

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2009-0001, Sequence 4]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-33; Introduction**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of 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) 2005-33. 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.regulations.gov>.

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

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005-33 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**LIST OF RULES IN FAC 2005-33**

Item	Subject	FAR case	Analyst
I .....	Trade Agreements—Costa Rica, Oman, and Peru (Interim) .....	2008-036	Murphy.
II .....	Contractor's Request for Progress Payments .....	2005-032	Murphy.

**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 2005-33 amends the FAR as specified below:

**Item I—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008-036) (Interim)**

This interim rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements. The free trade agreements with Costa Rica, Oman, and Peru join the North American Free Trade Agreement (NAFTA), the Australia, Bahrain, Chile, Morocco, and Singapore Free Trade Agreements, and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with respect to the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, which are already in the FAR.

The threshold for supplies and services is \$67,826 for the CAFTA-DR and \$194,000 for the Oman and Peru FTAs. The threshold for construction is \$7,443,000 for the CAFTA-DR and the Peru FTA and \$8,817,449 for the Oman FTA.

**Item II—Contractor's Request for Progress Payments (FAR Case 2005-032)**

This final rule converts the proposed rule published at 73 FR 19035 on April 8, 2008, to a final rule with one editorial change. This final rule incorporates improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments.

Dated: June 9, 2009.  
**Al Matera,**  
*Director, Office of Acquisition Policy.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-33 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 2005-33 is effective June 15, 2009 except for Item II, which is effective July 15, 2009.

Dated: June 9, 2009.  
**Shay D. Assad,**  
*Director of Defense Procurement and Acquisition Policy.*

Dated: June 5, 2009.  
**Rodney P. Lantier,**  
*Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, U.S. General Services Administration.*

Dated: June 8, 2009.  
**William P. McNally,**  
*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*  
[FR Doc. E9-13979 Filed 6-12-09; 8:45 am]  
**BILLING CODE 6820-EP-S**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 25 and 52**

[FAC 2005-33; FAR Case 2008-036; Item I; Docket 2009-0019, Sequence 1]

**RIN 9000-AL23**

**Federal Acquisition Regulation; FAR Case 2008-036, Trade Agreements—Costa Rica, Oman, and Peru**

**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 the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

**DATES:** *Effective Date:* June 15, 2009.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before August 14, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–33, FAR case 2008–036, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–036” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2008–036. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2008–036” 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 2005–33, FAR case 2008–036, 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:** For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–33, FAR case 2008–036.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This rule amends FAR Part 25 and the corresponding clauses in Part 52 to implement the Dominican Republic—Central America—United States Free Trade Agreement (CAFTA–DR) with respect to Costa Rica, the United States-

Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

Congress approved these trade agreements in the Dominican Republic—Central America—United States Free Trade Agreement Implementation Act (Pub. L. 109–53), the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109–283) (19 U.S.C. 3805 note), and the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138) (19 U.S.C. 3805 note). These Acts waive the applicability of the Buy American Act for some foreign supplies and construction materials from Costa Rica, Oman, and Peru and specify procurement procedures designed to ensure fairness in the acquisition of supplies and services.

This interim rule adds Costa Rica, Oman, and Peru to the definition of “Free Trade Agreement country.” The rule also deletes Costa Rica from the definition of “Caribbean Basin country” because, in accordance with Section 201(a)(3) of Pub. L. 109–53, when the CAFTA–DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act.

The excluded services for the Oman and Peru FTAs are the same as for the Bahrain FTA, CAFTA–DR, Chile FTA, and NAFTA. Costa Rica has the same thresholds as the other CAFTA–DR countries.

The threshold for supply and service contracts of the Oman and Peru FTAs is \$194,000. Like the Morocco and Bahrain FTAs, the Oman and Peru FTA thresholds for supplies and services is higher than the thresholds for the other FTAs. Therefore, Omani and Peruvian end products are not covered by the Buy American Act—Free Trade Agreements—Israeli Trade Act provision and clause (FAR 52.225–3 and 52.225–4).

For construction contracts, the Oman FTA threshold is \$8,817,449 and the Peru FTA threshold is \$7,443,000. Like NAFTA and the Bahrain FTA, the Omani threshold for construction is higher than the thresholds of the other FTAs. Therefore Omani construction material, along with Bahrainian and Mexican construction material, is excluded from coverage under the Buy American Act—Construction Materials under the Trade Agreements provision and clause for acquisitions less than \$8,817,449 (52.225–11 Alternate I and 52.225–12 Alternate II, respectively). Canadian construction material is not excluded, because it is covered under

the World Trade Organization Government Procurement Agreement.

This is a significant regulatory action and, therefore, was 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**

This 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.* Although the rule opens up Government procurement to the goods and services of Costa Rica, Oman, and Peru, the Councils do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401–70, and acquisitions that are set aside for small businesses are exempt. Therefore, the Councils have not performed an Initial Regulatory Flexibility Analysis. The Councils invite comments from small business concerns and other interested parties on this issue. The Councils will also consider comments from small entities concerning the affected FAR parts 25 and 52 in accordance with 5 U.S.C. 610. Interested parties should submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2008–036), in correspondence.

##### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply, because the interim rule affects the certification and information collection requirements in the provisions at FAR 52.212–3, 52.225–4, 52.225–6, and 52.225–11 currently approved under OMB clearances 9000–0136 (Commercial Item Acquisition: FAR Sections Affected: Part 12; 52.212–1, and 52.212–3), 9000–0130 (Buy America Act, Trade Agreements Act Certificate: FAR Sections Affected: 52.225–4), 9000–0025 (Buy American Act, Trade Agreements Act Certificate: FAR Sections Affected: 52.225–6), and 9000–0141 (Buy America Act—Construction: FAR Sections Affected: Subpart 25.2, 52.225–9, and 52.225–11) respectively. While the FAR Secretariat believes this impact to be negligible, comments are invited on the burden and number of entities affected as part of this rulemaking.

##### **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 these free trade agreements all took effect on January 1, 2009. 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 Parts 25 and 52**

Government procurement.

Dated: June 9, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 25 and 52 as set forth below:

1. The authority citation for 48 CFR parts 25 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 25—FOREIGN ACQUISITION**

2. Amend section 25.003 by—

a. Removing from the definition “Caribbean Basin country” the words “Costa Rica,”;

b. Revising paragraph (2) of the definition “Designated country”; and removing from paragraph (4) the words “Costa Rica”; and

c. Removing from the definition “Free Trade Agreement country” the words “Chile, Dominican” and adding “Chile,

Costa Rica, Dominican” in their place, and removing the word “Nicaragua, or” and adding “Nicaragua, Oman, Peru, or” in its place.

The revised text reads as follows:

**25.003 Definitions.**

\* \* \* \* \*  
*Designated country* \* \* \*

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

\* \* \* \* \*

3. Amend section 25.400 by revising paragraphs (a)(2)(iii) through (a)(2)(vii), and adding paragraphs (a)(2)(viii) and (a)(2)(ix) to read as follows:

**25.400 Scope of Subpart.**

(a) \* \* \*

(2) \* \* \*

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. 3805 note));

(iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. 3805 note));

(v) Morocco FTA (The United States—Morocco Free Trade Agreement, as approved by Congress in the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. 3805 note));

(vi) CAFTA-DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. 4001 note));

(vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. 3805 note));

(viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. 3805 note)); and

(ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. 3805 note));

\* \* \* \* \*

**25.401 [Amended]**

4. Amend section 25.401 in paragraph (b), in the table heading, by removing from the fourth column “Bahrain, FTA, CAFTA-DR, Chile FTA, and NAFTA” and adding “Bahrain FTA, CAFTA-DR, Chile FTA, NAFTA, Oman FTA and Peru FTA” in its place.

5. Amend section 25.402 by revising the table following paragraph (b) to read as follows:

**25.402 General.**

\* \* \* \* \*

(b) \* \* \*

Trade Agreement	Supply Contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction Contract (equal to or exceeding)
WTO GPA .....	\$194,000	\$194,000	\$7,443,000
FTAs			
Australia FTA .....	67,826	67,826	7,443,000
Bahrain FTA .....	194,000	194,000	8,817,449
CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua) .....	67,826	67,826	7,443,000
Chile FTA .....	67,826	67,826	7,443,000
Morocco FTA .....	194,000	194,000	7,443,000
NAFTA			
-Canada .....	25,000	67,826	8,817,449
-Mexico .....	67,826	67,826	8,817,449
Oman FTA .....	194,000	194,000	8,817,449
Peru FTA .....	194,000	194,000	7,443,000
Singapore FTA .....	67,826	67,826	7,443,000
Israeli Trade Act .....	50,000	—	—

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**52.212–3 [Amended]**

■ 6. Amend section 52.212–3 by revising the date of the provision to read “(JUN 2009)”; and by removing from paragraphs (g)(1)(i) and (g)(1)(ii) “Bahrainian or Moroccan” and adding “Bahrainian, Moroccan, Omani, or Peruvian” in its place each time it appears (three times).

■ 7. Amend section 52.212–5 by revising the date of the clause, and paragraphs (b)(32)(i) and (b)(33) 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 (JUN 2009)

\* \* \* \* \*

(b) \* \* \*

\_\_\_\_ (32)(i) 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act (JUN 2009) (41 U.S.C. 10a–10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, 19 U.S.C. 3805 note, Pub. L. 108–77, 108–78, 108–286, 108–302, 109–53, 109–169, 109–283, and 110–138).

\* \* \* \* \*

\_\_\_\_ (33) 52.225–5, Trade Agreements (JUN 2009) (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).

\* \* \* \* \*

■ 8. Amend section 52.225–3 by—

■ a. Revising the date of the clause;

■ b. Revising the definitions

“Bahrainian or Moroccan end product” and “Free Trade Agreement country”; and

■ c. Removing from paragraph (c) “the Bahrain and Morocco FTAs” and adding “the Bahrain, Morocco, Oman, and Peru FTAs” in its place, and removing “other than a Bahrainian or Moroccan” and adding “other than a Bahrainian, Moroccan, Omani, or Peruvian” in its place each time it appears (twice).

■ The revised text reads as follows:

**52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.**

\* \* \* \* \*

Buy American Act—Free Trade Agreements—Israeli Trade Act (JUN 2009)

\* \* \* \* \*

(a) \* \* \*

*Bahrainian, Moroccan, Omani, or Peruvian end product* means an article that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Morocco, Oman, or Peru; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Morocco, Oman, or Peru into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

\* \* \* \* \*

*Free Trade Agreement country* means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore.

\* \* \* \* \*

**52.225–4 [Amended]**

■ 9. Amend section 52.225–4 by—

■ a. Revising the date of the provision to read “(JUN 2009)”; and

■ b. Removing from paragraphs (a) and (b) “Bahrainian or Moroccan” and adding “Bahrainian, Moroccan, Omani, or Peruvian” in its place each time it appears (three times).

■ 10. Amend section 52.225–5 by—

■ a. Revising the date of the clause; and

■ b. Revising paragraph (2) in the definition “Designated country”; and removing from paragraph (4) of that definition the words “Costa Rica,”.

■ The revised text reads as follows:

**52.225–5 Trade Agreements.**

\* \* \* \* \*

Trade Agreements (JUN 2009)

(a) \* \* \*

*Designated country* \* \* \*

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

\* \* \* \* \*

■ 11. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. Amending paragraph (a) in the definition “Designated country” by—

■ 1. Revising paragraph (2); and

■ 2. Removing from paragraph (4)

“Costa Rica,”;

■ c. Amending Alternate I, by—

■ 1. Revising the date of Alternate I;

■ 2. Removing from the introductory paragraph text and in the definition “Bahrainian or Mexican construction material” “Bahrainian or Mexican” and adding “Bahrainian, Mexican, or Omani” in its place (twice);

■ 3. Removing from the definition “Bahrainian or Mexican construction material” in paragraphs (1) and (2) “Bahrain or Mexico” and adding

“Bahrain, Mexico, or Oman” in its place (twice);

■ 4. Revising paragraph (b)(1); and

■ 5. Removing from paragraph (b)(2) “other than Bahrainian or Mexican” and adding “other than Bahrainian, Mexican, or Omani” in its place.

■ The revised text reads as follows:

**52.225–11 Buy American Act—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

Buy American Act—Construction Materials Under Trade Agreements (JUN 2009)

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

\* \* \* \* \*

*Designated country* \* \* \*

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

\* \* \* \* \*

*Alternate I (JUN 2009).* \* \* \*

\* \* \* \* \*

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except the Bahrain FTA, NAFTA, and the Oman FTA apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated country construction materials other than Bahrainian, Mexican, or Omani construction materials.

\* \* \* \* \*

■ 12. Amend section 52.225–12 in Alternate II by—

■ a. Revising the date of Alternate II;

■ b. Removing from the introductory paragraph text “Bahrainian or Mexican” and adding “Bahrainian, Mexican, or Omani” in its place;

■ c. Revising paragraph (d)(1); and

■ d. Removing from paragraph (d)(3) “Bahrainian or Mexican” and adding “Bahrainian, Mexican, or Omani” in its place.

**52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

*Alternate II (JUN 2009)* \* \* \*

(d) *Alternate offers.* (1) When an offer includes foreign construction material, except foreign construction material from a designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–11, the offeror also may submit an alternate offer based on

use of equivalent domestic or designated country construction material other than Bahrainian, Mexican, or Omani construction material.

\* \* \* \* \*

[FR Doc. E9-13978 Filed 6-12-09; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 32, 43, 52, and 53

[FAC 2005-33; FAR Case 2005-032; Item II; Docket 2008-0002; Sequence 1]

RIN 9000-AI47

#### Federal Acquisition Regulation; FAR Case 2005-032, Contractor's Request for Progress Payments

**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 incorporate improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments, used to request those progress payments. Changes made to the Standard Form as published in the proposed rule include correction of misspellings, and an editorial change made at Item 4 to better describe the order number.

**DATES:** *Effective Date:* July 15, 2009.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat, 1800 F Street, NW, Room 4041, Washington, DC 20405, (202) 501-4755. Please cite FAC 2005-33, FAR case 2005-032.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Councils published a proposed rule in the **Federal Register** at 73 FR 19035 on April 8, 2008, to (1) address revisions necessary to implement the paid-cost rule and (2) simplify the SF 1443 and related regulations and instructions to improve clarity.

No comments were received by the close of the public comment period on June 9, 2008. Subsequently, one comment was received from one commenter. The commenter specifically took no issue with the proposed FAR changes, but objected to the costs that would be incurred by its member companies to make programming changes that ensue from altering the SF 1443. The commenter reasoned that "(s)ince DOD's goal is to significantly expand the use of performance based payments, it would appear to be more cost effective not to incur significant expenditures on changes to a form (i.e., SF 1443) that is part of a system (progress payments) that is no longer the preferred system for providing financing payments."

The Councils were puzzled at the commenter's cost estimate of \$87,000 to update software to use the new SF 1443 because the changes incorporated into the SF 1443 by this case were, generally, necessitated by prior changes to the paid-cost rule and other changes to FAR Part 32. These changes had been in effect for some time, so contractors using SF 1443 to request progress payments have already made changes to their software to conform their progress payment requests to the updated FAR text.

The commenter, an association representing large defense aerospace corporations, was requested to provide the cost analysis upon which it based its estimate of the cost to reprogram software in order to enable electronic generation and submittal of the SF 1443 to request a progress payment. The commenter subsequently provided data supporting its estimate of approximately \$87,000 per contractor. This estimate and the supporting data were forwarded to the Small Business Administration (SBA) Office of Advocacy for review specifically to determine the impact of modifying the SF 1443 on small businesses. Two independent reviews were conducted, one by the SBA's regulatory economist and one by an outside small business expert selected by the SBA. Neither of these reviews discovered a substantial economic impact on a significant number of small entities.

Further, the Councils did not find the commenter's rationale regarding performance-based payments convincing. While it is the goal of Federal Government agencies, not just DoD, to use performance-based payments wherever possible, there remain many circumstances in which progress payments are an important financing mechanism. Therefore, the

Councils approved this case as a final rule.

During a final review by the Councils' Acquisition Finance Team, it was discovered that the last item in the "INSTRUCTIONS" section of the form on page 2 was labeled in error as pertaining to "Item 26." However, the instruction actually refers to paragraph (f) of the "CERTIFICATION" section. That correction has been made to the form. In addition, a sentence was added to the SF 1443 instructions for Items 14a-14e to clarify that the "financing payments" to be included do not include interim payments under a cost reimbursement contract.

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 the changes are designed to simplify the form and improve clarity. (See also, the Background section above for a thorough discussion of lack of impact on small entities.)

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0010.

##### List of Subjects in 48 CFR Parts 32, 43, 52, and 53

Government procurement.

Dated: June 9, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 32, 43, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 32, 43, 52, and 53 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).