

52.225-9 Buy American Act—Construction Materials.

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**BUY AMERICAN ACT—
CONSTRUCTION MATERIALS (FEB
2009)**(a) *Definitions.* * * **Commercially available off-the-shelf (COTS) item*—(1) Means any item of supply (including construction material) that is—(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);
(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Domestic preference.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

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(End of clause)

■ 23. Amend section 52.225–10 by revising the date of the provision and paragraph (a) to read as follows:

52.225-10 Notice of Buy American Act Requirement—Construction Materials.

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**NOTICE OF BUY AMERICAN ACT
REQUIREMENT—CONSTRUCTION
MATERIALS (FEB 2009)**(a) *Definitions.* “Commercially available off-the-shelf (COTS) item,” “construction material,” “domestic construction material,” and “foreign construction material,” as used in this provision, are defined in the clause of this solicitation entitled “Buy American Act—Construction Materials” (Federal Acquisition Regulation (FAR) clause 52.225–9).

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(End of provision)

■ 24. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), by adding, in alphabetical order, the definition “Commercially available off-the-shelf (COTS) item” and revising the definition “Domestic construction material”;

■ c. Revising paragraph (b)(1); and

■ d. Revising the date of Alternate I and in paragraph (b)(1) adding a new second sentence to read as follows:

**52.225-11 Buy American Act—
Construction Materials Under Trade
Agreements.**

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**BUY AMERICAN ACT—
CONSTRUCTION MATERIALS UNDER
TRADE AGREEMENTS (FEB 2009)**(a) *Definitions.* * * *

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Commercially available off-the-shelf (COTS) item—(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated country construction materials.

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Alternate I (FEB 2009). * * *

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(b) *Construction materials.* (1) * * * In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). * * *

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■ 25. Amend section 52.225–12 by revising the date of the provision and revising paragraph (a) to read as follows:

52.225-12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

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**NOTICE OF BUY AMERICAN ACT
REQUIREMENT—CONSTRUCTION
MATERIALS UNDER TRADE
AGREEMENTS (FEB 2009)**(a) *Definitions.* “Commercially available off-the-shelf (COTS) item,” “construction material,” “designated country construction material,” “domestic construction material,” and “foreign construction material,” as used in this provision, are defined in the clause of this solicitation entitled “Buy American Act—Construction Materials Under Trade Agreements” (Federal Acquisition Regulation (FAR) clause 52.225–11).

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(End of provision)

[FR Doc. E9–551 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 4, 15, 17, 22, and 52****[FAC 2005–30; FAR Case 2001–004; Item III; Docket 2007–0001, Sequence 6]****RIN 9000-AK82****Federal Acquisition Regulation; FAR
Case 2001–004, Exemption of Certain
Service Contracts from the Service
Contract Act (SCA)****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 adopted as final, with changes, the interim rule which amended the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add an SCA exemption for contracts for certain

additional services that meet specific criteria.

DATES: *Effective Date:* February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-30, FAR case 2001-004.

SUPPLEMENTARY INFORMATION:

A. Background

The Wage and Hour Division of the U.S. Department of Labor's (DoL) Employment Standards Administration, issued a final rule, published in the **Federal Register** at 66 FR 5327, January 18, 2001, amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the SCA. The Councils opened FAR Case 2001-004 to implement the DoL rule.

The Councils published an interim rule in the **Federal Register** at 72 FR 63076 on November 7, 2007. The public comment period closed on January 7, 2008. The Councils received comments from 4 commenters (one commenter submitted 4 separate responses).

1. Non-statutory certifications.

The respondent is concerned about additional non-statutory certifications.

Response: These certifications are imposed by the Secretary of Labor as a condition for the Secretary granting the exemptions. The certifications are found in DoL regulations at 29 CFR 4.123(e)(1)(ii)(D) and (e)(2)(ii)(G). The FAR rule implements the DoL requirements for certification by the prime contractor with respect to compliance with the DoL conditions for exemption from the SCA. The certification at FAR 52.222-48 was already required. In accordance with FAR 1.107, the Administrator of the Office of Federal Procurement Policy approved this non-statutory certification and the new non-statutory certification at FAR 52.222-52 because these certifications provide the basis for determining applicability of the SCA to the acquisition. When certain conditions are met, the certifications are necessary in order to exempt contracts for maintenance, calibration, or repair of certain equipment (FAR 52.222-48) and contracts for certain services (FAR 52.222-52) from the application of the SCA. The certifications are necessary to encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce the Government's

commitment to reduce Government—unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards. Without the certifications from the contractor, the DoL conditions for exemption would not be met, and all contractors would be required to comply with the SCA and, if the contract exceeds \$2,500, the appropriate DoL wage determination.

2. Existing conditions for exemption for contracts for maintenance, calibration or repair of certain equipment (22.1003-4(c)(2)). Paragraph 22.1003-4(c)(2)(i) sets forth the condition that “the items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.”

One respondent questions if this means that the condition can be met only if the contractor that sold or traded the equipment is also the contractor performing the “maintenance, calibration, or repair services?”

Response: The respondent's interpretation is correct. This is existing FAR text that comes from the DoL rule at 29 CFR 4.123(e)(1)(ii)(A).

3. DoL determination after award (22.1003-4(c)(4)(ii)).

One respondent suggests that the wording at FAR 22.1003-4(c)(4)(ii) should be the same as the wording at FAR 22.1003-4(d)(4)(ii).

Response: Since the FAR at 22.1003-4(c)(4)(ii) and 22.1003-4(d)(4)(ii) is based on the DoL rule at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.123(e)(2)(iii), and there is no discrepancy between these two paragraphs in the DoL rule, then they should read the same in the FAR rule. The suggested changes have been made to make the FAR paragraphs read the same, except that the run-on sentence has been corrected in 22.1003-4(d)(4)(ii), rather than repeating it in 22.1003-4(c)(4)(ii).

4. New exemptions for contracts for certain services (22.1003-4(d)(1)). Paragraph 22.1003-4(d)(1)(i) provides exemption for “Automobile or other vehicle (e.g., aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).”

• One respondent wants it indicated with more certainty, that aircraft maintenance services are covered.

• One respondent requests a definition of “maintenance services.”

• One respondent wants to know what does “similar facility” mean? Is a contractor owned and operated facility,

such as a depot or hangar outfitted for commercial aircraft maintenance and repair work a similar facility? The respondent suggests using the phrase “Government facility performing automobile maintenance or repair services” instead of “Government motor pool or similar facility.”

Response:

• Specifically listing aircraft maintenance services as an example provides complete certainty. This specifically reflects the DoL regulations at 29 CFR 4.123(e)(2)(i).

• “Maintenance services” is a widely used commercial term that should not require further definition. Since the FAR is implementing the DoL rule, the Councils decided not provide a definition that might inadvertently change the intent of the DoL rule.

• The FAR is implementing the DoL rule. The suggested rewrite would change the meaning of the DoL rule.

5. Inconsistencies between wording of new exemptions and existing exemptions (22.1003-4(c)(1) and (d)(1)). For example, 22.1003-4(d)(1)(i) refers only to “Automobile or other vehicle (e.g., aircraft) maintenance services” as qualifying for the exemption, whereas 22.1003-4(d)(1)(iv) refers to “maintenance, calibration, repair, and/or installation ... services for all types of equipment where the services are obtained.”

One respondent recommends making the language consistent by using the terms “maintenance, calibration, repair, and/or installation services.”

Response: The Councils cannot change in the FAR the exemptions provided by DoL in its rule (29 CFR 4.123(e)(2)(i)(A) and (D)).

6. Conditions for new exemptions (22.1003-4(d)(2)).

• One respondent notes the condition in paragraph 22.1003-4(d)(2)(i) that—

“(A) The contract will be awarded on a sole-source basis; or

(B) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.”

• The respondent requests transparency in this area by announcing the relative weighting of all of the source selection factors in the Federal Business Opportunities announcement.

Response: FAR 15.101-1 states that when using a tradeoff process, the following apply:

(1) All evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solicitation; and

(2) The solicitation shall state whether all evaluation factors other than cost or price,

when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

It is outside the scope of this case to revise this policy. The information provided is sufficient to know whether the combination of other factors at least as important as price or cost in selecting the contractor.

- One respondent notes the condition in paragraph 22.1003–4(d)(2)(iv) that “Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.” This requirement to have the capability of tracking the percentage of time each employee spends on Government work is a problem for contractors that meet the other criteria.

Response: This condition is imposed by the DoL rule (29 CFR 4.123(e)(2)(ii)(D)). The Councils do not have the authority to change the conditions imposed by the DoL.

- One respondent notes the additional conditions that apply to the new exemptions and recommends their deletion to avoid unnecessary confusion and complexity for contractors and contracting officers.

Response: See prior response.

- One respondent considers paragraph 22.1003–4(d)(2)(vi) confusing, since it is unclear when an “advance” contracting officer determination of offeror compliance would be made and whether the determination will be a formal determination and finding per FAR 1.701 or something less. This respondent suggests the following replacement language:

“The Contracting Officer determines prior to award, but after receipt of offers based on the contract requirements, that the conditions for a certified exemption in paragraph (d)(2)(ii) through (v) can be met by an offeror.”

Response: This condition is from the DoL rule (29 CFR 4.123(e)(2)(ii)(F)). In the DoL rule this clearly means before the solicitation is issued, because the DoL rule continues on “If upon receipt of offers, the contracting officer finds that he or she did not correctly determine” This is implemented through the positive statement at 22.1003–4(d)(3)(ii)(B) in combination with the results at (d)(3)(iii) if the conditions are not met. The Councils have added “before issuing the solicitation” at (vi) to clarify the FAR rule.

- Paragraph (vii) requires the following:

“(A) The apparent successful offeror certifies that the conditions in paragraphs (d)(2)(ii) through (v) will be met; and

(B) For other than sole source awards, the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306(c)); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).”

- One respondent requests clarification of the term “substantially all.” One respondent is concerned about the meaning of “substantially all” other offerors. She runs through several scenarios, considering if there are only 2 or 3 offerors, what would “substantially all” mean. She recommends that only the apparently successful offeror should have to certify.

Response: This term was left undefined to provide maximum flexibility to contracting officers. The Councils acknowledge the respondent’s concerns, but the FAR rule must follow the conditions set by DoL for use of these new exemptions.

- One respondent questions how far down the supply chain the SCA compliance test and certifications must go.

Response: The flowdown requirement in the clauses at 52.222–52 and 52.222–54 each require that the contractor must flow down the clause to any subcontract for services for which the exemption is being claimed.

- The same respondent also objects to use of the term “responsive” at subparagraph (vii)(B)(2) (also appears at subparagraph (d)(3)(ii)(B)(2)). The respondent states that this term is a legacy term of art used in the Sealed Bidding process to describe an offeror’s statement of affirmative compliance with (or lack of exception to) all the terms and conditions of a formally advertised procurement. The respondent suggest the following:

“(2) Considered compliant with the Government’s requirements (see FAR 15.306(a)).”

Response: The term “responsive” is not just a legacy term from Part 14, but is used in many other FAR parts (1, 7, 8, 9, 19, 22, 37, and 50) to describe an offer that meets the Government requirements. Although the term “compliant” is used in many places in the FAR, the Councils did not find any example in the FAR of an offer being described as “compliant.”

7. *Contract award or resolicitations (new exemptions) (22.1003–4(d)(3)).* Paragraph (ii)(C) states a condition for award without the otherwise applicable

SCA clauses is that “The contracting officer has no reason to doubt the certification.”

- One respondent is concerned that there is a lack of definition or standard for “no reason to doubt” and that it does not appear to be in the best interests of the acquisition community to allow a decision to cancel a solicitation to hinge on the concept of doubt.

Response: The FAR rule implements the DoL rule. The DoL rule requires that “If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the prime contract or subcontract.” (29 CFR 4.123(e)(2)(ii)(G))

- One respondent is concerned that this resolicitation process could, in some cases, unduly increase the workload of the contracting officer.

Response: The FAR rule implements the DoL rule and follows the conditions set by DoL for use of these new exemptions.

8. *DoL determination (new exemptions) (22.1003–4(d)(4)).* One respondent states that this paragraph provides for a post-award determination of some type by the DoL, not the contracting agency, at any time during contract performance. The respondent suggests that exemption compliance over time will be challenging, and that the interim rule should provide a “grace period” in which the prime or the subcontractor could remedy any compliance shortfalls.

Response: The DoL regulations require that when the DoL discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the SCA did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by DoL, shall include in the contract the stipulations contained in 29 CFR 4.6 and any applicable wage determination issued by the DoL Administrator or his authorized representative through the exercise of any and all authority that may be needed including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination. With respect to any contract subject to section 10 of the Act, the DoL Administrator may require retroactive application of such wage determination (29 CFR 4.5(c)(2)).

The FAR rule implements the DoL requirements. It is up to DoL whether it

would allow time for correction of a compliance shortfall. The DoL regulations do not contemplate such a process.

9. *Exceptions (new exemptions) (FAR 22.1003-4(d)(5)).*

Paragraph (5)(iii) provides that the new exemptions do not apply to solicitations and contracts that are subject to section 4(c) of the SCA.

One respondent interprets this to mean that any contract that has now or ever contained SCA clauses can never be exempt in future contracts from the SCA.

Response: Section 4(c) of the SCA reads as follows:

(c) Predecessor contracts; employees' wages and fringe benefits No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

Section 4(c) is different from the regular wage determination and this provision applies to a situation where collective bargaining agreement union agreements are involved. Many SCA covered contracts involve annual, recurring procurements of the same services. When a collective bargaining agreement governs the wage rates and fringe benefits of service workers employed to perform work called for by an incumbent SCA covered contract, the wage determination to be issued for the successor contract must reflect the wage and fringe benefit provisions of the predecessor, contractor's collective bargaining agreement, including any accrued or prospective increases contained therein.

The successor contractor obligation to comply with the provisions of the collective bargaining agreement under Section 4(c) of the SCA extend only for the immediate successor contract period of performance. Thus, if the predecessor contractor was signatory to a collective bargaining agreement, the successor contractor would be required to comply with those provisions but would not be required to enter into a collective bargaining agreement. At the end of that

first period of performance, the successor contractor would be subject to a general wage determination and Section 4(c) would no longer be in effect.

10. *Incorrect references (22.1003-5 and 22.1003-6).*

Several respondents pointed out that the references at 22.1003-5 and 22.1003-6 to "22.1003(c)(1) and (d)(1)(iv)" should both read "22.1003-4(c)(1) and (d)(1)(iv)."

Response: The Councils concur. The draft final rule has been amended.

11. *Prescriptions for use of provisions and clauses (22.1006).*

One respondent had several suggestions to clarify the prescriptions for the use of provisions and clauses.

1. Certification provision 52.222-48 will not be in solicitation if ORCA is used, so use of SCA clause in contract can not be tied to presence of certification provision in solicitation. The same concern applies to 52.222-52, if it is incorporated into ORCA.

The respondent suggests several solutions for drafting the prescriptions.

Response: The Councils recognize the problem, and have adopted a different solution. The FAR drafting conventions prohibit prescribing a clause in more than one place, and normally there is a separate prescription for each provision or clause.

There is a widespread problem, extending beyond this single case, that there is no indication in FAR 52.204-8 as to which representations or certifications are applicable to the particular solicitation. This is unlike FAR 52.212-3, which either gives the criteria for applicability, or requires that the contracting officer indicate the applicability of some of the representations and certifications (e.g., FAR 52.212-3(k)). Because it is essential that the contracting officer have the ability to indicate the applicability of FAR 52.222-48 or 52.222-52 to a solicitation, the Councils have agreed to an overall fix to the FAR clause at 52.204-8, indicating for each representation or certification either its general applicability, if that is sufficient, or in more complex cases, requiring the contracting officer to specifically indicate if the representation or certification is applicable.

Once this is accomplished, the inclusion of the clauses at FAR 52.222-51 and 52.222-53 can be tied to either the inclusion of 52.222-48 or 52.222-52 in the solicitation, or the indication of the applicability of the comparable certification in 52.204-8(c)(2) or 52.212-3(k).

2. Paragraph 22.1006(a)(2) does not directly contradict FAR 22.1003-4(c)(3)

or (d)(3), but it is not totally consonant. One states that the contracting officer includes the SCA clause if the contracting officer determines it is appropriate to do so. The other states that the SCA clause is excluded, if the contracting officer determines that is it appropriate to do so.

Response: The Councils have revised FAR 22.1006(a)(2) to put it in terms of excluding the SCA clause when the contracting officer determines that the SCA does not apply, consistent with DoL regulations and other parts of the rule.

3. Reference at FAR 22.1003-4(d)(3)(iii) should be 22.1006(e)(3) not (e)(4).

Response: The Councils have made the correction.

4. Language at FAR 22.1006(e)(1) prescribing the use of 52.222-48 is unclear and at (e)(3), prescribing the use of 52.222-52 is unclear. One respondent interprets it as potentially applying to all contracts that contain the SCA clause, not just the targeted services.

Response: The phrase "but the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(c) 'or (d)'" was intended to target the specific services. If this is not sufficiently clear, the Councils have made the following revision. The use of "and" instead of "but" makes it clear that both conditions must be met."

"(e)(1) The contracting officer shall insert the provision at 52.222-48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that include the clause at 52.222-41, Service Contract Act of 1965 and the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(c)."

* * * * *

(3) The contracting officer shall insert the provision at 52.222-52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that include the clause at 52.222-41, Service Contract Act of 1965 and the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(d)."

12. *Provisions and clauses:*

a. FAR 52.212-3, 52.222-48, 52.222-51, and 52.222-53. "Or subcontractor in the case of an exempt subcontract."

One respondent requests that the language that is included parenthetically in paragraph (a)(1) of the provisions at FAR 52.222-52, also be included in the provisions at 52.212-3(k)(1)(i) and 52.222-48(a)(1) as well as the clauses at 52.222-51(a) and 52.222-53(a).

Response: The Councils concur with inclusion of the phrase in the

provisions, because it is possible that a subcontractor may be exempt, and the term "offeror" does not include "subcontractor."

However, the Councils do not agree with inclusion of the parenthetical phrase in the clauses, because FAR 22.1001 defines "contractor" to include a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

b. *FAR 52.212-5, correction of paragraph reference.*

One respondent points out the oversight to revise the paragraph reference in paragraph (e)(1) of the FAR clause 52.212-5.

Response: The Councils have made the correction.

c. *FAR 52.222-53, order of paragraphs.*

One respondent recommends reversal of paragraphs FAR 52.222-53(e)(1) and (e)(2) in order to put the more likely situation first—*i.e.*, award on the basis of other factors in addition to cost or price and that cost or price is of equal or lesser importance than the other factors. Further, the same respondent states that there is one particular type of service that allows award only on a sole source basis (FAR 22.1003-4(d)(1)(iv)-Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis. Therefore, the respondent recommends that FAR paragraph 52.222-53(e)(2) address only this type of services.

Response: The Councils concur with the reversal of the paragraphs. However, the Councils do not agree that the new paragraph (e)(2) should address only the service at FAR 22.1003-4(d)(1)(iv). The DoL criteria allow any of the subcontract services to be purchased on a sole source basis (29 CFR 4.123(e)(2)(ii)(B)), not just the maintenance, etc. services that must be purchased sole source. Therefore the Councils have revised the subject paragraphs as follows:

"(e)(1) Except for services identified in FAR 22.1003-4(d)(1)(iv), the subcontractor for exempt services shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost; or

(2) A subcontract for exempt services shall be awarded on a sole source basis."

13. *FAR Matrix.*

One respondent identified that the FAR matrix incorrectly referred to FAR 52.222-48 as a clause and states that it

will go in section I. Although the matrix correctly identifies 52.222-52 as a provision, it incorrectly states that it will go in Section I. The same commenter also objects that these provisions should not be incorporated by reference because it requires a fill-in.

Response: Partially Concur. FAR 52.222-48 and 52.222-52 are provisions and belong in Section K. The FAR Matrix will be revised. The Councils disagree that a provision requiring a fill-in should not be incorporated by reference. See FAR 52.104(d).

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) that is summarized as follows:

This rule finalizes an interim rule with changes, to amend the Federal Acquisition Regulation to implement Department of Labor (DoL) regulation 29 CFR 4.123, Administrative limitations, variance, tolerances, and exemptions. Paragraph (e) of that regulations provides exemption for contracts for certain services that meet specific criteria.

The objective of the DoL final rule was to be more commercial-like, encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce our commitment to reduce Government-unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards.

This final rule will have a positive economic impact on the small contractors and subcontractors that meet the exemption criteria to be exempt from the SCA for certain services, because it may provide additional opportunities for work on Federal projects; enable these contractors to compete in a more commercial-like environment, and alleviate the burden of complying with Government-unique terms and conditions for these types of contracts.

Pursuant to Section (4)(b) of the SCA, the Secretary of Labor may grant reasonable exemptions to the provisions of the SCA, but only in special circumstances where the exemption is necessary and proper in the public interest, and is in accord with the remedial purposes of the Act to protect prevailing labor standards.

There were no comments in response to the initial regulatory flexibility analysis.

This final rule will apply to all large and small entities that seek award of Federal service contracts in the service categories identified. The Councils relied on the DoL regulatory flexibility analysis (66 FR 5339), which determined that a majority of contracts

affected by the proposed exemption would likely be performed by small businesses. FPDS does not provide an accurate estimate of the contracts potentially covered by the exemption, but DoL estimates that the total value of the exempt contracts could be relatively small, and that the SCA would no longer apply to only a relatively small number of contracts that currently contain SCA wage determination provisions.

The rule imposes no reporting, recordkeeping, or other information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* This rule implements the Department of Labor Rule (66 FR 5327), which stated in the preamble that the DoL rule contained no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96-511). The DoL preamble stated further, that although offerors are required to certify that the criteria for exemption are met, the certifications can be submitted as part of the bid process and offerors are not required to maintain records to support the certification.

There are no practical alternatives that will accomplish the objectives of this rule. However, the exemption is expected to have a positive impact on small entities, because it does not contain any new reporting or recordkeeping or other compliance requirements applicable to small business. Rather, the exemption would relieve small businesses and other contractors from the requirements of the SCA on certain contracts.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) does not apply because the final rule does not impose or remove information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* This final rule implements the DoL rule published in the **Federal Register** at 66 FR 5327, January 18, 2001, which stated in the preamble that the DoL rule contained no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96-511). The DoL preamble stated further, that although offerors are required to certify that the criteria for exemption are met, the certifications can be submitted as part of the bid process and offerors are not required to maintain records to support the certification.

List of Subjects in 48 CFR Parts 4, 15, 17, 22, and 52

Government procurement.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 4, 15, 17, 22, and 52 which was published in the **Federal Register** at 72 FR 63076 on November 7, 2007, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 4, 15, 22, 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 4—ADMINISTRATIVE MATTERS

4.1201 [Amended]

■ 2. Amend section 4.1201 in paragraph (c) by removing “52.204–8(c)” and adding “52.204–8(d)” in its place.

■ 3. Amend section 4.1202 by—

- a. Revising the introductory text;
- b. Redesignating paragraphs (r) through (bb) as (s) through (cc) respectively; and
- c. Adding new paragraph (r).

The revised and added text reads as follows:

4.1202 Solicitation provision and contract clause.

Except for commercial item solicitations issued under FAR Part 12, insert in solicitations the provision at 52.204–8, Annual Representations and Certifications. The contracting officer shall check the applicable provisions at 52.204–8(c)(2). When the clause at 52.204–7, Central Contractor Registration, is included in the solicitation, do not include the following representations and certifications:

* * * * *

(r) 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

15.102 [Amended]

■ 4. Amend section 15.102 in paragraph (b) by removing “52.204–8(c)” and adding “52.204–8(d)” in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

■ 5. Amend section 22.1003–4 by—

- a. Removing from paragraph (c)(3)(iii) “22.1006(a)(2)” and adding “22.1006(a)” in its place;

- b. Revising paragraph (c)(4)(ii);
 - c. Revising paragraph (d)(2)(i) and revising the first sentence in paragraph (d)(2)(vi);
 - d. Removing from paragraph (d)(3)(i) “22.1006(a)(2)” and adding “22.1006” in its place, and revising paragraph (d)(3)(iii); and
 - e. Revising paragraph (d)(4)(ii).
- The revised text reads as follows:

22.1003–4 Administrative limitations, variations, tolerances, and exemptions.

* * * * *

(c) * * *

(4) * * *

(ii) If the Department of Labor determines that any conditions in paragraph (c)(2) of this subsection have not been met with respect to a subcontract, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

(d) * * *

(2) * * *

(i) (A) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost; or

(B) The contract will be awarded on a sole source basis.

* * * * *

(vi) The contracting officer (or contractor with respect to a subcontract) determines in advance before issuing the solicitation, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions in paragraph (d)(2)(ii) through (v) of this subsection.

* * *

* * * * *

(3) * * *

(iii) If the conditions in paragraph (d)(3)(ii) of this subsection are not met, then the contracting officer shall resolicit, amending the solicitation by removing the exemption provision from the solicitation as prescribed at 22.1006(e)(3). The contract will include the applicable Service Contract Act clause(s) as prescribed at 22.1006 and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

* * * * *

(4) * * *

(ii) If the Department of Labor determines that any conditions in paragraph (d)(2) of this subsection have not been met with respect to a

subcontract, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

* * * * *

22.1003–5 [Amended]

■ 6. Amend section 22.1003–5 in paragraph (k) by removing “22.1003(c)(1)” and adding “22.1003–4(c)(1)” in its place.

22.1003–6 [Amended]

■ 7. Amend section 22.1003–6 in paragraph (b)(2) by removing “22.1003(c)(1)” and adding “22.1003–4(c)(1)” in its place.

■ 8. Amend section 22.1006 by revising paragraphs (a) and (e) to read as follows:

22.1006 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.222–41, Service Contract Act of 1965, in solicitations and contracts (except as provided in paragraph (a)(2) of this section) if the contract is subject to the Act and is—

(i) Over \$2,500; or

(ii) For an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be \$2,500 or less.

(2) The contracting officer shall not insert the clause at 52.222–41 (or any of the associated Service Contract Act clauses as prescribed in this section for possible use when 52.222–41 applies) in the resultant contract if—

(i) The solicitation includes the provision at—

(A) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification;

(B) 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification; or

(C) Either of the comparable certifications is checked as applicable in the provision at 52.204–8(c)(2)(v) or (vi) or 52.212–3(k); and

(ii) The contracting officer has made the determination, in accordance with paragraphs (c)(3) or (d)(3) of subsection 22.1003–4, that the Service Contract Act does not apply to the contract. (In such case, insert the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, or 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in

the contract, in accordance with the prescription at paragraph (e)(2)(ii) or (e)(4)(ii) of this subsection).

* * * * *

(e)(1) The contracting officer shall insert the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that—

(i) Include the clause at 52.222–41, Service Contract Act of 1965; and

(ii) The contract may be exempt from the Service Contract Act in accordance with 22.1003–4(c).

(2) The contracting officer shall insert the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements—

(i) In solicitations that include the provision at 52.222–48, or the comparable provision is checked as applicable in the clause at 52.204–8(c)(2)(v) or 52.212–3(k)(1); and

(ii) In resulting contracts in which the contracting officer has determined, in accordance with 22.1003–4(c)(3), that the Service Contract Act does not apply.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, the contracting officer shall insert the provision at 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that—

(A) Include the clause at 52.222–41, Service Contract Act of 1965; and

(B) The contract may be exempt from the Service Contract Act in accordance with 22.1003–4(d).

(ii) When resoliciting in accordance with 22.1003–4(d)(3)(iii), amend the solicitation by removing the provision at 52.222–52 from the solicitation.

(4) The contracting officer shall insert the clause at 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements—

(i) In solicitations that include the provision at 52.222–52, or the comparable provision is checked as applicable in 52.204–8(c)(2)(vi) or 52.212–3(k)(2); and

(ii) In resulting contracts in which the contracting officer has determined, in accordance with 22.1003–4(d)(3), that the Service Contract Act does not apply.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraphs (b)(1) and (b)(2) “paragraph (c)” wherever it

occurs, and adding “paragraph (d)” (four times) in its place; and

■ c. Redesignating paragraph (c) as paragraph (d), adding new paragraph (c), and revising the second sentence in newly designated paragraph (d).

■ The revised and added text reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (FEB 2009)

* * * * *

(c)(1) The following representations or certifications in ORCA are applicable to this solicitation as indicated:

(i) 52.203–2, Certificate of Independent Price Determination. This provision applies to solicitations when a firm-fixed-price contract or fixed-price contract with economic price adjustment is contemplated, unless—

(A) The acquisition is to be made under the simplified acquisition procedures in Part 13;

(B) The solicitation is a request for technical proposals under two-step sealed bidding procedures; or

(C) The solicitation is for utility services for which rates are set by law or regulation.

(ii) 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions. This provision applies to solicitations expected to exceed \$100,000.

(iii) 52.204–3, Taxpayer Identification. This provision applies to solicitations that do not include the clause at 52.204–7, Central Contractor Registration.

(iv) 52.204–5, Women-Owned Business (Other Than Small Business). This provision applies to solicitations that—

(A) Are not set aside for small business concerns;

(B) Exceed the simplified acquisition threshold; and

(C) Are for contracts that will be performed in the United States or its outlying areas.

(v) 52.209–5, Certification Regarding Responsibility Matters. This provision applies to solicitations where the contract value is expected to exceed the simplified acquisition threshold.

(vi) 52.214–14, Place of Performance—Sealed Bidding. This provision applies to invitations for bids except those in which the place of performance is specified by the Government.

(vii) 52.215–6, Place of Performance. This provision applies to solicitations unless the place of performance is specified by the Government.

(viii) 52.219–1, Small Business Program Representations (Basic & Alternate I). This provision applies to solicitations when the contract will be performed in the United States or its outlying areas.

(A) The basic provision applies when the solicitations are issued by other than DoD, NASA, and the Coast Guard.

(B) The provision with its Alternate I applies to solicitations issued by DoD, NASA, or the Coast Guard.

(ix) 52.219–2, Equal Low Bids. This provision applies to solicitations when

contracting by sealed bidding and the contract will be performed in the United States or its outlying areas.

(x) 52.222–22, Previous Contracts and Compliance Reports. This provision applies to solicitations that include the clause at 52.222–26, Equal Opportunity.

(xi) 52.222–25, Affirmative Action Compliance. This provision applies to solicitations, other than those for construction, when the solicitation includes the clause at 52.222–26, Equal Opportunity.

(xii) 52.222–38, Compliance with Veterans' Employment Reporting Requirements. This provision applies to solicitations when it is anticipated the contract award will exceed the simplified acquisition threshold and the contract is not for acquisition of commercial items.

(xiii) 52.223–1, Biobased Product Certification. This provision applies to solicitations that require the delivery or specify the use of USDA-designated items; or include the clause at 52.223–2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts.

(xiv) 52.223–4, Recovered Material Certification. This provision applies to solicitations that are for, or specify the use of, EPA-designated items.

(xv) 52.225–2, Buy American Act Certificate. This provision applies to solicitations containing the clause at 52.225–1.

(xvi) 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate. (Basic, Alternate I, and Alternate II) This provision applies to solicitations containing the clause at 52.225–3.

(A) If the acquisition value is less than \$25,000, the basic provision applies.

(B) If the acquisition value is \$25,000 or more but is less than \$50,000, the provision with its Alternate I applies.

(C) If the acquisition value is \$50,000 or more but is less than \$67,826, the provision with its Alternate II applies.

(xvii) 52.225–6, Trade Agreements Certificate. This provision applies to solicitations containing the clause at 52.225–5.

(xviii) 52.225–20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

(xix) 52.226–2, Historically Black College or University and Minority Institution Representation. This provision applies to—

(A) Solicitations for research, studies, supplies, or services of the type normally acquired from higher educational institutions; and

(B) For DoD, NASA, and Coast Guard acquisitions, solicitations that contain the clause at 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns.

(2) The following certifications are applicable as indicated by the Contracting Officer:

[Contracting Officer check as appropriate.]

(i) 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.

(ii) 52.219–21, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program.

_____ (iii) 52.219–22, Small Disadvantaged Business Status.

_____ (A) Basic.

_____ (B) Alternate I.

_____ (iv) 52.222–18, Certification

Regarding Knowledge of Child Labor for Listed End Products.

_____ (v) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

_____ (vi) 52.222–52 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

_____ (vii) 52.223–9, with its Alternate I, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).

_____ (viii) 52.223–13, Certification of Toxic Chemical Release Reporting.

_____ (ix) 52.227–6, Royalty Information.

_____ (A) Basic.

_____ (B) Alternate I.

_____ (x) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

(d) * * * After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically that apply to this solicitation as indicated in paragraph (c) of this provision have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [*offeror to insert changes, identifying change by clause number, title, date*]. * * *

* * * * *

[End of provision]

■ 10. Amend section 52.212–3 by revising the date of the provision and paragraph (k)(1)(i) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(k) * * *

[](1) * * *

(i) The items of equipment to be serviced under this contract are used regularly for other than Governmental purposes and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontract) in substantial quantities to the general public in the course of normal business operations;

* * * * *

[End of provision]

■ 11. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Revising paragraph (c)(6);

■ c. Removing from paragraph (e)(1) “in paragraphs (e)(1)(i) through (xi) of this

paragraph” and adding “in this paragraph (e)(1)” in its place; and

■ d. Revising paragraph (e)(1)(x).

■ The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(C) * * *

(6) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements (FEB 2009) (41 U.S.C. 351, *et seq.*).

* * * * *

(e)(1) * * *

(x) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements (FEB 2009) (41 U.S.C. 351, *et seq.*).

* * * * *

[End of clause]

■ 12. Amend section 52.222–48 by revising the date of the provision and paragraph (a)(1) to read as follows:

52.222–48 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

* * * * *

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT CERTIFICATION (FEB 2009)

* * * * *

(a) * * *

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror (or subcontractor in the case of an exempt subcontract) in substantial quantities to the general public in the course of normal business operations;

* * * * *

[End of provision]

■ 13. Amend section 52.222–53 by revising the date of the clause and paragraph (e) to read as follows:

52.222–53 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements.

* * * * *

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES— REQUIREMENTS (FEB 2009)

* * * * *

(e)(1) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor for exempt services shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost; or

(2) A subcontract for exempt services shall be awarded on a sole source basis.

* * * * *

[End of clause]

[FR Doc. E9–532 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, and 24

[FAC 2005–30; FAR Case 2008–003; Item IV; Docket 2008–0001, Sequence 08]

RIN 9000–AL13

Federal Acquisition Regulation; FAR Case 2008–003, Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts—Section 844 of the National Defense Authorization Act for Fiscal Year 2008

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 844 of the National Defense Authorization Act for Fiscal Year 2008 “Public Disclosure of Justification and Approval Documents for Noncompetitive Contracts” (FY08 NDAA). Section 844 of the FY08 NDAA stipulates the requirements regarding the public availability of justification and approval documents after the award of Federal contracts, except for information exempt from public disclosure.

DATES: *Effective Date:* February 17, 2009.

Applicability Date: This interim rule applies to all contracts awarded from a 6.303–1 justification and approval document on or after the effective date.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before March 16,