

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Circular 97-25;
Introduction**

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

ACTION: Summary presentation of interim rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 97-25. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.arnet.gov/far>.

DATES: For effective dates and comment dates, see separate documents which follow.

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 the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 97-25 and specific FAR case number(s). Interested parties may also visit our website at <http://www.arnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Preference for Performance-Based Contracting	2000-307	Wise.
II	Contractor Personnel in the Procurement of Information Technology Services	2000-609	Nelson.

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

Federal Acquisition Circular 97-25 amends the FAR as specified below:

ITEM I—Preference for Performance-Based Contracting (FAR Case 2000-307)

This interim rule amends FAR 2.101, Definitions, and 37.102, Policy, to implement Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). The rule affects contracting officers that buy services by explicitly establishing a preference for performance-based contracts or task orders.

Item II—Contractor Personnel in the Procurement of Information Technology Services (FAR Case 2000-609)

This interim rule adds FAR 39.104 to implement Section 813 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). Section 813 prohibits the use of minimum experience or education requirements for contractor personnel in solicitations for the acquisition of information technology services, unless—

1. The contracting officer first determines that the needs of the agency cannot be met without such requirement; or
2. The needs of the agency require the use of a type of contract other than a performance-based contract.

Dated: April 27, 2001.

Al Matera,
Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97-25 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administration for the National Aeronautics and Space Administration.

All Federal Acquisition Regulation (FAR) changes and other directive material contained in FAC 97-25 are effective May 2, 2001.

April 5, 2001.

David A. Drabkin,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: April 25, 2001.

Deidre A. Lee,
Director, Defense Procurement.

April 6, 2001.

Tom Luedtke,
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 and 37**

[FAC 97-25; FAR Case 2000-307; Item I]

RIN 9000-AJ12

**Federal Acquisition Regulation;
Preference for Performance-Based Contracting**

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 implement Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. The FAR rule explicitly establishes a preference for performance-based contracting when acquiring services.

DATES: Effective Date: May 2, 2001.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before July 2, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVP), 1800 F Street,

NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.2000-307@gsa.gov.

Please submit comments only and cite FAC 97-25, FAR case 2000-307 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. Julia Wise, Procurement Analyst, at (202) 208-1168. Please cite FAC 97-25, FAR case 2000-307.

SUPPLEMENTARY INFORMATION:

A. Background

Section 821(a) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398) establishes, Governmentwide, the following order of precedence when acquiring services—

1. A firm-fixed-price performance-based contract or task order.
2. A performance-based contract or task order that is not firm-fixed-price.
3. A contract or task order that is not performance-based.

Section 821(e)(1) provides a definition for “performance-based” that applies to Section 821(a): “The term ‘performance-based,’ with respect to a contract, a task order, or contracting means that the contract, task order, or contracting, respectively, includes the use of performance work statements that set forth contract requirements in clear, specific, and objective terms with measurable outcomes.”

This interim FAR rule—

1. Moves the existing definition “performance-based contracting” at FAR 37.101 to FAR 2.101, Definitions, and revises it to include the substance of the Section 821(e) definition; and
2. Revises FAR 37.102, Policy, to explicitly state that performance-based contracting is the preferred method for acquiring services and to enumerate the order of precedence established by statute.

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 rule does not impose a new policy requirement on small entities. The FAR currently promotes the use of performance-based service contracting and the use of firm-fixed-price type of contracts and task orders when it is appropriate to do so. For example, in the current FAR—

1. Paragraph (a) of 37.102, policy, states “Agencies shall use performance-based contracting methods * * * to the maximum extent practicable, for the acquisition of services. * * *”
2. Subpart 37.6, Performance-Based Contracting, exclusively addresses performance-based contracting; and
3. Subpart 16.1, Selecting Contract Types, addresses a preference, under certain conditions, for a firm-fixed-price type of contract that best utilizes the basic profit motive of business enterprise.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 2 and 37 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 97-25, FAR case 2000-307), 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.*

D. 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. The Councils have been tasked with publishing an interim rule to implement Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398), which is effective 180 days after the date of enactment (October 30, 2000) of Public Law 106-398. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils 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 2 and 37

Government procurement.

Dated: April 27, 2001.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2 and 37 as set forth below:

1. The authority citation for 48 CFR parts 2 and 37 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 adding, in alphabetical order, the definition “Performance-based contracting” to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Performance-based contracting means structuring all aspects of an acquisition around the purpose of the work to be performed with the contract requirements set forth in clear, specific, and objective terms with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.

* * * * *

PART 37—SERVICE CONTRACTING

37.101 [Amended]

3. Amend section 37.101 by removing the definition “Performance-based contracting.”

4. Amend section 37.102 by revising paragraph (a) to read as follows:

37.102 Policy.

(a) Performance-based contracting (see Subpart 37.6) is the preferred method for acquiring services (Public Law 106-398, section 821). When acquiring services, including those acquired under supply contracts, agencies must—

- (1) Use performance-based contracting methods to the maximum extent practicable, except for—

- (i) Architect-engineer services acquired in accordance with 40 U.S.C. 541-544 (see part 36);
- (ii) Construction (see part 36);
- (iii) Utility services (see part 41); or
- (iv) Services that are incidental to supply purchases; and

- (2) Use the following order of precedence (Public Law 106-398, section 821(a));

- (i) A firm-fixed price performance-based contract or task order.

- (ii) A performance-based contract or task order that is not firm-fixed price.
- (iii) A contract or task order that is not performance-based.

* * * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 39

[FAC 97-25; FAR Case 2000-609; Item II]

RIN 9000-AJ11

Federal Acquisition Regulation; Contractor Personnel in the Procurement of Information Technology Services

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 implement Section 813 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. The Act requires that the FAR be amended to address the use, in the procurement of information technology services, of requirements regarding the experience and education of contractor personnel.

DATES: *Effective Date:* May 2, 2001.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before July 2, 2001 to be considered in the formulation of a final rule.

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

Submit electronic comments via the Internet to: farcase.2000-609@gsa.gov.

Please submit comments only and cite FAC 97-25, FAR case 2000-609 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. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 97-25, FAR case 2000-609.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends the FAR to implement Section 813 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). The Act prohibits the use of minimum experience or education requirements for contractor personnel in solicitations for the acquisition of information technology services, unless—

1. The contracting officer first determines that the needs of the agency cannot be met without such requirement; or

2. The needs of the agency require the use of a type of contract other than a performance-based contract.

This interim rule implements the Act by adding a new section to Subpart 39.1 to implement Section 813 of the Act.

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 changes 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.*, because it will make it easier for them to hire employees to work on information technology service contracts, as well as increase their business opportunities in obtaining Government contracts. Therefore, we have prepared an Initial Regulatory Flexibility Analysis that is summarized as follows:

The interim rule amends FAR Part 39 to implement Section 813 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). The Act requires that the Federal Acquisition Regulation be revised to address the use, in the procurement of information technology services, of requirements regarding the experience and education of contractor personnel. The rule prohibits the use of minimum experience or education requirements for contractor personnel in solicitations for the acquisition of information technology services, unless the contracting officer first determines the needs of the agency cannot be met without that requirement; or the needs of the agency require the use of a type of contract other than a performance-based contract. The interim rule will apply to all large and small

entities that seek award of Federal information service contracts. The rule should have a positive economic impact on small businesses because it will make it easier for them to hire employees to work on information technology service contracts, as well as increase their business opportunities in obtaining Federal contracts.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Part 39 in accordance with 5 U.S.C. 610. Submit such comments separately and cite 5 U.S.C. 601, *et seq.* (FAC 97-25, FAR case 2000-609), 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.*

D. 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 in order to implement section 813 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). The Act requires that the FAR be amended within 180 days of enactment; enactment was on October 30, 2000. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils 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 39

Government procurement.

Dated: April 27, 2001.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR part 39 as set forth below:

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

1. The authority citation for 48 CFR part 39 continues to read as follows: