

\$3,000, because the simplified acquisition threshold will not be raised at this time. Other frequently used thresholds that are adjusted include—

- The FPDS reporting threshold (FAR 4.602(c)) will be raised from \$2,500 to \$3,000.
- Commercial Items test program ceiling (FAR 13.500) will be raised from \$5,000,000 to \$5,500,000.
- The cost and pricing data threshold (FAR 15.403-4) will be raised from \$550,000 to \$650,000.

The prime contractor subcontracting plan (FAR 19.702) floor will be raised from \$500,000 to \$550,000, but for construction (\$1,000,000) is unchanged.

#### **Item V—Trade Agreements—Thresholds (FAR Case 2005-030)**

This final rule converts the interim rule published at 71 FR 864, January 5, 2006, to a final rule without change. This rule changes the thresholds for application of the World Trade Organization Government Procurement Agreement and the other Free Trade Agreements with Canada, Mexico, Chile, Singapore, and Australia. These threshold increases occur every two years in order to keep pace with inflation.

#### **Item VI—Reporting of Purchases from Overseas Sources (Interim) (FAR Case 2005-034)**

This interim rule amends FAR Part 25 and adds a provision in FAR 52.225 to implement Section 837 of Division A of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (Pub. L. 109-115). Section 837 requires the head of each Federal agency to submit a report to Congress relating to acquisitions of articles, materials, or supplies that are manufactured outside the United States. The new provision requests from offerors necessary data regarding place of manufacture. The new provisions will require an offeror to indicate whether the place of manufacture of the end products it expects to provide in response to the solicitation is predominantly inside or outside the United States. Whenever the place of manufacture for a contract is coded outside the United States, the contracting officer will be required to enter into Federal Procurement Data System (FPDS) the reason for buying items manufactured outside the United States.

#### **Item VII—Exception to the Buy American Act for Commercial Information Technology (FAR Case 2005-022)**

This final rule converts the interim rule published at 71 FR 223, January 3, 2006, to a final rule without change. This final rule amends FAR 25.103 and Subpart 25.11 to implement Section 535(a) of Division F of the Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts. Section 535(a) authorizes an exception to the Buy American Act for acquisitions of information technology that are commercial items. The final rule applies to all offerors responding to solicitations for commercial information technology where the Buy American Act previously applied (generally, acquisitions between the micro-purchase threshold and \$193,000). The effect of this exemption is that the following clauses are no longer applicable in acquisition of commercial information technology:

- FAR 52.225-1, Buy American Act—Supplies,
- FAR 52.225-2, Buy American Act Certificate,
- FAR 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act,
- FAR 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

This is because the Buy American Act no longer applies. The Free Trade Agreement non-discriminatory provisions are no longer necessary since all products now are treated without the restrictions of the Buy American Act.

The Trade Agreements provision and clause at FAR 52.225-5 and FAR 52.225-6 are still necessary when the Trade Agreements Act applies (acquisitions above \$193,000). The Trade Agreements provision and clause already waive applicability of the Buy American Act for eligible products and are needed to implement the restrictions on procurement of noneligible end products. Section 535 and subsequent similar sections waived only the Buy American Act, not all restrictions on the purchase of foreign information technology.

#### **Item VIII—Technical Amendments**

Editorial changes are made at FAR 1, 3, 4, 5, 7, 13, 26, 33, 49, 50, 52, and 53 in order to update references.

Dated: September 19, 2006.

**Ralph De Stefano,**  
*Director, Contract Policy Division.*

#### **Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-13 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-13 is effective September 28, 2006.

Dated: September 19, 2006.

**Roger D. Waldron,**  
*Acting Senior Procurement Executive,*  
*General Services Administration.*

Dated: September 8, 2006.

**Shay D. Assad,**  
*Director, Defense Procurement and Acquisition Policy.*

Dated: September 12, 2006.

**Thomas Luedtke,**  
*Assistant Administrator for Procurement,*  
*National Aeronautics and Space Administration.*

[FR Doc. 06-8199 Filed 9-27-06; 8:45 am]

BILLING CODE 6820-EP-S

## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

#### **48 CFR Parts 5, 6, 8, 11, and 13**

**[FAC 2005-13; FAR Case 2005-037; Item I; Docket 2006-0020, Sequence 10]**

**RIN 9000-AK55**

#### **Federal Acquisition Regulation; FAR Case 2005-037, Implement OMB Policy on the Use of Brand Name Specifications**

**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 to amend the Federal Acquisition Regulation (FAR) to require agencies to publish on the Governmentwide point of entry (GPE) or e-Buy the documentation required by

the FAR to support the use of brand name specifications.

**DATES:** *Effective Date:* September 28, 2006.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before November 27, 2006 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–13, FAR case 2005–037, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for this document at the “Federal Acquisition Regulation” agency and review the “Document Title” column; click on the Document ID number. Click on “Add Comments”.

You may also search for any document using the “Advanced search/document search” tab, selecting from the agency field “Federal Acquisition Regulation”, and typing the FAR case number in the keyword field.

- 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 2005–13, FAR case 2005–037, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT** For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2005–13, FAR case 2005–037. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On April 11, 2005, the Office of Management and Budget (OMB) issued a memorandum on the use of brand name specifications to reinforce the need to maintain vendor and technology neutral contract specifications. To provide for maximum competition, solicitations should limit the use of brand name specifications. As a general rule, contract specifications should emphasize the necessary physical, functional, and performance characteristics of a product - ;not brand names. OMB encouraged agencies to take steps to mitigate brand name usage and requested agencies to publicize the justification for use of brand name with

the contract solicitation. While the justifications are generally available upon request, posting the brand name justifications will improve the overall transparency of the acquisition process. Contracting officers must be sensitive when dealing with proprietary information when posting justifications. FAR 6.305 requires contracting officers to carefully screen all justifications for contractor proprietary information and remove such information before making available to the public. Contracting officers are to adhere to the exemptions on disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202 in determining the information that should be removed.

The OMB memorandum applies to all acquisitions exceeding \$25,000 that use brand name specifications, including open market purchases, purchases from the Federal Supply Schedules (FSS) program, and sole source procurements. Contracting officers should not use other contract vehicles instead of the FSS program when it is not in the best interest of the Government to do so, just to circumvent the brand name posting requirement.

To implement the OMB memorandum, the Councils are amending the FAR to add a requirement to publish on the GPE or e-Buy the documentation required by the FAR to support the use of brand name specifications. The proposed changes require—

- For brand name orders against the FSS program, posting to e-Buy the documentation or justification required by FAR 8.405–6. The rule also restricts the use of oral orders over \$25,000 against the FSS that contain brand specifications.

- For non-FSS acquisitions, including simplified acquisitions, posting to the Federal Business Opportunities website ([www.fedbizopps.gov](http://www.fedbizopps.gov)) the justification or documentation required by FAR 11.105.

OMB issued a second memorandum on April 17, 2006 to provide additional implementation guidance to agencies when publicizing the brand name justification which reflects the approach above. In response to OMB’s memoranda, agencies submitted several comments and questions on the posting requirement and the requirement for the brand name justifications. The questions and comments are summarized below and the Councils invite interested parties to comment on these questions.

1. The OMB memorandum requires agencies to post the brand name justification to e-Buy with the request

for quotation (RFQ) when using the FSS. However, some agencies use commercial companies such as FedBid to post the RFQs for FSS purchases and FedBid posts the RFQ to FedBizOpps instead of e-Buy. Should agencies be allowed to post the brand name justification to FedBizOpps instead of e-Buy when they use FedBid or another commercial company to post an RFQ for FSS purchases? If an alternative posting solution is used, will OMB be able to obtain a report on the use of these brand name justifications, if necessary?

2. The OMB memorandum requires agencies to post brand name justifications for orders against the FSS but not for orders against indefinite-delivery contracts including GWACS. Agencies can avoid the posting requirement simply by purchasing on an indefinite-delivery contract instead of the FSS. Should agencies be required to post brand name justifications for orders against indefinite-delivery contracts? If yes, where is the best place to post the justification?

3. Should agencies be required to post brand name justifications for orders issued on the SmartBuy program and other strategic sourcing vehicles?

4. Should agencies be required to post brand name justifications to renew software license agreements that are required to receive software updates?

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 adds no new requirements for contractors. The rule requires agencies to post documentation required by the FAR to the GPE or e-Buy. An Initial Regulatory Flexibility Analysis (IRFA) has therefore not been prepared. The Councils will consider comments from small entities concerning the affected FAR Parts 5, 6, 8, 11, and 13 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 2005–13, FAR case 2005–037), 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 to limit the use of brand name specifications and provide for maximum competition. 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 5, 6, 8, 11, and 13.**

Government procurement.  
Dated: September 19, 2006.

**Ralph De Stefano,**  
*Director, Contract Policy Division.*

Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, 8, 11, and 13 as set forth below:

1. The authority citation for 48 CFR parts 5, 6, 8, 11, and 13 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 5—PUBLICIZING CONTRACT ACTIONS**

2. Amend section 5.102 by adding paragraph (a)(6) to read as follows:

**5.102 Availability of solicitations.**

(a)(1) \* \* \*

(6) When an acquisition contains brand name specifications, the contracting officer shall include with the solicitation the justification or documentation required by 6.302-1(c), 13.106-1(b), or 13.501, redacted as necessary (see 6.305).

**PART 6—COMPETITION REQUIREMENTS**

3. Amend section 6.302-1 in paragraph (c) by adding a new sentence before the last sentence to read as follows:

**6.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.**

\* \* \* \* \*

(c) \* \* \* See 5.102(a)(6) for the requirement to post the brand name justification. \* \* \*

**PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

4. Amend section 8.402 by—  
a. Adding to paragraph (c)(2) “(except see 8.405-6)” after “contractors”; and  
b. Adding to paragraph (d) a new sentence after the second sentence to read as follows:

**8.402 General.**

(d) \* \* \* Ordering activities shall post an RFQ to e-Buy when an order contains brand name specifications (see 8.405-6).

5. Amend section 8.405-1 by revising paragraphs (c) and (d)(1) to read as follows:

**8.405-1 Ordering procedures for supplies, and services not requiring a statement of work.**

(c) *Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold.* (1) Ordering activities shall place orders with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, an ordering activity shall consider reasonably available information about the supply or service offered under MAS contracts by surveying at least three schedule contractors through the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors (see 8.405-5).

(2) When an order contains brand name specifications, the contracting officer shall post the Request for Quote (RFQ) along with the justification or documentation as required by 8.405-6.

(3) In addition to price, when determining best value, the ordering activity may consider, among other factors, the following:

- (i) Past performance.
- (ii) Special features of the supply or service required for effective program performance.
- (iii) Trade-in considerations.
- (iv) Probable life of the item selected as compared with that of a comparable item.
- (v) Warranty considerations.
- (vi) Maintenance availability.
- (vii) Environmental and energy efficiency considerations.
- (viii) Delivery terms.

(d) \* \* \*;  
(1) Review (except see (c)(2) of this subsection) the pricelists of additional schedule contractors (the GSA Advantage! on-line shopping service can be used to facilitate this review);

- 6. Amend section 8.405-6 by—
  - a. Revising paragraph (a) and the introductory text of paragraph (b);
  - b. Removing paragraph (b)(3);
  - c. Redesignating paragraph (b)(4) as (b)(3);
  - d. Revising paragraph (c);
  - e. Redesignating paragraphs (d), (e), and (f) as (f), (g) and (h) respectively;
  - f. Adding new paragraphs (d) and (e);
  - g. Removing from the newly designated paragraph (f) “of schedule contractors to fewer than required in 8.405-1 or 8.405-2”;
  - h. Removing from newly designated paragraph (g)(2)(iv) “8.405-6(b)” and adding “8.405-6(a) and (b)” in its place;
  - i. Revising newly designated paragraph (g)(2)(viii);
  - j. Removing from newly designated paragraph (h)(2) “(f)(3) or (f)(4)” and adding “(h)(3) or (h)(4)” in its place; and
  - k. Removing from newly designated paragraph (h)(3)(iii) “(f)(4)” and adding “(h)(4)” in its place.

The revised and added text reads as follows:

**8.405-6 Limited sources justification and approval.**

(a) Orders placed under Federal Supply Schedules are exempt from the requirements in Part 6. However, an ordering activity must justify its action when restricting consideration—

- (1) Of schedule contractors to fewer than required in 8.405-1 or 8.405-2; or
- (2) To an item peculiar to one manufacturer (e.g., a particular brand name, product, or a feature of a product, peculiar to one manufacturer). A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer. Brand name specifications shall not be used unless the particular brand name, product, or feature is essential to the Government’s requirements, and market research indicates other companies’ similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency’s needs.

(b) Circumstances that may justify restriction cited in paragraph (a)(1) of this subsection include—

- (c) Ordering activities shall procure such requirements only if the need to do so is justified in writing and approved at the levels specified in paragraphs (f) and (h) of this subsection.

(d) Except as provided in paragraph (e) of this subsection, when an order contains brand name specifications, the ordering activity shall post the following information along with the Request for Quotation (RFQ) to e-Buy (<http://www.ebuy.gsa.gov>):

(1) For proposed orders exceeding \$25,000, but not exceeding the simplified acquisition threshold, the documentation required by paragraph (f) of this subsection.

(2) For proposed orders exceeding the simplified acquisition threshold, the justification required by paragraph (g) of this subsection.

(e) The posting requirement of paragraph (d) of this subsection does not apply when—

(1) Disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception;

(2) The nature of the file (e.g., size, format) does not make it cost-effective or practicable for contracting officers to provide access through e-Buy; or

(3) The agency's senior procurement executive makes a written determination that access through e-Buy is not in the Government's interest.

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(viii) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the restricted consideration before any subsequent acquisition for the supplies or services is made.

\* \* \* \* \*

■ 7. Amend section 8.406–1 by revising the first sentence of the introductory text to read as follows:

**8.406–1 Order placement.**

Ordering activities may place orders orally (except for services requiring a statement of work (SOW) or orders containing brand name specifications that exceed \$25,000) or use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order supplies or services from schedule contracts. \* \* \*

\* \* \* \* \*

**PART 11—DESCRIBING AGENCY NEEDS**

■ 8. Amend section 11.105 by—

■ a. Redesignating paragraphs (a), (b), and (c) as (a)(1), (a)(2)(i), and (a)(2)(ii) respectively; and adding new paragraphs (a)(3) and (b);

■ b. Amending newly redesignated paragraph (a)(2)(i) by removing “and” from the end of the paragraph and adding “or” in its place; and

■ c. Revising newly redesignated paragraph (a)(2)(ii).

The revised and added text reads as follows:

**11.105 Items peculiar to one manufacturer.**

\* \* \* \* \*

(a)(1) \* \* \*

(2)(i) \* \* \*

(ii) The basis for not providing for maximum practicable competition is documented in the file (see 13.106–1(b)) or justified (see 13.501) when the acquisition is awarded using simplified acquisition procedures.

(3) The documentation or justification is posted for acquisitions over \$25,000. (See 5.102(a)(6).)

(b) For multiple award schedule orders, see 8.405–6.

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 9. Amend section 13.105 by adding paragraph (c) to read as follows:

**13.105 Synopsis and posting requirements.**

\* \* \* \* \*

(c) See 5.102(a)(6) for the requirement to post a brand name justification or documentation required by 13.106–1(b) or 13.501.

■ 10. Amend section 13.106–1 by—

■ a. Amending paragraph (b)(1) by adding “brand name” after “agreements,”;

■ b. Amending paragraph (b)(2) by adding “(including brand name)” after “For sole source”; and

■ c. Adding a new paragraph (b)(3) to read as follows—

**13.106–1 Soliciting competition.**

\* \* \* \* \*

(b) \* \* \*

(3) See 5.102(a)(6) for the requirement to post the brand name justification or documentation.

\* \* \* \* \*

**13.106–3 [Amended]**

■ 11. Amend section 13.106–3 in paragraph (b)(3)(i) by adding “(see 13.106–1 for brand name purchases)” after “competition”.

**13.501 [Amended]**

■ 12. Amend section 13.501 by—

■ a. Amending the paragraph heading in paragraph (a) by adding “(including brand name)” after “Sole source”;

■ b. Amending paragraph (a)(1)(i) by adding “(including brand name)” after “2.101,”; and

■ c. Amending paragraphs (a)(1)(ii) and (a)(2) by adding “(including brand name)” after “sole source”.

[FR Doc. 06–8200 Filed 9–27–06; 8:45 am]

BILLING CODE 6820–EP–S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 2, 7, 11, 31, and 39**

[FAC 2005–13; FAR Case 2004–018; Item II; Docket 2006–0020, Sequence 16]

RIN 9000–AK29

**Federal Acquisition Regulation; FAR Case 2004–018, Information Technology Security**

**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 adopt as final without change, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the Information Technology (IT) Security provisions of the Federal Information Security Management Act of 2002 (FISMA) (Title III of Public Law 107–347, the E-Government Act of 2002 (E-Gov Act)).

**DATES:** *Effective Date:* September 28, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2005–13, FAR case 2004–018. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 70 FR 57449, September 30, 2005 to implement the Information Technology (IT) Security provisions of the Federal Information Security Management Act of 2002 (FISMA) (Title III of Public Law 107–347, the E-Government Act of 2002 (E-Gov Act)). There was a correction published in the **Federal Register** at 70 FR 69100, November 14, 2005, deleting the definition at FAR 2.101 of