The Councils do not concur. The purpose of the rule is to improve the accuracy of size status reporting over the life of certain contracts. Under this FAR rule, a rerepresentation at the contract level that the contractor is no longer small, results in the task orders being reported as awarded to a concern that is not small. FAR clause 52.219-28 requires that contractors rerepresent size status by updating their representations and certifications at the prime contract level in the Online Representations and Certifications Application (ORCA). The contractor must notify the contracting office that it has made the required rerepresentation. In accordance with FAR 19.301-2(d) of the final rule, after a contractor rerepresents it is other than small, and the contracting officer modifies the contract to reflect the rerepresentation, the agency no longer includes the value of options exercised, modifications issued, orders issued, or purchases made under blanket purchase agreements on that contract in its small business prime contracting goal achievements.

The Councils do not agree that rerepresentation for purposes of competing for task orders should be required. This FAR rule at paragraph 19.301-2(e), and the SBA regulation that it implements, state that a change in size status does not change the terms and conditions of the contract.

*Comment:* One commenter states the purpose of the interim rule is to improve the accuracy of size status representations in the Central Contractor Registration (CCR) and the Online Representations and Certifications Applications (ORCA) databases. The rule does not do this because it does not require contractors to recertify their status in these databases unless and until directed to by individual contracting officers. The integrity of these databases and future competitions is then at the mercy of individual contracting officers and their agencies who may have a vested interest in doing business with a large business under a contract vehicle with a small business.

*Response:* As stated in the interim rule, the primary purpose of this rule is to improve the accuracy of size status reporting over the life of certain contracts. This is done by revising the size status in the reporting database, Federal Procurement Data System (FPDS). Size status is revised in FPDS for actions under a particular contract from the point when the contracting officer modifies the contract to reflect the rerepresentation, forward. Although the rule does improve the accuracy of

CCR and ORCA by keeping the information more current for future competitions, that is not its primary purpose. Further, the accuracy of the data in these Government-wide databases is not dependent on the actions of an individual contracting officer.

The FAR already requires contractors to update the information in CCR at least annually to ensure that it is current, accurate and complete. This rule adds a requirement for contractors to additionally update the information in CCR and ORCA when any of the events requiring rerepresentation occur. This means that the contractor may now be updating the information more often than annually. Neither the annual nor the rerepresentation update is dependent on an individual contracting officer directing it.

When a contractor is submitting a bid or proposal in response to a solicitation, the contractor is required by a FAR provision in the solicitation to verify that the representations and certifications in ORCA, including those related to the size standard applicable to the solicitation, have been updated within the last 12 months, are current, accurate, and complete. Therefore, there is already a requirement in the FAR for representations to be accurate, complete and current for future competitions. This rule adds a requirement for ORCA also to be updated when any of the events requiring rerepresentation occur. These requirements are in standard FAR provisions and clauses and are not dependent on individual contracting officer direction.

*Comment:* One commenter states that the interim rule does not utilize the authorities in SBA regulations, 13 CFR 121.1001, which give SBA Government Contracting Area Directors and the Head of the SBA Office of Government Contracting in Washington, DC the authority to initiate size determinations for the purpose of cleaning up government-wide databases. The commenter recommends that the interim rule be modified to provide for notice and dual reporting to the SBA Area Directors and/or the Office of Government Contracting on any recertification requests.

*Response:* The Councils have not adopted this recommendation since the SBA final rule published on November 15, 2006 did not amend 13 CFR 121.1001(b)(9). The rerepresentation rule does not affect SBA's authority to initiate a formal size determination for purposes of validating firms listed in the Central Contractor Registration.

*Comment:* One commenter states that the interim rule is ineffective at

applying the anti-misrepresentation provisions of the Small Business Act. The Small Business Act contains procedures for debarring companies that misrepresent their size status. Recommend contracting officers refer companies representing themselves as small businesses to the SBA to determine size status and possible misrepresentation. Additionally, the interim rule should permit referral to agency suspension and debarment officials.

*Response:* The Councils do not concur. The FAR already addresses the remedies for misrepresentation of size status. FAR 19.301-1(b) states, "The contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a small business unless (1) another offeror or interested party challenges the concern's small business representation, or (2) the contracting officer has a reason to question the representation." The interim rule provided at FAR 19.302(c)(1) that a protest concerning a specific rerepresentation shall be referred to the SBA. Nothing in this FAR rule precludes agencies from taking actions that are otherwise justified and permitted under the FAR.

*Comment:* One commenter states that the purpose of the interim rule is to promote consistency with the SBA Recertification Regulations. However, these regulations are in conflict. Federal agencies will follow the FAR only without any additional guidance. The commenter recommends that the interim rule be modified to specifically direct Contracting Officers to follow the SBA Recertification Regulations.

*Response:* The Councils do not agree. The stated purpose of the interim rule is to improve the accuracy of small business size status reporting, at the prime contract level, over the life of certain contracts. Contracting officers under the Executive Branch are required to follow the FAR. In cases where there are inconsistencies between Title 13 (SBA regulations) and Title 48 (FAR) of the Code of Federal Regulations, contracting officers follow the FAR.

*Comment:* One commenter states that the interim rule fails to utilize existing authorities concerning non-responsibility, fraud and misrepresentation in Government contracting. The interim rule does not address penalties when there is a small business size and status misrepresentation. As a result, the interim rule sends a message that misconduct in small business programs is acceptable.

*Response:* The Councils do not agree that the interim rule sends a message

that misconduct in small business programs is acceptable. The same penalties that are currently available when a misrepresentation has occurred for initial award of a contract apply when a firm rerepresents its size status. The contractor is required to provide its rerepresentation in the Online Representations and Certifications Application (ORCA). ORCA alerts the contractor that it may be subject to penalties if information submitted in ORCA is not "current, accurate and complete." As part of the signatory process in ORCA, the contractor is notified that, "By submitting the representations and certifications in ORCA, you are attesting to the accuracy of the information and may be subject to penalties for misrepresentations."

*Comment:* One commenter recommends amending the last sentence of FAR 19.301-2, paragraph (a), to read: "or as authorized under another appropriate authority."

*Response:* The Councils do not concur. The Councils believe that the language, as written, is sufficient and the recommended change could be read as changing the meaning. The intent is that whatever authority is used the period of performance will not be extended by more than six months.

*Comment:* One commenter stated that FPDS-NG needs to allow an effective date for a change to be entered, regardless of the modification date.

*Response:* FAR 19.301-2(d) has been revised to state that agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation. The modification date is the effective date for changing status in FPDS.

*Comment:* One commenter stated that the requirements are unclear for existing contracts. This commenter asked, under the rule, is a contracting officer required to modify a contract awarded to a small business that is other than long-term if the contract does not include an option to exercise?

*Response:* No. There are two instances when the contracting officer is required to modify contracts awarded to small business concerns prior to June 30, 2007, to include the FAR clause at 52.219-28: 1) when the contract is a long-term contract; and 2) when the contract is not a long-term contract but the contract is being modified to exercise any option as defined in FAR 2.101. If a contract that is not a long-term contract does not include any options that have not yet been exercised, then the contract would not be modified.

*Comment:* One commenter asked with regard to FAR 19.301-2(b)(1) and (2): Do the words "within 30 days after execution of a novation agreement" and "within 30 days of a merger or acquisition" assume that FAR clause 52.219-28 is already in the contract? The language here can be interpreted two different ways. One scenario is that the small business must rerepresent upon three different sets of circumstances, (1) after execution of a novation agreement, (2) after merger or acquisition, or (3) after the FAR clause 52.219-28 is added to the contract. In this scenario, if the clause is not already in the contract, how would a small business rerepresent after execution of a novation agreement or a merger/acquisition? The second scenario assumes that the clause is already in the contract and upon execution of a novation agreement or after a merger/acquisition, the small business rerepresents itself.

*Response:* This rule addresses two circumstances with the same end result: 1) contracts awarded on or after June 30, 2007, where the clause is in the contract at time of award; and 2) contracts awarded prior to June 30, 2007, where the clause is incorporated into the contract through a contract modification. In the first circumstance, the contractor must rerepresent its size status within 30 days after an acquisition or merger, or within 30 days after execution of a novation agreement. In the second circumstance, the contractor must rerepresent its size status within 30 days of the contract being modified to incorporate FAR clause 52.219-28, if a novation agreement was executed, or a merger or acquisition occurred, prior to inclusion of the clause in the contract. In either case, the clause would be in the contract before the contractor is required to rerepresent its size status.

*Comment:* One commenter states that the rule appears to be focused on (1) size classification issues; (2) statistical reporting; and (3) unrestricted single-award contract scenarios. The commenter asked, how does a contracting officer treat a former small business acquired by a large business on a small business set-aside multiple-award indefinite-delivery indefinite-quantity contract?

*Response:* The purpose of the rule is to improve the accuracy of small business size status reporting, at the prime contract level, over the life of certain contracts. As set forth at FAR 19.301-2(e), a change in size status does not change the terms and conditions of the contract. How a contracting officer treats a concern that has rerepresented

that it is no longer a small business will depend on the terms and conditions of the contract and will be case specific.

*Comment:* One commenter recommends changing “the conditions” to “any of the conditions” at FAR 4.1201(b)(2), 19.202–5(c), and 19.301–3(a).

*Response:* The Councils concur that revising FAR 4.1201(b)(2) to read “any of the conditions” would be more clear and have made this change to the rule. However, the Councils do not agree that a change at FAR 19.202–5(c) or 19.301–3(a) is necessary because clause 52.219–28, which is referenced at 19.202–5(c) and 19.301(b), already states “upon the occurrence of *any* [emphasis added] of the following.” FAR 19.301–3(a) refers to 19.301(b).

*Comment:* One commenter recommends changing “consider” to “take into account” in FAR 17.207(e)(2).

*Response:* Non-Concur. The term “consider” is used and understood throughout the FAR. Making the recommended change would not add clarity or improve understanding.

*Comment:* One commenter recommends changing “small business” to “small business concern” at FAR 19.202–5(c)(2), 19.301–2(b), and 19.301–3(b).

*Response:* Concur, for consistency within the FAR. The rule has been revised accordingly.

*Comment:* One commenter recommends amending FAR 19.202–5 to include the following to be consistent with 52.219–28(b), (f), and (g): “Require a contractor that does not have representations and certifications in ORCA, or that does not have a representation in ORCA for the North American Industry Classification System code applicable to the contract, to complete and submit the representation required by paragraph (g) of clause 52.219–28, or. . .”

*Response:* The Councils do not concur. FAR 19.202–5(c) contains the requirement to rerepresent. The various methods for rerepresenting are contained in FAR clause 52.219–28. It is not necessary nor would it add clarity to restate the methods for rerepresenting since they are contained in FAR clause 52.219–28 to which 19.202–5(c) refers.

*Comment:* One commenter recommends amending FAR clause 52.219–28, paragraph (a) “Definitions”, “Small Business Concern,” to be consistent with the definition in section 19.001. The commenter recommends the following language, which appears to have been omitted from FAR clause 52.219–28, be appended to paragraph (a): “Such a concern is ‘not dominant in its field of operation’ when it does not

exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.”

*Response:* The Councils have included the recommended language in FAR 52.219–28(a) for consistency. The definition which was in FAR 19.001 is now in 2.101.

*Comment:* One commenter recommends amending FAR 52.219–28(2)(ii)(sic) to change the language from, “Within 60 to 120 days prior to the exercise date specified in the contract for any option thereafter,” to “Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.”

*Response:* The Councils have revised the language at FAR 52.219–28(b)(3)(ii) as recommended for overall ease of understanding.

*Comment:* One commenter recommends amending FAR 52.219–28(e) to read as follows: “to ensure that they reflect the Contractor’s current status.”

*Response:* The Councils have adopted the recommended change to FAR 52.219–28(e) for overall ease of understanding.

In addition to the changes made in the final rule in response to public comments, the Councils made additional changes to make the rule more clear.

In FAR paragraph 19.202–5(c), “and the conditions in paragraph (b) of the clause are met” was changed to “and the conditions in the clause for rerepresenting are met.” The reason for the change is that paragraph 19.202–5(c)(2) refers to paragraph (f) of the clause which was not specifically covered in the introductory language in FAR 19.202–5(c), which only referred to paragraph (b) of the clause. By stating the conditions in the clause for rerepresenting are met, both paragraphs (b) and (f) are clearly covered.

FAR paragraph 19.301–2(d) was replaced with, “After a contractor rerepresents it is other than small in accordance with 52.219–28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under blanket purchase agreements on that contract in its small business prime contracting goal achievements. Agencies

must issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation.”

This change was made to make it clear that the rerepresentation impacts all funding obligations under the contract, not just options exercised and orders issued. The Councils believe that this was implicit since the purpose of the rule is to improve the accuracy of size status reporting, which would cover all funds that are reported. However, the Councils have now made the language more clear by making it more explicit. A thirty-day timeframe has been added for making the change in FPDS. The Councils believe that it was understood that the change to FPDS would be done expeditiously, this thirty-day timeframe makes that more clear.

FAR paragraph 52.219–28(e) has been revised to read in part, “The contractor shall notify the contracting office in writing within the time frames specified in paragraph (b) of this clause.”

The Councils believe that it was implicit in the former language that the contractor must notify the Government within the time frames established for rerepresentation. However, this change ensures that it is clear. The phrase “by e-mail or otherwise” was deleted as unnecessary since “in writing” covers all forms of written submissions including e-mails.

This is a significant regulatory action and, therefore, was subject to review under Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. The 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:

These 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.* The purpose of the SBA’s final rule, which this FAR rule implements, is to enable the Government to report more accurate small business prime contracting statistics. The rule provides for more accurate statistics through rerepresentations on contracts and using the size status in effect at the time of the rerepresentation.

Improving the accuracy of the statistics may benefit small businesses. The premise of the SBA rule is that if agencies can no longer take credit toward their small business goals for funds obligated to contracts where, over the course of the contract, the contractor has become other than small, agencies will need to make up the shortfall in meeting their

goals by seeking new procurement opportunities with the present universe of small businesses.

In the preamble to its rule, SBA estimated that potentially 2,300 concerns could be initially impacted by the requirement to rerepresent on long-term contracts, and 250 concerns may be impacted annually, thereafter. In addition, it is estimated that 300 concerns may be affected annually by the requirement to rerepresent size status as a result of novations, acquisitions, or mergers.

This rule will not impose any additional recordkeeping requirements on small businesses because they are already required to review and update their size status data, at a minimum, on an annual basis.

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 (Pub. L. 104-13) applies because the final rule contains information collection requirements. The FAR clause at 52.219-28, Post-Award Small Business Program Rerepresentation requires the contractor to rerepresent size status and then notify the contracting office in writing that the data have been validated or updated, and provide the date of the validation or update. Public comments were solicited for the information collection at the interim rule stage (72 FR 36852). No comments were received. Accordingly, the FAR Secretariat will forward a request for approval of a new information collection requirement concerning 9000-0163 to the Office of Management and Budget under 44 U.S.C. Chapter 35. Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

### List of Subjects in 48 CFR Parts 1, 4, 19, and 52

Government procurement.

Dated: March 13, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Accordingly, the interim rule published in the **Federal Register** at 72 FR 36852, July 5, 2007, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 1, 4, 19, and 52 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).

## PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

### 1.106 [Amended]

■ 2. Amend section 1.106 by adding, in numerical sequence, FAR segment “52.219-28” and its corresponding OMB Control Number “9000-0163”.

## PART 4—ADMINISTRATIVE MATTERS

### 4.1201 [Amended]

■ 3. Amend section 4.1201 by removing from paragraph (b)(2) “When the” and adding “When any of the” in its place.

## PART 19—SMALL BUSINESS PROGRAMS

■ 4. Amend section 19.202-5 by revising the introductory text of paragraph (c); and removing from paragraphs (c)(1) and (c)(2) “business” and adding “business concern” in its place.

### 19.202-5 Data collection and reporting requirements.

\* \* \* \* \*

(c) When the contract includes the clause at 52.219-28, Post Award Small Business Program Rerepresentation, and the conditions in the clause for rerepresenting are met—

\* \* \* \* \*

■ 5. Amend section 19.301-2 by revising the section heading as set forth below; by removing from the introductory text of paragraph (b) “business” and adding “business concern” in its place; and by revising paragraph (d) to read as follows:

### 19.301-2 Rerepresentation by a contractor that represented itself as a small business concern.

\* \* \* \* \*

(d) After a contractor rerepresents it is other than small in accordance with 52.219-28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under blanket purchase agreements on that contract in its small business prime contracting goal achievements. Agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation.

\* \* \* \* \*

■ 6. Amend section 19.301-3 by revising the section heading as set forth below; and by removing from paragraph (b) “business” and adding “business concern” in its place. The revised text reads as follows:

### 19.301-3 Rerepresentation by a contractor that represented itself as other than a small business concern.

\* \* \* \* \*

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(16) 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 (MAR 2009)

\* \* \* \* \*

(b) \* \* \*

(16) 52.219-28, Post Award Small Business Program Rerepresentation (MAR 2009) (15 U.S.C. 632(a)(2)).

\* \* \* \* \*

(End of Clause)

■ 8. Amend section 52.219-28 by revising the date of the clause; by adding in paragraph (a), in the definition “Small business concern” two new sentences to the end of the paragraph; and by revising paragraphs (b)(3)(ii) and (e) to read as follows:

### 52.219-28 Post-Award Small Business Program Rerepresentation.

\* \* \* \* \*

POST-AWARD SMALL BUSINESS PROGRAM REREPRESENTATION (MAR 2009)

(a) *Definitions.* \* \* \*

*Small business concern* \* \* \* Such a concern is “not dominant in its field of operation” when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

(b) \* \* \*

(3) \* \* \*

(ii) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.

\* \* \* \* \*

(e) Except as provided in paragraph (g) of this clause, the Contractor shall make the rerepresentation required by paragraph (b) of this clause by validating or updating all its representations in the Online Representations and Certifications Application and its data in the Central Contractor Registration, as necessary, to ensure that they reflect the Contractor’s current status. The Contractor shall notify the contracting office in writing within the timeframes specified in paragraph (b) of this

clause that the data have been validated or updated, and provide the date of the validation or update.

\* \* \* \* \*

(End of clause)

[FR Doc. E9-5871 Filed 3-18-09; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 15

[FAC 2005-31; FAR Case 2008-012; Item II; Docket 2008-0001, Sequence 10]

RIN 9000-AL12

#### Federal Acquisition Regulation; FAR Case 2008-012, Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items

**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 Section 814 of the National Defense Authorization Act for Fiscal Year 2008. Section 814 required the harmonization of the thresholds for cost or pricing data. Specifically, Section 814 required alignment of the threshold for cost or pricing data on non-commercial modifications of commercial items with the Truth In Negotiation Act (TINA) threshold for cost and pricing data.

**DATES:** *Effective Date:* March 19, 2009.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before May 18, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-31, FAR case 2008-012, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-012" under the heading "Comment or Submission". Select the link "Send a Comment or Submission"

that corresponds with FAR Case 2008-012. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2008-012" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-31, FAR case 2008-012, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at (202) 501-3221 for clarification of content. Please cite FAC 2005-31, FAR case 2008-012. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The National Defense Authorization Act (NDAA) for Fiscal Year 2008, Section 814, implemented two areas of clarification with regards to the submission of cost or pricing data on non-commercial modifications of commercial items. The first area dealt with clarifying at what point during the life of the contract that the cost or pricing data threshold should be applied. Section 814 of the NDAA for FY 2008 clarified this point by inserting "(at the time of contract award)" after "total price of the contract" language already contained in this FAR section. The second area dealt with the harmonization of the thresholds for cost or pricing data. Section 814 of the NDAA for FY 2008 deleted the current threshold amount (\$500,000) for cost or pricing data relative to non-commercial modifications of commercial items and aligned this threshold with the current Truth In Negotiation Act (TINA) threshold for cost or pricing data of \$650,000. Thus, as the TINA threshold for cost or pricing data is adjusted in the future so will the threshold for obtaining cost or pricing data on non-commercial modifications of commercial items. This case will make the necessary changes within the FAR.

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 interim rule is not expected 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.*, since it is harmonizing this FAR section with other parts of the FAR and should actually reduce the administrative burden on contractors by not requiring them to track two separate dollar thresholds for submitting cost or pricing data. It is also increasing this dollar threshold relative to the submittal of cost or pricing data in this situation and thus contractors will experience a reduced administrative burden since they no longer will be required to submit cost or pricing data on this lower threshold amount. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Part 15 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.* (FAC 2005-31, FAR case 2008-012), in correspondence.

##### 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. Chapter 35, *et seq.*

##### D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this provision of the National Defense Authorization Act for Fiscal Year 2008, Section 814 went into effect upon enactment, on January 28, 2008. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

##### List of Subjects in 48 CFR Part 15

Government procurement.