

Item VI—Expiration of the Price Evaluation Adjustment (FAR Case 2005–002)

This final rule adopts, without change, an interim rule that amended the FAR to cancel the authority for civilian agencies, other than NASA and the U.S. Coast Guard, to apply the price evaluation adjustment to certain small disadvantaged business concerns in competitive acquisitions. The change was required because the statutory authority for the adjustments had expired. As a result, certain small disadvantaged business concerns will no longer benefit from the adjustments. DoD, NASA, and the U.S. Coast Guard are authorized to continue applying the price evaluation adjustment.

Item VII—Removal of Sanctions Against Certain European Union Member States (FAR Case 2005–045)

This interim rule removes the sanctions in FAR Part 25 against Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom on acquisitions not covered by the World Trade Organization Government Procurement Agreement (WTO GPA). These sanctions did not apply to small business set-asides, to acquisitions below the simplified acquisition threshold using simplified acquisition procedures, or to acquisitions by the Department of Defense. Contracting officers may now consider offers of end products, services, and construction that were previously prohibited by the sanctions.

Item VIII—Free Trade Agreements - Morocco (FAR Case 2006–001)

This interim rule allows contracting officers to purchase the products of Morocco without application of the Buy American Act if the acquisition is subject to the Morocco Free Trade Agreement. The U.S. Trade Representative negotiated a Free Trade Agreement with Morocco, which went into effect January 1, 2006. This agreement joins the North American Free Trade Agreement (NAFTA) and the Australia, Chile, and Singapore Free Trade Agreements which are already in the FAR. The threshold for applicability of the Morocco Free Trade Agreement is \$193,000 for supplies and services, \$7,407,000 for construction.

Item IX—Fast Payment Procedures (FAR Case 2004–031)

This amendment permits, but does not require, fast payment when invoices and/or outer shipping containers are not marked “Fast Pay”, provided the contract includes the “Fast Payment

Procedure” clause. If the Fast Payment clause is in the contract, such unmarked invoices will no longer be rejected. Instead, they will be paid using either fast payment or normal payment procedures. In addition, the revision deletes the requirement for marking invoices “No Receiving Report Prepared.”

X—Technical Amendment

An editorial change is made at FAR 19.1005(a) in Item 3 of the NAICS Description by removing from the end of NAICS code entry “541310” the word “or”.

Dated: April 12, 2006.

Gerald Zaffos,

Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–09 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 2005–09 is effective May 19, 2006, except for Items II, IV, V, VI, VII, VIII, and X which are effective April 19, 2006.

Dated: April 8, 2006.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: April 12, 2006.

Roger D. Waldron,

Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

Dated: April 5, 2006.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, and 7

[FAC 2005–09; FAR Case 2004–007; Item I; Docket FAR–2006–0020]

RIN 9000–AK08

Federal Acquisition Regulation; FAR Case 2004–007, Federal Technical Data Solution (FedTeDS)

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 require contracting officers to use the Federal Technical Data Solution (FedTeDS) for electronic posting of solicitation-related materials that require control over availability or distribution unless certain exceptions apply.

DATES: Effective Date: May 19, 2006.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAC 2005–09, FAR case 2004–007.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 63436 on November 1, 2004. The 60-day comment period for the proposed rule ended January 3, 2005. Sixteen comments were received from seven commenters. Some of the comments merely agreed with the concept of FedTeDS, others pointed out areas of concern. The substantive comments are discussed below.

Public Comments

1. *Comment:* FedTeDS will reduce competition on typical large construction projects. By restricting document access to those who are registered in CCR and have an access code, the use of FedTeDS will result in

reduced interest in the project and reduced competition.

Council's response: In keeping with the President's Management Agenda and the eGov initiative, making FedTeDS use mandatory for solicitation-related documents that require limited availability or distribution will better secure that information and eliminate the use of duplicative and less secure document hosting systems. There has been no noticeable reduction in interest or competition where vendors have been required to register and use FedTeDS to access solicitation information. FedTeDS provides tools for vendors to customize their environment, track information, and reduce unnecessary paper handling.

2. *Comment:* The construction industry standard is for plans and specifications to be viewable in plan rooms and on the internet. Others, such as plan rooms and printing companies, are likely to distribute FedTeDS materials publicly without the Government's knowledge.

Council's response: Those who access and download FedTeDS information have an obligation to assure continued control over that information. The FedTeDS program staff is working with plan rooms to explore ways that the security provided by FedTeDS can be applied in a similar manner by plan rooms wishing to distribute the information outside FedTeDS.

3. *Comment:* The use of FedTeDS should be optional, not mandatory. Optional use will allow agencies to maintain and develop similar websites. Agencies should be free to use or develop any mechanism they choose to secure solicitation related information.

Council's response: As part of the Integrated Acquisition Environment, the objective of FedTeDS is to carry out the President's Management Agenda and the eGov initiative to eliminate duplicative and redundant systems. Agencies should not be compelled to choose among multiple mechanisms for securing solicitation-related data. Vendors and other interested parties should not be compelled to understand and adapt to an array of mechanisms and Web site addresses used to secure solicitation-related information. FedTeDS provides a single, secure system and Web site for Governmentwide use in controlling access and distribution of solicitation-related documents.

4. *Comment:* FedTeDS functionality will be included in the Governmentwide Point of Entry (GPE) FedBizOpps system. This will eliminate the need for FedTeDS as a separate system.

Council's response: The inclusion of FedTeDS functionality in FedBizOpps is an optional requirement in the solicitation for replacement of FedBizOpps. Once the contract has been awarded, the expectations, plans and anticipated deliverable dates for inclusion of FedTeDS functionality in FedBizOpps will be known. Until the new FedBizOpps system and its FedTeDS-like functionality become operational, FedTeDS remains a proven and useful system for Governmentwide use.

5. *Comment:* The FAR amendment to mandate the use of FedTeDS will limit the Government's ability to enhance systems and leverage new technologies.

Council's response: The comment is too vague to adequately address the real concern.

6. *Comment:* The language proposed for FAR 5.102 is confusing and redundant. The language should be changed to be more clear and concise.

Council's response: We concur that the proposed language for FAR 5.102 is confusing and contains redundancies. We have revised the applicable language accordingly.

7. *Comment:* The amendment should contain a definition for "sensitive but unclassified information." This term is in wide use among agencies and may be useful in determining what information should be posted on FedTeDS.

Council's response: The industry terminology for "sensitive but unclassified information" is changing to unclassified, sensitive information. This term is consistent with the Computer Security Act of 1987, where "sensitive information" refers to any information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of Federal programs, but which has not been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy. Furthermore, the Act states that the head of a Federal agency may employ standards for the cost effective security and privacy of sensitive information in a Federal computer system within or under the supervision of that agency. FedTeDS has "Sensitive but Unclassified" compliance requirements as part of accessing any information in the system. The Councils will work with program officials to have the terminology reviewed and updated as appropriate.

8. *Comment:* The Governmentwide Point of Entry (GPE), not FedTeDS, should be used to distribute all solicitation related materials.

Council's response: Currently, the GPE does not contain the functionality needed to control the availability or distribution of solicitation-related documents. Until the GPE is upgraded to provide the required functionality, FedTeDS will be used to provide the required functionality.

9. *Comment:* Use of FedTeDS should be made mandatory, not optional. Mandatory use will reduce the need for agencies to maintain similar websites.

Council's response: We agree. The use of FedTeDS is being made mandatory with a few necessary exceptions. Those exceptions are the same used to advertise and distribute solicitations on the GPE.

10. *Comment:* The proposed amendment does not cover vendors that are exempt from registering in CCR, such as foreign vendors who may be interested in work to be performed outside the U.S.

Council's response: FedTeDS requires all vendors to be registered in CCR and FedTeDS in order to gain access to FedTeDS. Vendors who are unable to register, or who are exempt from registration in CCR, may contact the contracting officer directly to receive the solicitation-related documents.

11. *Comment:* Are the exceptions at FAR 5.102 meant to address all of the exceptions to CCR registration found at FAR 4.1102?

Council's response: No. FAR 4.1102 addresses exceptions to the requirement for prospective vendors to register in CCR. Vendors who are excepted from CCR registration under FAR 4.1102 may contact the contracting officer directly to obtain the solicitation-related documents posted on FedTeDS. The FAR 5.102 exceptions address the requirement to post on FedTeDS solicitation-related documents that require control over access and distribution as opposed to posting those documents on the GPE.

12. *Comment:* The use of the MPIN (unique CCR vendor identification) for FedTeDS access poses a security risk for vendors. A company may not wish to share their MPIN with individual employees because the MPIN is also used to access competitively sensitive past performance information contained in the Past Performance Information Retrieval System (PPIRS) or other Government systems that may require the MPIN for access. While individual employees may be assigned individual FedTeDS accounts, those individuals may then distribute or otherwise handle FedTeDS information in a manner that is inconsistent with company policy.

Council's response: Under both CCR and FedTeDS, only the company point

of contact knows the MPIN. The point of contact uses the MPIN to register one or more employees in FedTeDS. Registration consists of identifying each employee designated to have FedTeDS access and assigning them a unique user identification and password for use in accessing FedTeDS. The employees then use their assigned user identification and password to log into FedTeDS. Thus, only the company point of contact has access to the MPIN.

13. *Comment:* Contracting officers may use FedTeDS registration inappropriately. In at least one case, oral proposal presenters were required to be registered in FedTeDS in order to be assigned an oral appointment time. Some solicitations and materials are posted on FedTeDS that are in no way sensitive.

Council's response: The Government may use its discretion in determining what needs to be included in any procurement and posted on FedBizOpps and in FedTeDS.

FedTeDS has proved to be a useful tool to control access and distribution of solicitation-related documents where control is deemed necessary by the Government. Training materials will be developed for contracting officers to assure proper use of FedTeDS.

14. *Comment:* Granting employees access to FedTeDS using the MPIN may inadvertently violate International Traffic in Arms (ITAR) regulations by weakening central control over access and distribution of export controlled materials.

Council's response: The Councils share the commenter's concern and have revised the proposed rule to address the export control issue. As indicated in our response to Comment 12, the company point of contact does not have to disclose the company MPIN to other employees to register them in FedTeDS. As indicated the company point of contact controls which employees receive a user identification and password.

15. *Comment:* Once an individual is registered in FedTeDS, they start getting notices of other solicitations that are only posted in FedTeDS. These employees may download these solicitations and distribute or otherwise mishandle them without the company knowing.

Council's response: This comment is similar to comment 12 and 14. Anyone who gains access to FedTeDS information may then redistribute that information in an uncontrolled manner. Control of employee behavior and potential liability for employee actions is a matter for internal company management and concern.

Therefore, this final rule amends FAR Parts 2, 5 and 7 to require contracting officers to provide solicitation-related information that requires limited availability or distribution to offerors electronically via the FedTeDS system unless certain exceptions apply.

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 rule does not impose any costs on either small or large businesses; therefore, an Initial Regulatory Flexibility Analysis has not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 5, and 7 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 2005–09, FAR case 2004–007), 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. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 5, and 7

Government procurement.

Dated: April 12, 2006.

Gerald Zaffos

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, and 7 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, and 7 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 2—DEFINITION OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order

the definition “Federal Technical Data Solution (FedTeDS)” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Federal Technical Data Solution (FedTeDS) is a web application integrated with the Governmentwide Point of Entry (GPE) and the Central Contractor Registration (CCR) system for distribution of information related to contract opportunities. It is designed to enhance controls on the access and distribution of solicitation requirements or other documents when controls are necessary according to agency procedures. FedTeDS may be found on the Internet at <https://www.fedteds.gov>.

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PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.102 by revising paragraph (a)(1); redesignating paragraph (a)(4) as (a)(5), and adding new paragraph (a)(4); revising newly redesignated (a)(5); and by removing from paragraph (b) introductory text “(a)(4)” and adding “(a)(5)” in its place. The revised text reads as follows:

5.102 Availability of solicitations.

(a)(1) Except as provided in paragraph (a)(5) of this section, the contracting officer must make available through the GPE solicitations synopsisized through the GPE, including specifications, technical data, and other pertinent information determined necessary by the contracting officer. Transmissions to the GPE must be in accordance with the interface description available via the Internet at <http://www.fedbizopps.gov>.

* * * * *

(4) When an agency determines that a solicitation contains information that requires additional controls to monitor access and distribution (e.g., technical data, specifications, maps, building designs, schedules, etc.), the information shall be made available through the Federal Technical Data Solution (FedTeDS) unless an exception in paragraph (a)(5) of this section applies. When FedTeDS is used, it shall be used in conjunction with the GPE to meet the synopsis and advertising requirements of this part.

(5) The contracting officer need not make a solicitation available through the GPE, or make other information available through FedTeDS as required in paragraph (a)(4) of this section, when—

(i) Disclosure would compromise the national security (e.g., would result in

disclosure of classified information, or information subject to export controls) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception;

(ii) The nature of the file (e.g., size, format) does not make it cost-effective or practicable for contracting officers to provide access to the solicitation through the GPE;

(iii) Agency procedures specify that the use of FedTeDS does not provide sufficient controls for the information to be made available and an alternative means of distributing the information is more appropriate; or

(iv) The agency's senior procurement executive makes a written determination that access through the GPE is not in the Government's interest.

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■ 4. Amend section 5.207 by revising paragraph (c)(18) to read as follows:

5.207 Preparation and transmittal of synopses.

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(c) * * *

(18) If the technical data required to respond to the solicitation will not be furnished as part of such solicitation, identify the source in the Government, such as FedTeDS (<https://www.fedteds.gov>), from which the technical data may be obtained.

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PART 7—ACQUISITION PLANNING

■ 5. Amend section 7.105 by revising paragraph (b)(15) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(15) *Government-furnished information.* Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors. Indicate which information that requires additional controls to monitor access and distribution (e.g., technical specifications, maps, building designs, schedules, etc.), as determined by the agency, is to be posted via the Federal Technical Data Solution (FedTeDS) (see 5.102(a)).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 2

[FAC 2005-09; FAR Case 2004-030; Item II; Docket FAR-2006-0020]

RIN 9000-AK21

Federal Acquisition Regulation; FAR Case 2004-030, Definition of Information Technology

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 to convert to a final rule without change, an interim rule amending the Federal Acquisition Regulation (FAR) to revise the definition of "Information technology" to reflect the changes to the definition resulting from the enactment of Public Law 108-199, Consolidated Appropriations Act, 2004. Section 535(b) of Division F of Public Law 108-199 permanently revises the term "Information technology", which is defined at 40 U.S.C. 11101, to add "analysis and evaluation" and to clarify the term "ancillary equipment."

DATES: *Effective Date:* April 19, 2006.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2005-09, FAR case 2004-030. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 70 FR 43577 on July 27, 2005. The interim rule revised the definition of "Information technology" to reflect the changes to the definition resulting from the enactment of Public Law 108-199, Consolidated Appropriations Act, 2004. The new language at Section 535(b) of Division F of Public Law 108-199 permanently revises the term "Information technology", which is defined at 40 U.S.C. 11101, to add "analysis and evaluation" and to clarify the term "ancillary equipment."

The Councils received one public comment in response to the interim rule. The commenter indicated that the addition of the words "analysis, evaluation" was omitted from the changes to the definition of information technology in FAR 2.101(b) in the **Federal Register** on page 43578. Although not reprinted in full FAR text of the definition of information technology, change instruction 2 of the **Federal Register** notice added "analysis, evaluation" to the two appropriate portions of the definition. The Code of Federal Regulations text was changed in accordance with this instruction, and no further changes are required.

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 rule only revises and clarifies the definition for information technology resulting from the enactment of Public Law 108-199, Consolidated Appropriations Act, 2004. This is a minor technical change to the definition. We did not receive any comments on this issue from small business concerns or other interested parties.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 2

Government procurement.

Dated: April 12, 2006.

Gerald Zaffos,

Director, Contract Policy Division.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR part 2, which was published in the **Federal Register** at 70