

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 7, and 37****[FAC 2001-07; 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: 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 821 of the Floyd D. Spence National Defense Authorization Act. The FAR rule explicitly states that performance-based contracting is the preferred method for acquiring services, enumerates an order of precedence, and further clarifies the documentation required in an acquisition plan when acquiring services.

DATES: Effective Date: May 15, 2002.

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 2001-07, FAR case 2000-307.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 66 FR 22082, May 2, 2001. The interim rule explicitly stated that performance-based contracting is the preferred method for acquiring services and enumerated the order of precedence established by Section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106-398). The coverage contained in the final rule is the same as that in the interim rule except that the final rule amends paragraph (b)(4) of FAR 7.105 to clarify that contracting officers must provide rationale if a performance-based contract will not be

used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis (see 37.102(a) and 16.505(a)(3)).

Two respondents submitted comments on the interim rule. The first comment suggested that the language changes in FAR Parts 2 and 37 in this rule should be incorporated into FAR Part 8. While the Councils do not believe added references in Part 8 are needed as a general matter with respect to this rulemaking, revisions to Subpart 8.4 regarding use of the Federal Supply Schedules for the acquisition of services are under development and references to Part 37 policies on performance-based service contracting will be considered for incorporation as appropriate as part of that regulatory initiative.

The second comment stated that the FAR Part 2 definition for performance-based contracting is internally inconsistent because it calls for requirements to be set forth in clear, specific, and objective terms with measurable outcomes but also dictates the use of "broad and imprecise" statements of work. The Councils disagree. As revised, the definition of performance-based contracting, consistent with section 821(e) of the Defense Authorization Act for FY 01, explains what performance-based contracting should not include (e.g., broad and imprecise work statements, a structure centering on the manner that the work should be performed), and what it should contain (e.g., a work statement that has clear, specific, and objective terms with measurable outcomes).

This commenter further suggested that the regulations do not need to be changed, but acquisition personnel need to be trained in developing performance-based requirements. The regulatory changes in this rule are not meant as a substitute for training that will enhance the knowledge and skills of acquisition personnel in performance-based contracting. Guidance is available at the following websites:

<http://www.arnet.gov/Library/OFPP/BestPractices/>,
<http://oamweb.osec.doc.gov/pbsc/index.html>, or
<http://www.gsa.gov/Portal/content/pubs/content.jsp?contentOID=119969&contentType=1008&PMVP=1>.

Finally, the Office of Federal Procurement Policy has advised the FAR Council that it is establishing an inter-agency group to ensure a common understanding among the agencies regarding performance-based contracting requirements.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose a new policy requirement on small entities. The FAR currently promotes the use of and documentation 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. Therefore, a Final Regulatory Flexibility Analysis (FRFA) was not performed. The Councils invite comments from small businesses and other interested parties. The Councils will also consider comments from small entities concerning the affected FAR subparts 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 2001-07, 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.*

**List of Subjects in 48 CFR Parts 2, 7,
and 37**

Government procurement.

Dated: April 23, 2002

Al Matera,

Director, Acquisition Policy Division.

**Interim Rule Adopted as Final with
One Change**

Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2 and 37 that was published in the **Federal Register** at 66 FR 22082, May 2, 2001, as a final rule with the following change:

PART 7—ACQUISITION PLANNING

1. The authority citation for 48 CFR part 7 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).

2. Amend section 7.105 by adding a sentence to the end of paragraph (b)(4) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(4) * * * Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis (see 37.102(a) and 16.505(a)(3)).

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 13, 25, and 52

[FAC 2001-07; FAR Case 1999-616; Item II]

RIN 9000-AI90

Federal Acquisition Regulation; Revisions to Balance of Payments Program

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 remove the language pertaining to the Balance of Payments Program.

DATES: Effective Date: May 15, 2002.

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. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-07, FAR case 1999-616.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR part 25, Foreign Acquisition, to remove subpart 25.3, Balance of Payments Program, and makes conforming changes to FAR parts 13 and 52. This revision will reduce the

administrative burdens on both the Government and the public, without significant impact on our international balance of payments.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 54936, September 11, 2000. One public comment was received. The commenter raised three specific issues: (1) This rule is a significant rule under E.O. 12866 and represents a major rule; (2) concern that no effort was made to coordinate the proposed changes and elimination of the Balance of Payments Program with the Department of Commerce; and (3) industry would be adversely impacted by the elimination of the Balance of Payments Program by the deletion of FAR 25.3. In response to these concerns, this rule is not deemed a significant rule nor a major rule and not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule applies primarily to civilian agency acquisitions of supplies valued at more than \$100,000, but not more than \$186,000, for use outside the United States. Few acquisitions meet all of these limitations. In reference to the coordination issue with the Department of Commerce, the Department of Commerce has a representative on the Civilian Agency Acquisition Council and raised no objection when the proposed rule was discussed and agreed upon. In addressing the commenter's economic concerns, it appears the commenter is unaware that the Balance of Payments Program will be continued within the Department of Defense, and is unaware of the DFARS case that has been opened to address this program.

Civilian agencies have limited overseas purchases and given the small range of products and services to which the Balance of Payments Program applies, the benefits derived from applying the Balance of Payments Program to Civilian agency procurements does not equal the time and effort expended. The Councils, with the recommendations of the International Acquisition Committee, thoroughly considered this comment before agreeing to convert the proposed rule to a final rule without change.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space

Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies primarily to civilian agency acquisitions of supplies valued at more than \$100,000, but not more than \$186,000, for use outside the United States. Few acquisitions meet all of these limitations.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR will reduce information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000-0023, 9000-0130, and 9000-0141 by approximately 1,121 hours.

List of Subjects in 48 CFR Parts 13, 25, and 52

Government procurement.

Dated: April 23, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 13, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 13, 25, and 52 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 13—SIMPLIFIED ACQUISITION PROCEDURES

2. Amend section 13.302-5 by revising paragraph (d)(3)(i) to read as follows:

13.302-5 Clauses.

* * * * *

(d) * * *

(3)(i) When an acquisition for supplies for use within the United States cannot be set aside for small business concerns and trade agreements apply (see Subpart 25.4), substitute the clause at FAR 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act, used with Alternate I or Alternate II, if appropriate, instead of the clause at FAR 52.225-1, Buy American Act—Supplies.

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PART 25—FOREIGN ACQUISITION

25.000 [Amended]

3. Amend section 25.000 by removing “the Balance of Payments Program,”.