I. Background

DoD, GSA, and NASA are publishing this interim rule amending the FAR to implement the requirements of section 801 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110–181), as amended, (10 U.S.C. 2304 note) and Section 817 of the NDAA for FY 2012 (Pub. L. 112–81), titled “Compliance with Defense Procurement Requirements for Purposes of Internal Controls of Nondefense Agencies for Procurements of Behalf of the Department of Defense,” amended section 801(d) of the NDAA for FY 2008 (10 U.S.C. 2304 note) to provide clarifying language that identifies the types of laws and regulations with which nondefense departments and agencies must comply when procuring supplies and services on behalf of DoD. Specifically, section 817 clarifies that the nondefense agency certification of “compliance with defense procurement requirements” for a given fiscal year means compliance with (1) the FAR and other laws and regulations that apply to procurements of property and services by Federal agencies, and (2) laws and regulations (including DoD financial regulations) that apply to procurements of property and services made by DoD through other Federal agencies.

This interim rule makes the following changes:

- Clarifies FAR 4.603(c) regarding the allocation of socioeconomic credit to the requesting agency for assisted acquisitions.
- Adds to FAR 17.500(a) a cross-reference to the new FAR subpart 17.7 for additional requirements for nondefense agencies when acquiring supplies and services on behalf of DoD.
- Adds to FAR 17.502–2(b)(1)(i) a requirement for written confirmation by the requesting agency to the servicing agency for assistance when nondefense agencies must procure services on behalf of DoD.

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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

DoD, GSA, and NASA do not expect this rule 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. Nevertheless, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows.

Section 801 of the NDAA for FY 2008 (Pub. L. 110–161), section 806 of the NDAA for FY 2010 (Pub. L. 111–166), and section 817 of the NDAA for FY 2012 (Pub. L. 112–81) address requirements specific to the acquisition of supplies and services by nondefense agencies on behalf of DoD, and are, therefore, internal to the Government. However, this case also adds a clarification at FAR 4.603(c), restating existing Office of Federal Procurement Policy (OFPP) and Federal Procurement Data System (FPDS) policy regarding the allocation of socioeconomic credit for interagency acquisitions. Although DoD, GSA, and NASA do not expect the clarification to have a direct economic impact on a substantial number of small entities, there is the possibility that the regulatory clarification may improve the accuracy of FPDS data submissions related to the allocation of socioeconomic credit to agencies for contracts and orders awarded to a substantial number of small entities.

Improved data accuracy can have a positive impact on agencies’ annual small business goals.

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 subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–62, FAR Case 2012–010) 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

Pursuant to the Office of Federal Procurement Policy (OFPP) Reauthorization Act, the Secretary of Defense, the Administrator of General Services, and the Administrator of NASA have determined that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the NDAA for FY 2012 (Pub. L. 112–81) was enacted on December 31, 2011, and was effective upon enactment. Recognizing this, the FAR Principals opened FAR Case 2012–010 on January 19, 2012. Section 817 of the NDAA for FY 2012 amended section 801(d) of the NDAA for FY 2008 (10 U.S.C. 2304 note) to provide necessary clarifying language that identifies the types of laws and regulations with which nondefense departments and agencies must comply when procuring supplies and services on behalf of DoD. Specifically, section 817 clarifies that the nondefense agency certification of “compliance with defense procurement requirements” for a given fiscal year means compliance with (1) the FAR and other laws and regulations that apply to procurements of property and services by Federal agencies, and (2) laws and regulations (including DoD financial management regulations) that apply to procurements of property and services made by DoD through other Federal agencies. If this rule, which also informs nondefense agencies regarding their responsibilities when buying on behalf of DoD, is not implemented as an interim rule, it will negatively impact the accuracy and completeness of nondefense agency certifications for fiscal year 2013.

Every effort has been made to process this FAR requirement in an expeditious manner. Processing this rule as an interim rule, with an immediate effective date, will ensure that nondefense agencies conducting acquisitions on behalf of DoD are fully informed of DoD expectations and their responsibilities when nondefense agency senior management completes the statutorily-mandated certifications for fiscal year 2013. This requirement does not directly impact the public and is purely an administrative FAR change that affects Government agencies that conduct acquisitions on behalf of DoD.

Therefore, 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 Parts 4 and 17

Government procurement.

Dated: November 9, 2012.

Laura Auletta, Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4 and 17 as set forth below:

1. The authority citation for 48 CFR parts 4 and 17 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 4—ADMINISTRATIVE MATTERS

2. Amend section 4.603 by adding two sentences to the end of paragraph (c) to read as follows:
PART 17—SPECIAL CONTRACTING METHODS

3. Amend section 17.500 by adding a new sentence to the end of paragraph (a) to read as follows:

17.500 Scope of subpart.

(a) * * * * In addition to complying with the interagency acquisition policy and procedures in this subpart, nondefense agencies acquiring supplies and services on behalf of the Department of Defense shall also comply with the policy and procedures at subpart 17.7.

4. Amend section 17.502–1 by revising paragraph (b)(1)(i) to read as follows:

17.502–1 General.

(b) * * * * (1) * * * * (i) Prior to the issuance of a solicitation, the servicing agency and the requesting agency shall both sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties, including roles and responsibilities for acquisition planning, contract execution, and administration and management of the contract(s) or order(s). The requesting agency shall provide to the servicing agency any applicable agency-specific statutes, regulations, directives, and other applicable requirements for incorporation into the order or contract. In the event there are no agency unique requirements beyond the FAR, the requesting agency shall inform the servicing agency contracting officer in writing. For acquisitions on behalf of the Department of Defense, see also subpart 17.7. For patent rights, see 27.304–2. In preparing interagency agreements to support assisted acquisitions, agencies should review the Office of Federal Procurement Policy guidance, Interagency Acquisitions, available at http://www.whitehouse.gov/omb/assets/procurement/iac_revised.pdf.

5. Add Subpart 17.7 to read as follows:

Subpart 17.7—Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense

17.700 Scope of subpart.

(a) Compliance with this subpart is in addition to the policies and procedures for interagency acquisitions set forth in subpart 17.5. This subpart prescribes policies and procedures specific to acquisitions of supplies and services by nondefense agencies on behalf of the Department of Defense (DoD).

(b) This subpart implements Public Law 110–181, section 801, as amended (10 U.S.C. 2304 Note).

17.701 Definitions.

As used in this subpart—Department of Defense (DoD) acquisition official means—

(1) A DoD contracting officer; or

(2) Any other DoD official authorized to approve a direct acquisition or an assisted acquisition on behalf of DoD.

Nondefense agency means any department or agency of the Federal Government other than the Department of Defense.

Nondefense agency that is an element of the intelligence community means the agencies identified in 50 U.S.C. 401a(4), which include the—

(1) Office of the Director of National Intelligence;

(2) Central Intelligence Agency;

(3) Intelligence elements of the Federal Bureau of Investigation, Department of Energy, and Drug Enforcement Agency;

(4) Bureau of Intelligence and Research of the Department of State;

(5) Office of Intelligence and Analysis of the Department of the Treasury;

(6) The Office of Intelligence and Analysis of the Department of Homeland Security and the Office of Intelligence of the Coast Guard; and

(7) Such other elements of any department or agency as have been designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

17.702 Applicability.

This subpart applies to all acquisitions made by nondefense agencies on behalf of DoD. It does not apply to contracts entered into by a nondefense agency that is an element of the intelligence community for the performance of a joint program conducted to meet the needs of DoD and the nondefense agency.

17.703 Policy.

(a) A DoD acquisition official may request a nondefense agency to conduct an acquisition on behalf of DoD in excess of the simplified acquisition threshold only if the head of the nondefense agency conducting the acquisition on DoD’s behalf has certified that the agency will comply with defense procurement requirements for that fiscal year except when waived in accordance with paragraph (e) of this section.

(b) A nondefense agency is compliant with defense procurement requirements if the procurement policies, procedures, and internal controls of the nondefense agency applicable to the procurement of supplies and services on behalf of DoD, and the manner in which they are administered, are adequate to ensure the compliance of the nondefense department or agency with—

(1) The Federal Acquisition Regulation and other laws and regulations that apply to procurements of supplies and services by Federal agencies; and

(2) Laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies, including DoD financial management regulations, the Defense Federal Acquisition Regulation Supplement (DFARS), and the DFARS Procedures, Guidance, and Information (PGIs). (The DFARS and PGIs are accessible at: http://www.acq.osd.mil/dpap/).

(c) Within 30 days of the beginning of each fiscal year, submit nondefense agency certifications of compliance to the Director, Defense Procurement and Acquisition Policy, Department of Defense, 3060 Defense Pentagon, Washington DC 20301–3060.

(d) The DoD acquisition official, as defined at 17.701, shall provide to the servicing nondefense agency contracting officer any DoD-unique terms, conditions, other related statutes, regulations, directives, and other applicable requirements for incorporation into the order or contract. In the event there are no DoD-unique
requirements beyond the FAR, the DoD acquisition official shall so inform the servicing nondefense agency contracting officer in writing. Nondefense agency contracting officers are responsible for ensuring support provided in response to DoD’s request complies with paragraph (b) of this section.

(e) Waiver. The limitation in paragraph (a) of this section shall not apply to the acquisition of supplies and services on behalf of DoD by a nondefense agency during any fiscal year for which the Under Secretary of Defense for Acquisition, Technology, and Logistics has determined in writing that it is necessary in the interest of DoD to acquire supplies and services through the nondefense agency during the fiscal year. The written determination shall identify the acquisition categories to which the waiver applies.


[FR Doc. 2012–27905 Filed 11–19–12; 8:45 am]
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DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
48 CFR Parts 25 and 52
[FAC 2005–62; FAR Case 2012–027; Item iii; Docket 2012–0027, Sequence 01]
RIN 9000–AM43
Federal Acquisition Regulation; Free Trade Agreement—Panama

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 FAR part 25 and the corresponding provisions and clauses in part 52 to implement the United States—Panama Trade Promotion Agreement Implementation Act (Pub. L. 112–43) (19 U.S.C. 3805 note). This Trade Promotion Agreement is designated in the FAR as the Panama Free Trade Agreement (FTA). This FTA provides for—

• Waiver of the applicability of the Buy American statute (41 U.S.C. chapter 83) for some foreign supplies and construction materials from Panama; and

• Applicability of specified procurement procedures designed to ensure fairness in the acquisition of supplies and services (see FAR 25.408).

II. Discussion and Analysis

This interim rule adds Panama to the definition of “Free Trade Agreement country” in multiple locations in the FAR.

The Panama FTA covers acquisitions of supplies and services equal to or exceeding $202,000. The threshold for the Panama FTA is $7,777,000 for construction contracts. The Panama FTA threshold for supplies and services is higher than the threshold for supplies and services for most of the FTAs ($77,494), and equals the Bahrain, Morocco, Oman, and Peru FTA thresholds for supplies and services ($202,000). The excluded services for the Panama FTA are the same as for the Bahrain FTA, Dominican Republic—Central American FTA, Colombia FTA, Chile FTA, NAFTA, Oman FTA, and Peru FTA.

III. Executive Order 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 a significant regulatory action and, therefore, was 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 do not expect this interim rule 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 now opens up Government procurement to the goods and services of Panama, DoD, GSA, and NASA 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 Defense Federal Acquisition Regulation Supplement (DFARS) 225.401–70, and acquisitions that are set aside or provide other form of preference for small businesses are exempt. FAR 19.502–2 states that acquisitions of supplies or services with an anticipated dollar value between $3,000 and $150,000 (with some exceptions) are automatically reserved for small business concerns.