

#### **Item V—Small Business Competitiveness Demonstration Program (FAR Case 1999-012)**

This final rule converts the interim rule published as Item I of FAC 97-16 to a final rule without change.

The rule amends FAR Part 19 to clarify language pertaining to the Competitiveness Demonstration Program, consistent with revisions to the Program that were required by the OFPP and SBA joint final policy directive dated May 25, 1999. The rule revises FAR Subpart 19.10 to—

1. Advise the contracting officer to consider the 8(a) Program and HUBZone Program when there is not a reasonable expectation that offers will be received from two or more emerging small businesses; and

2. Add a new section 19.1006, Exclusions, to reflect the exclusions of orders under the Federal Supply Schedule Program and contract awards to educational and nonprofit institutions or governmental entities.

#### **Item VI—Construction Industry Payment Protection Act of 1999 (FAR Case 1999-302)**

This final rule amends FAR 28.102-2 and the clauses at 52.228-13, 52.228-15, and 52.228-16 to implement the Construction Industry Payment Protection (CIPP) Act of 1999. The CIPP Act amends the Miller Act to provide that the amount of a payment bond must equal the total amount payable by the terms of the contract, unless the contracting officer determines that a payment bond in that amount is impractical. The final rule also provides enhanced payment protection for Government contracts not subject to the Miller Act. The contracting officer must determine the appropriate amount of payment protection in each construction contract that exceeds \$25,000, and in any other contract that requires a performance bond in accordance with FAR 28.103-2.

#### **Item VII—Deferred Research and Development (R&D) Costs (FAR Case 1999-013)**

This final rule amends the FAR by clarifying and simplifying the “deferred research and development costs” cost principle at FAR 31.205-48. The rule will only affect contracting officers that price contracts using cost analysis, or that are required by a contract clause to use cost principles for the determination, negotiation, or allowance of contractor costs.

#### **Item VIII—Time-and-Materials or Labor Hours (FAR Case 1999-606)**

This final rule clarifies the requirements regarding changes to time-and-materials and labor-hour contracts. The rule changes the clause at FAR 52.243-3, Changes—Time-and-Materials or Labor-Hours, to be consistent with Alternate II of the clause at FAR 52.243-1, Changes—Fixed-Price. Alternate II is used in service contracts and most of the work performed under time-and-materials or labor-hour contracts also involves services.

#### **Item IX—Repeal of Reporting Requirements under Public Law 85-804 (FAR Case 2000-006)**

This final rule amends the FAR to implement paragraph 901(r)(1) of the Federal Reports Elimination Act of 1998 (Pub. L. 105-362). Paragraph 901(r)(1) repealed section 4 of Public Law 85-804 (50 U.S.C. 1434). Section 4 required each department and agency to report annually to Congress any contract action in excess of \$50,000 issued under the authority of this law. The rule revises FAR 50.000 to update the reference to Public Law 85-804 and eliminates the reporting requirements at FAR Part 50.104. Agencies are no longer required to submit to Congress annually a report of actions taken on requests for relief under the authority of Public Law 85-804.

#### **Item X—Technical Amendments**

These amendments update references and make editorial changes at sections 3.104-5, 4.803 and 22.400.

Dated: July 19, 2000.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

#### **Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 97-19 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.

All Federal Acquisition Regulation (FAR) changes and other directive material contained in FAC 97-19 are effective [insert date 60 days after publication in the Federal Register], except for the following items:

Items I, V, VI, and X are effective [insert date of publication in the Federal Register].

Item IV is effective [insert date 30 days after publication in the Federal Register].

Item II is effective October 1, 2000.

Each rule is applicable to solicitations issued on or after the rule's effective date.

Dated: July 19, 2000.

**Deidre A. Lee,**

*Director, Defense Procurement.*

#### **Federal Acquisition Circular**

Dated: July 19, 2000.

**David A. Drabkin,**

*Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.*

#### **Federal Acquisition Circular**

Dated: July 18, 2000.

**R. Scott Thompson,**

*Acting Associate 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, 7, 10, 15, and 19**

**[FAC 97-19; FAR Case 1997-306 (97-306); Item I]**

**RIN 9000-AI55**

#### **Federal Acquisition Regulation; Contract Bundling**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Sections 411-417 of the Small Business Reauthorization Act of 1997. Sections 411-417 amend Title 15 of the United States Code to define “contract bundling,” and to require agencies to avoid unnecessary bundling that precludes small business participation in the performance of Federal contracts.

**DATES:** *Effective Date:* July 26, 2000.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-19, FAR case 1997-306.

## SUPPLEMENTARY INFORMATION:

## A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 64 FR 72441, December 27, 1999. The interim rule is converted to a final rule, with changes, and amends FAR Parts 2, 4, 5, 7, 10, 15, and 19 to implement Sections 411–417 of the Small Business Reauthorization Act of 1997, Pub. L. 105–135, and the Small Business Administration (SBA) interim rule published in the **Federal Register** at 64 FR 57366, October 25, 1999.

We received comments from six respondents in response to the interim rule and considered them in drafting the final rule.

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 Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA). The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. The FRFA is summarized as follows:

This rule amends FAR Parts 2, 4, 5, 7, 10, 15, and 19 to implement Sections 411–417 of the Small Business Reauthorization Act of 1997, Pub. L. 105–135. Sections 411–417 amend Title 15 of the United States Code to define “contract bundling,” and to require agencies to avoid unnecessary bundling that precludes small business participation in the performance of Federal contracts.

The objective of the rule is to establish agency procedures for processing bundled requirements and to ensure maximum small business participation in bundled acquisitions. Agencies must—

- Perform market research when bundled requirements are anticipated;
- Justify bundling in acquisition strategies;
- Meet specific estimated benefit thresholds before bundling requirements;
- Assess the impact of bundling on small businesses;
- Submit solicitations containing bundled requirements to the Small Business Administration (SBA) procurement center representatives for review; and
- Include, in negotiated competitions for bundled requirements, a source selection factor for the offerors’ proposed use of small businesses as subcontractors and their past performance in meeting subcontracting goals.

These objectives are stated in Sections 411–417 of Pub. L. 105–135 and in SBA’s implementing regulations, published in the **Federal Register** at 64 FR 57366, October 25, 1999. We published an interim rule in the

**Federal Register** at 64 FR 72441, December 27, 1999. Six respondents provided public comments. There are no practical alternatives that will accomplish the objective of this rule (*i.e.*, to ensure maximum participation of small businesses in Federal contracting as agencies combine requirements in the face of downsizing and other cost-saving measures). No viable alternatives were proposed during the public comment period.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat.

## 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, 7, 10, 15, and 19

Government procurement.

Dated: July 19, 2000.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

## Interim Rule Adopted as Final With Changes

Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 4, 5, 7, 10, 15, and 19 which was published in the **Federal Register** at 64 FR 72441, December 27, 1999, as a final rule with the following changes:

1. The authority citation for 48 CFR parts 2, 5, 7, 10, 15, and 19 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by revising the definition “Bundled contract” to read as follows:

## 2.101 Definitions.

\* \* \* \* \*

*Bundled contract* means a contract where the requirements have been consolidated by bundling. (See the definition of *bundling*.)

\* \* \* \* \*

## PART 5—PUBLICIZING CONTRACT ACTIONS

3. In section 5.206, revise the introductory text of paragraph (a) to read as follows:

## 5.206 Notices of subcontracting opportunities.

(a) The following entities may use a CBD notice to seek competition for subcontracts, to increase participation

by qualified HUBZone small business, small, small disadvantaged, and small women-owned business concerns, and to meet established subcontracting plan goals:

\* \* \* \* \*

## PART 7—ACQUISITION PLANNING

4. Amend section 7.107 by revising the section heading and paragraphs (b)(2) and (h) to read as follows:

## 7.107 Additional requirements for acquisitions involving bundling.

\* \* \* \* \*

(b) \* \* \*

(2) Five percent of the estimated contract value (including options) or \$7.5 million, whichever is greater, if the value exceeds \$75 million.

\* \* \* \* \*

(h) The requirements of this section, except for paragraph (e), do not apply if a cost comparison analysis will be performed in accordance with OMB Circular A–76.

## PART 10—MARKET RESEARCH

5. In section 10.001, revise paragraph (c) to read as follows:

## 10.001 Policy.

\* \* \* \* \*

(c) If an agency contemplates awarding a bundled contract, the agency—

(1) When performing market research, should consult with the local Small Business Administration procurement center representative (PCR) or, if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the procuring activity is located; and

(2) At least 30 days before release of the solicitation—

(i) Must notify any affected incumbent small business concerns of the Government’s intention to bundle the requirement; and

(ii) Should notify any affected incumbent small business concerns of how the concerns may contact the appropriate Small Business Administration representative.

## PART 15—CONTRACTING BY NEGOTIATION

6. Amend section 15.305 by revising paragraph (a)(5) to read as follows:

## 15.305 Proposal evaluation.

(a) \* \* \*

(5) *Small business subcontracting evaluation.* Solicitations must be structured to give offers from small

business concerns the highest rating for the evaluation factors in 15.304(c)(3)(iii) and (c)(5).

\* \* \* \* \*

## PART 19—SMALL BUSINESS PROGRAMS

7. Amend section 19.101 by adding paragraph (g)(5) to read as follows:

### 19.101 Explanation of terms.

\* \* \* \* \*

(g) \* \* \*

(5) *Size determination for teaming arrangements.* For size determination purposes, apply the size standard tests in (g)(1)(i) and (ii) of this section when a teaming arrangement of two or more business concerns submits an offer, as appropriate.

\* \* \* \* \*

8. Amend section 19.202–1 by revising paragraph (e)(1)(iii) to read as follows:

### 19.202–1 Encouraging small business participation in acquisitions.

\* \* \* \* \*

(e) \* \* \*

(1) \* \* \*

(iii) The proposed acquisition is for a bundled requirement. (See 10.001(c)(2)(i) for mandatory 30-day notice requirement to incumbent small business concerns.)

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 12, 19, 23, 52, and 53

[FAC 97–19; FAR Case 2000–604; Item II]

RIN 9000–A175

### Federal Acquisition Regulation; North American Industry Classification System (NAICS)

**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 convert size standards and other programs in the FAR based on the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS).

**DATES:** *Effective Date:* October 1, 2000.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before September 25, 2000 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.2000–604@gsa.gov

Please submit comments only and cite FAC 97–19, FAR case 2000–604 in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAC 97–19, FAR case 2000–604.

### SUPPLEMENTARY INFORMATION:

#### A. Background

This interim rule amends the FAR to convert size standards and other programs in the FAR that are based on the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS).

The Small Business Administration (SBA) amended its regulations to convert small business size standards from the Standard Industrial Classification (SIC) System to the North American Industry Classification System (NAICS). These new size standards were published in the **Federal Register** at 65 FR 30836, May 15, 2000, and are effective on October 1, 2000. NAICS is a new system that classifies business concerns according to how they conduct their economic activity. SBA has determined that NAICS is a better description of industries in the U.S. economy than the SIC system for purposes of establishing size standards. This interim rule adopts the NAICS-based size standards effective October 1, 2000.

This rule conforms the FAR to the final SBA size standards and converts other programs in the FAR currently based on SIC codes to NAICS codes. These programs include the Small Business Competitiveness

Demonstration Program at Subpart 19.10, the Price Evaluation Adjustment for Small Disadvantaged Business Concerns at Subpart 19.11, the Small Disadvantaged Business Participation Program at Subpart 19.12, and the Historically Underutilized Business Zone (HUBZone) Program at Subpart 19.13.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the coding changes are primarily internal to the Government. External uses of the codes under the small business subcontracting program and small disadvantaged business participation programs are primarily limited to large businesses. This rule includes implementation of SBA's final rule, and SBA has certified that the impact of the SIC to NAICS change on each business will not be substantial. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 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 97–19, FAR case 2000–604), in correspondence.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104–13) applies; however, this interim rule does not impose new reporting and recordkeeping requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* This rule will require restructuring of contractors' record systems to collect data on small disadvantaged businesses under small business subcontracting plans and small disadvantaged business participation plans by NAICS rather than SIC. Because this merely involves use of a different industry classification system, this interim rule does not affect existing OMB clearances (9000–0006, 9000–0007, and 9000–0150).

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

A determination has been made under the authority of the Secretary of Defense