52.222–19 [Amended]

■ 6. Amend section 52.222–19 by removing from the clause heading ''(Feb 2008)'' and adding ''(Aug 09)'' in its place; and removing from paragraph (a)(4) ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

■ 7. Amend section 52.225–5 by revising the date of the clause; and in paragraph (a), in the definition ''Designated Country'', revising paragraph (1) to read as follows:

52.225–5 Trade Agreements.

* * * * *

TRADE AGREEMENTS (Aug 09)

(a) *Definitions.* * * *

Designated country * * *

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei))'', or United Kingdom);

* * * * *

52.225–11 [Amended]

■ 8. Amend section 52.225–11 by removing from the clause heading ''(June 2009)'' and adding ''(Aug 09)'' in its place; and in paragraph (a), in the definition ''Designated country'', removing from paragraph (1) ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

52.225–23 [Amended]

■ 9. Amend section 52.225–23 by removing from the clause heading ''(Mar 2009)'' and adding ''(Aug 09)'' in its place; and in paragraph (a), in the definition ''Recovery Act designated country'', removing from paragraph (1) ''Switzerland,'' and adding ''Switzerland, Taiwan,'' in its place.

[FR Doc. E9–19164 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 25, and 52

[FAC 2005–36; FAR Case 2008–004; Item IV; Docket 2008–0001; Sequence 21]

RIN 9000–AL01

Federal Acquisition Regulation; FAR Case 2008–004, Prohibition on Restricted Business Operations in Sudan and Imports from Burma

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 Section 6 of the Sudan Accountability and Divestment Act of 2007. Section 6 requires certification in each contract entered into by an Executive Agency that the contractor does not conduct certain business operations in Sudan. In addition, the Councils added Burma to the list of countries from which most imports are prohibited. This action was taken in accordance with Executive Order (E.O.) 13310, Blocking Property of the Government of Burma and Prohibiting Certain Transactions, and E.O. 13448, Blocking the Property and Prohibiting Certain Transactions Related to Burma.

DATES: *Effective Date*: August 11, 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 at (202) 501–4755. Please cite FAC 2005–36, FAR case 2008–004.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation (FAR) to implement Section 6 of the Sudan Accountability and Divestment Act of 2007, which was signed on December 31, 2007.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 73 FR 33636 on June 12, 2008. The public comment period ended August 11, 2008.

This rule amends the FAR to implement Section 6 of the Sudan Accountability and Divestment Act of 2007 (the Act), which requires certification in each contract entered into by an executive agency that the contractor does not conduct certain business operations in Sudan. In addition, the Councils added Burma to the list of countries from which most imports are prohibited.

B. Discussion and Analysis.

The FAR Secretariat received five (5) responses to the interim rule. These responses included a total of 16 comments on 11 issues. A sixth response was simply a copy of the statute and was not counted as a comment. All of the responses concerned the implementation of the Act; there were no comments on the addition of Burma to the list of prohibited countries. Each issue is discussed in the following sections.

No public comments were received regarding the portion of the interim rule addressing Burma. Therefore, that part of the interim rule is unchanged (see the **Federal Register** at 73 FR 33636 dated June 12, 2008).

1. Delete the definition of ''person'' and other issues with definitions.

Comment: **a**. Two respondents recommended that the final rule delete the definition of ''person.'' The respondents point out that Section 2 of the Act, which defines the key terms in the Act, does not define ''contractor'' but does define ''person.'' The term person, however, is used frequently in Section 3 of the Act, which addresses divestiture by State and local governments (not a subject of the FAR coverage), but it is not used at all in Section 6 of the Act, which the FAR is implementing. The respondents point out that, had the Congress intended ''person'' and ''contractor'' to be synonymous, it should have defined them so, and one respondent points out portions of the legislative history that reinforce its conclusion that the congressional intent was to have a different meaning for each term.

b. In addition, one respondent requested that the definition of ''restricted business operations'' at FAR sections 25.702–1 and 52.225–20 either delete the phrase ''as those terms are defined in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110–174)'' or replace ''defined in'' with the phrase ''described in Section 3(d) of''.

c. Last, a respondent reminded the Councils that in the ''definition of the

term 'business operations' in Section 3(d) of the Act, the term means 'engaging in commerce in any form *in Sudan*' (emphasis added).''

Response: **a**. The Councils have deleted the definition of ''person''. The definition of ''person'' was included at FAR 25.702–1, Definitions, and the clause at 52.225–20, as well, because Section 6 of the Act requires contractors to certify that they do not conduct business operations as described in Section 3(d) of the Act. This description of business operations that are restricted uses the term ''person'', which is therefore used in the rule within the definition of ''restricted business operations''. A cross reference to the definition of ''person'' in the Act is included within the definition of ''restricted business operations,'' rather than including a separate definition of ''person'' in the rule. The rule does not use the term ''person'' as synonymous with ''contractor'' or ''offeror''.

b. The Councils note that, although the statute describes the business operations that are restricted and does not define the term ''restricted business operations,'' the terms that are used within that definition of ''restricted business operations'' in the rule (''power production activities,'' ''mineral extraction activities,'' ''oil-related activities,'' and ''military equipment'') are all defined in section 2 of the Act, which is entitled ''DEFINITIONS''.

c. The Councils have not added ''in Sudan'' in the definition of ''business operations''. The Councils defined the term ''restricted business operations'' to include any business operations in Sudan, which the Councils believe fully implements the intent of the statute. In addition, the other specific conditions regarding what types of business operations are restricted are addressed at FAR sections 25.702–1, 52.212–3(a), and 52.225–20(a).

2. Apply the certification requirement only to offerors that would be in privity of contract with the U.S. Government.

Comment: **a**. Effectively, this recommendation is a logical outcome of the comment immediately above. Two respondents believed that, given the words the Congress chose, the way in which the law is structured, and the legislative history of the statute, it is clear that Congress intended the certification requirement to apply to the business operations of contractors themselves and not the business operations of other entities in their corporate families. One respondent quoted the report of the Senate Banking, Housing, and Urban Affairs Committee, in the section discussing divestment, not in the discussion of Section 6, says that ''(i)mplicit in this definition (of ''person'') is the requirement that parent companies to subsidiaries, or subsidiaries that share the same parent company, may be targeted for divestment as long as there is credible evidence linking their affiliates to business operations in key sectors of Sudan'' (emphasis added). In addition, the corporate entity that is submitting the proposal may not have any control over, or insight into, an affiliate or subsidiary of a shared corporate parent. In support of this position, another respondent states that ''(c)learly, only the offeror making the certification required under the interim regulation is the party that will be in privity of contract.''

b. In addition, a respondent claimed that, because the statute used the term ''contractor'' rather than ''offeror,'' the certification should be restructured so that not every offeror has to certify and the certification will be required only of the successful offeror. This change, according to the respondent, will substantially reduce the scope of the certification in terms of the number of companies it impacts.

Response: **a**. The Councils note that the plain words of the Act, Section 6, require each ''contractor,'' not each ''person,'' to certify, and only the definition of ''person'' includes the highly inclusive elements of affiliates, subsidiaries, and so forth. The interim rule has plainly implemented this, except that the term ''contractor'' has been changed to ''offeror'' due to the timing of the certification. The certification requires the offeror to certify that ''it'' does not conduct any restricted business operations in Sudan. This has been made even clearer by substituting ''the offeror'' for ''it''.

b. With regard to the timing of the certification requirement, however, the Councils do not agree that it should be delayed from proposal submission to a time immediately prior to award (when the Government knows which is the presumptive successful offeror) or should be limited solely to the successful offeror. The Government's solicitation and contract award process does not contemplate a second certification round wherein only the successful offeror is required to complete a certification(s). A failure to certify that it does not conduct restricted business operations in Sudan should remove an offeror from consideration for award. If an offeror is unable to certify, then it will not qualify for award, and the Government should not be expending time and money evaluating that offeror's proposal.

3. Apply the certification requirement to affiliated companies.

Comment: Two respondents were concerned that the interim rule does not explicitly extend to affiliated companies. One of these respondents notes that the report accompanying the Act specifically ''defines 'persons' to include 'parent companies to subsidiaries, or subsidiaries that share the same parent company' in addition to 'successors, subunits, or subsidiaries''', and the respondent encourages the Councils to interpret the legislation to include affiliated companies in the contract certification requirement. Another respondent quotes the same language from the report in requesting that affiliates be included.

Response: In response to the first comment above, the Councils attempted, in the interim rule, to stay as close as possible to the literal requirements in terms of the statute. Given that the statute does not use the term ''person,'' with its expansive definition, in Section 6 of the Act, the Councils do not agree that the certification requirement should be expanded to include affiliates. Please see also the response at Section 2 above.

4. Don't apply the certification requirement to affiliated companies.

Comment: A respondent stated that requiring companies to certify more broadly about the activities of their affiliates would require them to attest to factual matters typically beyond their reach. As a practical and legal matter, according to the respondent, offerors often do not have the right to access information about the activities of their affiliates, particularly of their parent or subsidiaries of that parent.

Response: The Councils agree that it is unlikely that most prospective Government contractors would be able to access the information needed to certify to the activities of their affiliates, parents, or parent-company subsidiaries. Please see responses to Comments 2 and 3 above.

5. Apply the requirement to all subcontractors.

Comment: A respondent believed that the rule could be improved by extending the contract prohibition to all subcontractors of companies that receive Federal contracts. Another respondent, also, was concerned that the exclusion of subcontractors would result in the exclusion of a significant portion of entities seeking to carry out work for the U.S. Government.

Response: In the Preamble to the interim rule, the Councils noted that the Act does not require flow down of the certification provision to subcontractors but only addresses contracts entered

into by executive agencies, *i.e.*, prime contracts. The Councils do not think it appropriate to exceed the limits of the statute.

6. Apply the certification requirement only to future contracts.

Comment: The interim rule requested comments on whether the law should also be applied to existing contracts to ensure compliance with the overall intent of the law. Two respondents were against extending the certification requirement ''retroactively,'' and they noted that there is no indication in the Act's legislative history to indicate any such intention on the part of the Congress.

Further, one respondent recommended that the certification not be required (1) under the annual Online Representations and Certifications (ORCA) update, (2) upon the exercise of an option or issuance of a task or delivery order under an existing contract, or (3) pursuant to the performance of warranty work or safety-related repair work for an otherwise completed project in Sudan.

Response: The Councils have resisted applying new requirements to existing contracts, and the Councils do not recommend doing so now. This final rule will have normal effective date (prospective) language, as set forth in FAR 1.108(d).

This rule does not require the new certification upon exercise of options or issuance of a task or delivery order.

With regard to annual update of the Online Representations and Certifications (ORCA), that has no impact on an existing contract. Annual updates to ORCA are only applicable to future contracts.

With regard to the third situation posed by the respondent above, this seems to be an extreme situation and should be treated by the contracting officer, if it occurs, under the FAR deviation process.

7. Ensure that contract extensions are covered.

Comment: A respondent was concerned that ''under existing practice, Federal contracts may be extended in some cases without being formally renewed and thus would not be subject to the contract prohibition rule.'' The respondent encouraged the Councils to ''address this potential loophole'' and ensure that contract extensions are covered by the certification requirement.

Response: The Councils are unaware of any circumstances under which the FAR sanctions the informal extension of contracts.

8. Require certification in ORCA and each individual offer.

Comment: A respondent encouraged a final rule that requires certification in both the ''ORCA Application'' and each individual proposal.

Response: The final rule does not change the interim rule's requirement to include the certification in each new procurement. In addition, the certification will be part of ORCA, and it will be considered in the contractor's annual ORCA certification. Annual updates to ORCA are only applicable to future contracts.

9. Require contractors to certify that they will not engage in targeted business operations during contract performance.

Comment: One respondent wanted the FAR to require companies that are awarded contract extensions to disclose any potential targeted business operations with Sudan and to explicitly require that companies certify they will not engage in targeted business operations for the duration of the contract.

Response: The statute does not require that the certification apply to future (targeted) business operations or include a promise not to engage in restricted business operations in Sudan for the duration of the company's contract with the U.S. Government. Therefore, the Councils do not think that it would be appropriate to substitute their judgment for the language of the statute.

10. Make certification into a check-the-box certification.

Comment: A respondent recommended that the final rule change the certification to a check-the-box certification. The respondent said that, ''(g)iven that the certification requirement may only be incorporated by reference into a solicitation, the FAR could create a substantial risk to offerors'' because offerors that are unaware of the content of the certification provision may unknowingly, and falsely, certify compliance. The respondent argued, also, that an explicit, check-the-box certification requirement would eliminate a potential defense to a falsely certifying contractor that it did not realize it was certifying at all.

Response: The respondent is incorrect in claiming that the certification may only be incorporated by reference. Incorporation by reference is the case for commercial items in the clause at 52.212–5; it is not the case for 52.225–20, Prohibition on Conducting Restricted Business Operation in Sudan—Certification, or 52.212–1, Instructions to Offerors—Commercial Items. In any case, a company signs and is responsible for complying with all requirements of the contract, whether a provision is reproduced in full or by reference.

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

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 this rule will only impact an offeror that is conducting restricted business operations in Sudan and wants to do business with the U.S. Government because there are already numerous sanctions against dealing with Sudan (*e.g.*, E.O.s 13412, 13400, and 13067, and 31 CFR Part 538), the number of entities impacted will be minimal. No comments to the contrary were received from small entities in response to the interim rule.

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. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: August 4, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 4, 15, 25, and 52 which was published in the **Federal Register** at 73 FR 33636 on June 12, 2008, is adopted as a final rule with the following changes:

■ 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 25.702–1 by removing the definition ''Person''; and in the definition ''Restricted business

operations'' revising the introductory text of paragraph (2) to read as follows:

25.702–1 Definitions.

* * * * *

Restricted business operations— * * *

(2) Does not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Revising in paragraph (a), in the definition ''Restricted business operations'' the second sentence of the introductory text; and

■ c. Removing from paragraph (m) ''that it'' and adding ''that the offeror'' in its place.

■ The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (Aug 2009)

* * * * *

(a) *Definitions.* * * *

Restricted business operations * * * Restricted business operations do not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

* * * * *

■ 4. Amend section 52.225–20 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraph (a) the definition ''Person'', and revising the second sentence in the introductory text of the definition ''Restricted business operations''; and

■ c. Removing from paragraph (b) ''that it'' and adding ''that the offeror'' in its place.

■ The revised text reads as follows:

52.225–20 Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

* * * * *

PROHIBITION ON CONDUCTING RESTRICTED BUSINESS OPERATIONS IN SUDAN—CERTIFICATION (Aug 2009)

(a) *Definitions.* * * *

Restricted business operations * * * Restricted business operations do not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

* * * * *

[FR Doc. E9–19165 Filed 8–10–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 28 and 52

[FAC 2005–36; FAR Case 2006–013; Item V; Docket 2006–0033; Sequence 1]

RIN 9000–AK71

Federal Acquisition Regulation; FAR Case 2006–013, List of Approved Attorneys, Abstractors, and Title Companies

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 update the procedures for the acceptance of a bond with a security interest in real property.

DATES: *Effective Date*: September 10, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–36, FAR case 2006–013.

SUPPLEMENTARY INFORMATION:

A. Background

FAR Subpart 28.2 requires agencies to obtain adequate security for bonds when bonds are used with a contract. A corporate or individual surety is an acceptable form of security for a bond. FAR Subpart 28.2 provides that when an individual surety secures a bond with an interest in real estate, the surety must provide evidence of title (*i.e.*, ownership) in the form of a certificate of title prepared by a qualified title attorney or abstractor, or a title insurance policy issued by title insurance company that has been approved by the Department of Justice (DOJ). Since DOJ no longer maintains a list of approved title insurance companies, agency contracting officers must now take other steps to ensure the adequacy of the title evidence or ensure the surety obtains a title insurance policy for the full amount of the Government's lien interest from a qualified title insurance company.

This FAR rule revises the types of acceptable title evidence by individual sureties to include mortgagee title insurance or other evidence of title consistent with Section 2 of the DOJ Title Standards 2001, maintained on a DOJ website. FAR clause 52.228–11, Pledges of Assets, is also updated with this new reference.

The rule also provides that contracting officers should request the assistance of agency legal counsel in determining if title evidence from individual sureties is consistent with the Justice Department Standards.

PUBLIC COMMENTS

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 12584 on March 16, 2007. The Councils received a single comment on the proposed rule. The Councils have partially adopted this comment and revised the final rule accordingly.

Comment: For those cases where real property is pledged to secure a bond, the proposed rule provided that ''depending on the value of the property, contracting officers should consider requesting assistance from agency designated legal counsel to determine if the evidence of title is adequate.'' The commenter believes this legal consultation should be mandatory.

Response: Partially adopted. The final rule drops the qualifier ''depending on the value of the property'' on seeking legal counsel when real property is pledged to secure a bond. However, the term ''should'' has been retained to provide contracting officers with the discretion to use their business judgment.

In considering the public comment, the Government revisited the proposed rule in total. In consultation with the Department of Justice, it was decided that when real property is pledged to secure a bond, instead of only allowing evidence of title that is consistent with DOJ standards as set forth in the proposed rule, that sureties could provide a mortgagee title insurance policy in an insurance amount equal to the amount of the lien. The Department of Justice observed that mortgagee title insurance is the most common form of title evidence in the commercial marketplace.