

telecommuting. Moreover, the requirement for a written determination will allow agencies to conduct periodic reviews as may be necessary to ensure there is no abuse of this discretion. Also, issues of contracting officer rewards are personnel issues that are beyond the scope of this case and the general purview of the Councils. Another commenter recommended creating a vetting procedure for determinations to prohibit telecommuting and to hold contracting officers' "feet to the fire." The Councils did not adopt this recommendation because compliance issues are beyond the scope of this case and are more appropriately addressed by individual agency management.

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 there is no Governmentwide policy or practice concerning contractor employee telecommuting. In addition, this rule will not be a major change, but instead a small positive benefit to small businesses.

#### 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 7, 11, 13, and 15

Government procurement.

Dated: May 27, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

■ Interim Rule Adopted as Final Without Change  
 ■ Accordingly, the interim rule amending 48 CFR parts 7, 11, 13, and 15, which was published in the **Federal Register** at 69 FR 59701, October 5, 2004, is adopted as a final rule without change. [FR Doc. 05-11181 Filed 6-7-05; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 4, 12, 37, and 52

[FAC 2005-04; FAR Case 2004-004; Item III]

RIN 9000-AJ97

#### Federal Acquisition Regulation; Incentives for Use of Performance-Based Contracting for Services

**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 to convert the interim rule published in the **Federal Register** at 69 FR 34226, June 18, 2004, to a final rule with changes to amend the Federal Acquisition Regulation (FAR) to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136). Section 1431 enacts Governmentwide authority to treat performance-based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance-based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance-based terminology and to conform to the language added by Section 1431.

**DATE:** *Effective Date:* June 8, 2005.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Julia Wise, Director, Contract Policy Division, at (202) 208-1168. Please cite FAC 2005-04, FAR case 2004-004.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the Federal Acquisition Regulation. DoD, GSA, and NASA published an interim rule in the **Federal Register** at 69 FR 34226, June 18, 2004, implementing Section 1431 and Section 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136). Public comments were received from three

entities. The Councils reviewed and resolved the comments. The disposition of comments, as stated below, requires one change to the rule, as requested in comment 7.

1. *Comment:* Requested clarification as to whether the term "performance assessment" should be used in place of "quality assurance" in FAR 37.601(a)(2). This comment was based on a statement in the "Guidebook for Performance-Based Services Acquisition (PBSA) in the Department of Defense," December 2000, that, "[h]ereafter, 'performance assessment' will be used in place of the term 'quality assurance' unless otherwise noted."

*Council's response:* This statement applied only to usage in the Guide and was not meant as a change in Governmentwide policy. In fact, a more recent memo, dated August 19, 2003, from the Undersecretary of Defense for Acquisition, Technology and Logistics, continues to use the term "quality assurance," as does the "Seven Steps Guide to Procurement Based Services Acquisition Guide." This comment is more appropriate for FAR Case 2003-18, which covers a broader revision of Performance-Based Services Acquisition, and will be considered along with other comments received in response to that case. FAR Case 2003-18 was published in the **Federal Register** at 69 FR 43712, July 21, 2004; public comments were due September 20, 2004.

2. *Comment:* Suggested that the Councils move the reference to quality assurance surveillance plans from FAR 37.601(a)(2) and make it a new subparagraph (5) to emphasize the importance of quality assurance surveillance plans.

*Council's response:* The Councils did not adopt this suggestion because the purpose of this case is to allow agencies to use FAR Part 12 for noncommercial services if the services otherwise meet the existing definition of performance-based contracting. This comment is more appropriate for FAR Case 2003-18 and will be considered along with other comments received in response to that case.

3. *Comment:* Recommended revising FAR 12.102(g)(1) by adding the additional qualifying factor of "Includes a performance work statement."

*Council's response:* The Councils did not adopt this suggestion because the purpose of the case is to allow agencies to use FAR Part 12 for noncommercial services if the services otherwise meet the existing definition of performance-based contracting, which addresses use of a work statement that is performance-based. FAR

12.102(g)(1)(vi) further addresses this comment.

4. *Comment:* Recommended changing FAR 12.102(g)(1)(ii) to: “has an estimated value at time of solicitation of not more than \$25 million” because they thought it would be very cumbersome to change back to FAR Part 15 if the contract value ends up exceeding \$25 million.

*Council's response:* The Councils did not adopt this suggestion because it will change the intent of this SARA provision. If acquisition planning is properly performed, prudent independent Government estimates are constructed and market research is conducted, the contracting officer will know upfront if this SARA authority is appropriate for this acquisition.

5. *Comment:* Recommended changing the language in FAR 12.102(g)(1)(iv) to “includes appropriate quality assurance provisions” instead of “includes a quality assurance surveillance plan” since the Government should not require the creation of a quality assurance plan different from the one the contractor uses when providing commercial services as required by FAR 12.208.

*Council's response:* FAR 12.208 does require the Government to rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing unless customary market practices for the commercial item being acquired include in-process inspection. Since the rule authorizes the use of FAR Part 12 procedures for certain non-commercial services, customary market practices for the non-commercial services may not exist. However, the Councils do not believe it is necessary to “include” the quality assurance surveillance plan in the contract or task order and revised the rule to require each contract or task order to “use” a quality assurance surveillance plan.

6. *Comment:* Recommended changing the language in FAR 12.102(g)(vii) to: “under terms and conditions similar to those being offered to the Federal Government.”

*Council's response:* The Councils recognize the difference in the language, but believe this change is consistent with and clarifies the statutory language.

7. *Comment:* Stated that the language in FAR 12.102(g)(2) was more prescriptive than the language in FAR 12.302 for tailoring provisions and clauses for commercial items and recommended that the language be revised to avoid unnecessary tailoring of the inspection and acceptance provisions in FAR 52.212-4(a).

*Council's response:* The Councils recognize the need to avoid unnecessary tailoring when acquiring commercial items, and consequently changed the language in FAR 12.102(g)(2) by inserting the word “may” instead of the word “should.” However, this case authorizes the use of FAR Part 12 procedures when purchasing certain non-commercial services. The current basis for tailoring a FAR Part 12 contract at FAR 12.302 authorizes tailoring based, in part, on customary commercial practices. It is likely that customary commercial practices may not exist for non-commercial services, even when the services are acquired using a performance-based requirement. This is particularly important in the area of inspection and acceptance covered by FAR 12.102(g)(2) and the clause at FAR 52.212-4. The Councils believe that relying exclusively on FAR 12.302 as the basis for tailoring provisions for non-commercial services may not adequately ensure the Government's interests are protected in this area. Therefore, the Councils determined that the FAR should provide the ability to consider additional remedies if needed to protect the Government against nonconforming services since the items being procured are not commercial items as defined by FAR 2.101. Since the new language at FAR 12.102(g)(2) only allows the contracting officer to tailor the inspections and acceptance provisions when necessary to protect the Government, the Councils do not believe this flexibility will lead to unnecessary tailoring.

8. *Comment:* Recommended several revisions to FAR 37.601(a) to provide for additional flexibility when using performance-based contracts for services.

*Council's response:* The Councils did not adopt these suggestions because this rule does not change existing FAR requirements at FAR 37.601(a) that pertain to performance-based contracts for services. The only revision to FAR 37.601 in this rule is to add a cross reference to FAR 12.102(g). These comments are more appropriate for FAR case 2003-18, which covers a broader revision of Performance-Based Services Acquisition, and will be considered along with other comments received in response to that case.

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 we have changed procedures for award and administration of contracts or task orders enabling the Government to treat certain commercial services as commercial items when the contract or task order—

- Is entered into on or before November 24, 2013;
- Has a value of \$25 million or less;
- Meets the definition of performance-based contracting at FAR 2.101;
- Includes a quality assurance surveillance plan;
- Includes performance incentives where appropriate;
- Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
- Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

Therefore, a Final Regulatory Flexibility Analysis (FRFA) was prepared in accordance with Title 5, of the United States Code 604. The rule revised the FAR in order to comply with recently enacted Public Law 108-136, Section 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004. Section 1431 provides for Governmentwide authority to treat certain performance-based contracts or task orders for services as commercial items if the certain conditions are met. Section 1433 also amends the definition of commercial services to conform to the language added by Section 1431 by inserting performance-based terms for clarification.

The implementation of Sections 1431 and 1433 will change the FAR as follows:

- Revises the commercial items definition in FAR 2.101 and 52.202-1;
- Adds a new record requirement for reporting commercial performance-based contracts and task orders to FAR 4.601;
- Incorporates the conditions for using FAR Part 12 for any performance-based contract or task order for services in FAR 12.102;
- Adds performance-based terms as required by section 1433; and
- Adds a cross reference to FAR 12.102(g) in FAR 37.601.

An Initial Regulatory Flexibility Analysis (IRFA) was published with the interim rule, and no comments

concerning the IRFA were received. A Final Regulatory Flexibility Analysis (FRFA) was prepared. The rule is expected to have a positive impact on small business concerns. However, it is not expected to have a significant impact on a substantial number of small entities because it provides Governmentwide procurement authority that enables the contracting officer (CO) to treat a noncommercial service as commercial if specific conditions, most of which pertain to performance-based contracting, are met. The Government is encouraged to use performance-based contracting techniques on all service contracts and allowing this authority—

- Opens up opportunities to small businesses that otherwise would not have been available if they could not meet the commercial items definition in FAR 2.101 and 52.202-1;

- Provides contracting flexibility when using performance-based contracting techniques;

- Helps the Government move closer to achieving the performance-based contracting performance-goals for Fiscal Years 2004 and 2005; and

- Allows the CO to use FAR Part 12, and procure these types of services similar to the commercial marketplace.

Specifically, a query of the Central Contractor Registration (CCR) system indicates there are 198,732 small businesses registered, and many of these contractors were awarded performance-based contracts or task orders for noncommercial services and the Government was required to use FAR Part 13, Simplified Acquisition Procedures, FAR Part 14, Sealed Bidding, or FAR Part 15, Contracting by Negotiations, for these acquisitions because they were not commercial items. This authority allows the CO to use FAR Part 12, which is the Government's preference since this will allow us to procure these types of services similar to the commercial marketplace, and using FAR Part 12 will provide more contracting flexibility and opportunities to the small business community.

The rule will impose no new reporting or recording keeping requirements on large or small entities. It only requires the Government to report on contracts or task orders awarded under this authority. Specifically, implementation of Section 1431 requires agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using the authority of this section. The Federal Procurement Data System—Next Generation (FPDS—NG) will be revised to enable agencies to report on

the use of such authority both Governmentwide and for each department and agency. By November 2006, the Office of Management and Budget will start reporting to the Committees on Governmental Affairs and Armed Services of the Senate, and the Committees on Government Reform and Armed Services of the House of Representatives on the implementation of this section. The authority of Section 1431 expires on November 24, 2013, ten years after enactment.

The FAR Secretariat has submitted a copy of the FRFA 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 Parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005-004, FAR Case 2004-004), 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, 4, 12, 37, and 52

Government procurement.

Dated: May 27, 2005.

Julia B. Wise,  
Director, Contract Policy Division.

### Interim Rule Adopted as Final With Changes

■ Accordingly, DOD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 4, 12, 37, and 52, which was published in the **Federal Register** at 69 FR 34226, June 18, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 37, and 52, is revised 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 12—ACQUISITION OF COMMERCIAL ITEMS

#### 12.102 [Amended]

■ 2. Amend section 12.102 in paragraph (g)(1)(iv) by removing “Includes” and adding “Uses” in its place; and in paragraph (g)(2) by removing “should” and adding “may” in its place.

[FR Doc. 05-11189 Filed 6-7-05; 8:45 am]

**BILLING CODE 6820-EP-S**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 15

[FAC 2005-04; FAR Case 2004-035; Item IV]

RIN 9000-AK17

### Federal Acquisition Regulation; Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items

**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) regarding prohibition on obtaining cost or pricing data to implement Section 818 of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

**DATES:** *Effective Date:* June 8, 2005.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before August 8, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-04, FAR case 2004-035, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2004-035@gsa.gov](mailto:farcase.2004-035@gsa.gov). Include FAC 2005-04, FAR case 2004-035, in the subject line of the message.

- Fax: 202-501-4067.
- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-04, FAR case 2004-035, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>.