

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### IV. 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.* The interim rule removed requirements relating to subcontracts for COTS items. In the case of commercial items, the requirement extends only to the first-tier subcontracts. This rule will impact small entities that are awarded a lower-tier subcontract for a non-COTS item that exceeds \$30,000, in that these entities must now disclose to the higher-tier subcontractor whether they are debarred, suspended, or proposed for debarment. Although a substantial number of small entities may be impacted by this rule, the impact is not significant. It will probably take only minimal time to include the required information with an offer. For the other impact of the rule, which will require the higher-tier subcontractor to provide an explanation if desiring to subcontract with an entity that has been debarred, suspended, or proposed for debarment, DoD, GSA, and NASA have determined that this will not impact a substantial number of small entities, because it should be a rare occurrence that a subcontractor would potentially jeopardize performance or integrity by knowingly contracting with an entity that is debarred, suspended, or proposed for debarment. No public comments were received with regard to the impact of this rule on small entities.

#### V. Paperwork Reduction Act

This rule affects the certification and information collection requirements in the provisions at FAR case 2009-036 currently approved under OMB Control Number 9000-0094 in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible because the change in burden hours is so slight.

#### List of Subjects in 48 CFR Parts 9 and 52

Government procurement.

Dated: June 28, 2011.

**Laura Auletta,**

*Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.*

Accordingly, the interim rule amending 48 CFR parts 9 and 52, which was published in the **Federal Register** at 75 FR 77739, December 13, 2010, is adopted as final with the following changes:

- 1. The authority citation for 48 CFR parts 9 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 9—CONTRACTOR QUALIFICATIONS

##### 9.405-2 [Amended]

- 2. Amend section 9.405-2 by removing from paragraph (b) introductory text, in the third sentence, “to subcontract” and adding “to enter into a subcontract in excess of \$30,000” in its place.

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

- 3. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(6) 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 (AUG 2011)

\* \* \* \* \*

(b) \* \* \*

(6) 52.209-6, Protecting the Government’s Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment. (Dec 2010) (31 U.S.C. 6101 note).

\* \* \* \* \*

- 4. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(2)(i) to read as follows:

##### 52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

\* \* \* \* \*

##### Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (AUG 2011)

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) 52.209-6, Protecting the Government’s Interest When Subcontracting with Contractors Debarred, Suspended, or

Proposed for Debarment (Dec 2010) (Applies to contracts over \$30,000).

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 16

[FAC 2005-53; FAR Case 2011-015; Item IV; Docket 2011-0015, Sequence 1]

RIN 9000-AM08

#### Federal Acquisition Regulation; Extension of Sunset Date for Protests of Task and Delivery Orders

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

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 825 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011. The statute extends the sunset date for protests against the award of task or delivery orders by DoD, NASA, and the Coast Guard from May 27, 2011, to September 30, 2016.

**DATES:** *Effective Date:* July 5, 2011.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before September 6, 2011 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-53, FAR Case 2011-015, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2011-015” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2011-015.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2011-015” on your attached document.

- *Fax:* (202) 501-4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), *Attn:* Hada Flowers, 1275 First

Street, NE., 7th Floor, Washington, DC 20417.

*Instructions:* Please submit comments only and cite FAC 2005–53, FAR Case 2011–015, 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:** Ms. Deborah Lague, Procurement Analyst, at (202) 694–8149, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2010–53, FAR Case 2011–015.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are publishing this interim rule amending the FAR to implement section 825 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383, enacted January 7, 2011). Section 825 amends 10 U.S.C. 2304c(e) to extend the sunset date for protests against the award of task and delivery orders from May 27, 2011, to September 30, 2016, but only for Title 10 agencies, *i.e.*, DoD, NASA, and the Coast Guard. There has been no comparable change to Title 41, so the sunset date for protests against the award of task and delivery orders by other agencies remains May 27, 2011. With this change, contractors will no longer be able to protest task or delivery orders awarded by agencies

other than DoD, NASA, and the Coast Guard. There is no effect on Government automated systems.

**II. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**III. Regulatory Flexibility Act**

The change 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 Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

This rule was initiated to implement section 825 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383), enacted January 7, 2011. Section 825 amends 10 U.S.C. 2304c(e) to extend the sunset date for protests against the award of task or delivery orders by DoD,

NASA, and the Coast Guard from May 27, 2011, to September 30, 2016.

Prior to the National Defense Authorization Act for Fiscal Year 2008, there was no authority for protests against the award of task or delivery orders under indefinite-delivery contracts. That statute, however, amended Titles 10 and 41 to allow protests against the award, or proposed award, of a task or delivery order by any Federal agency if (a) the protest is on the grounds that the order increases the scope, period, or maximum value of the contract, or (b) the order is valued at over \$10 million.

This protest authority has been in effect for the past 2½ years. Section 825 extended the sunset date for Title 10 agencies (DoD, NASA, and the Coast Guard). However, there has not been a similar change to the Title 41 authority, so the sunset date remains May 27, 2011, for all other agencies.

The authority to file protests against the award of task or delivery orders is relatively new, and there is little data available, as such protests may be filed with the agency or General Accountability Office (GAO). Section 843 of Pub. L. 110–181 gave the Comptroller General of the United States the exclusive jurisdiction of a protest of an order valued in excess of \$10 million. Data on agency-level protests is not compiled outside the agency concerned, so we had to base our estimate on the total number of protests filed at the GAO in Fiscal Years 2009 and 2010. The data was extracted from GAO’s latest report to the Congress. Only Fiscal Years 2009 and 2010 protest numbers were used because the authority to protest against task or delivery orders did not exist prior to that time.

Offerors can protest to the agency or to the GAO. Assuming that one-half of all protests are filed with the GAO and the other half are filed with the agency, then the average number of protests filed per fiscal year would be 4,300 (see below):

Fiscal Year 2009 protests to GAO	2,000
Fiscal Year 2010 protests to GAO	2,300
	<u>4,300</u>
Divided by	
Average annual GAO protests	2
Multiplied by	<u>2</u>
Estimated total number of protests	4,300

Protests may be filed against the award of contracts as well as certain task or delivery orders. There are few prohibitions on the grounds for protests against the award of a contract. However, protests against the award of a task or delivery order are limited to (a) a protest on the grounds that the order increases the scope, period, or maximum

value of the contract; or (b) a protest of an order valued in excess of \$10 million. Therefore, it is reasonable to assume that less than 50 percent of the total number of protests filed is against the award of a task or delivery order. A generous estimate is approximately one-fourth, or 1,075. Likewise, only a percentage of the protests against the

award of a task or delivery order are made by small businesses. Even if we assume that percentage to be one-half, then the number of protests filed by small businesses against the award of a task or delivery order is estimated to be 539.

# of protests of task/delivery orders by small businesses	539
% of protests sustained	<u>x .03</u>
# of task/delivery orders protests sustained	16

The number 16 represents the number of small business task or delivery order protests

sustained in a fiscal year. However, this number is representative of protests against

awards by all Government agencies, not just DoD, NASA, and the Coast Guard. If the

assumption is made that half of the protests sustained are on DoD, NASA, or Coast Guard task or delivery orders, then it can be estimated that extending the sunset date for protests against task or delivery order awards by Title 10 agencies will result in an additional 8 awards to small businesses per fiscal year that the protest authority remains in effect.

There is no requirement for small entities to submit any information under this provision. Therefore, no professional skills are necessary on the part of small entities for compliance, and the cost to small entities associated with this provision is \$0.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the interim rule, *i.e.*, implementation of a statutory mandate.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in the subpart affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–53, FAR Case 2011–015) in correspondence.

#### IV. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### V. 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 the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383) was enacted on January 7, 2011, and requires the extension of the sunset date for the affected agencies to be published in the FAR prior to the expiration of the previous sunset date, May 27, 2011. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA 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 16

Government procurement.

Dated: June 28, 2011.

**Laura Auletta,**

*Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.*

Therefore, DoD, GSA, and NASA amend 48 CFR part 16 as set forth below:

#### PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 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).

■ 2. Amend section 16.505 by revising paragraph (a)(9)(ii) to read as follows:

##### 16.505 Ordering.

\* \* \* \* \*

(a) \* \* \*

(9) \* \* \*

(ii) The authority to protest the placement of an order under this subpart expires on September 30, 2016, for DoD, NASA and the Coast Guard (10 U.S.C. 2304a(d) and 2304c(e)), and on May 27, 2011, for other agencies (41 U.S.C. 4103(d) and 4106(f)).

\* \* \* \* \*

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#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 23 and 52

[FAC 2005–53; FAR Case 2009–028; Item V; Docket 2010–0097, Sequence 1]

RIN 9000–AL64

#### Federal Acquisition Regulation; Encouraging Contractor Policies To Ban Text Messaging While Driving

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.)

13513, dated October 1, 2009, entitled “Federal Leadership on Reducing Text Messaging while Driving.”

**DATES:** *Effective Date:* August 4, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Clark, Procurement Analyst, at (202) 219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–53, FAR Case 2009–028.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 75 FR 60264 on September 29, 2010, to amend the FAR to implement E.O. 13513 (October 1, 2009), published in the **Federal Register** at 74 FR 51225 on October 6, 2009, entitled “Federal Leadership on Reducing Text Messaging while Driving.” The rule requires Government agencies to encourage Federal contractors and subcontractors to adopt and enforce policies that ban text messaging while driving. This requirement applies to all solicitations and contracts entered into on or after September 29, 2010. The interim rule encouraged contracting officers to modify existing contracts to include the FAR clause 52.223–18, Contractor Policy to Ban Text Messaging While Driving. The clause in the interim rule indicated that Federal contractors should adopt and enforce policies banning text messaging while driving company-owned or -rented vehicles or Government-owned vehicles; or privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government. The interim rule clause also indicated that Federal contractors should conduct initiatives such as—

(1) Establishing new rules and programs or re-evaluating existing programs to prohibit text messaging while driving; and

(2) Education, awareness, and other outreach programs to inform employees about the safety risks associated with texting while driving.

As a result of public comments, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) changed “should” to “encouraged to” in this final rule clause. The revised language better aligns with the intent of the Executive Order. A corresponding change has been made to the clause title. Five respondents submitted comments on the interim rule.