

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009-0001, Sequence 2]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-31; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005-31. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

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

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005-31 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

LIST OF RULES IN FAC 2005-31

Item	Subject	FAR case	Analyst
I	Small Business Size Rerepresentation	2006-032	Cundiff
II	Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (Interim).	2008-012	Chambers
III	Amendments to Incorporate New Wage Determinations	2008-014	Woodson
IV	Least Developed Countries that are Designated Countries	2008-021	Murphy
V	Federal Food Donation Act of 2008 (Interim)	2008-017	Jackson
VI	Technical Amendments		

SUPPLEMENTARY INFORMATION:

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

FAC 2005-31 amends the FAR as specified below:

Item I—Small Business Size Rerepresentation (FAR Case 2006-032)

This rule amends the Federal Acquisition Regulation (FAR) to adopt as final, with changes, an interim FAR rule published in the **Federal Register** at 72 FR 36852, July 5, 2007, amending the FAR to implement the Small Business Administration's (SBA) final rule published on November 15, 2006 (71 FR 66434), entitled Small Business Size Regulations; Size for Purposes of Governmentwide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations. The purpose of the SBA rule and this FAR rule is to improve the accuracy of small business size status reporting, at the prime contract level, over the life of certain contracts (long-term contracts, novations, acquisitions, and mergers). Contractors are required to rerepresent their size status prior to the end of the fifth year of a contract that is more than five years in duration (long-term

contract); prior to exercising any option thereafter; following execution of a novation agreement on any contract; or following a merger or acquisition, regardless of whether there is a novation agreement. A change in the size status does not change the terms and conditions of the contract, but the agency may no longer include the value of options exercised or orders issued against the contract in its small business prime contracting goal achievements.

Item II—Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items (FAR Case 2008-012) (Interim)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim final rule amending the Federal Acquisition Regulation (FAR) to harmonize the thresholds for cost or pricing data on non-commercial modifications of commercial items to reflect the Truth In Negotiation Act (TINA) threshold for cost and pricing data.

The Councils are hereby implementing a requirement of the National Defense Authorization Act (NDAA) for FY 2008. Specifically, Section 814 of the Act requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold for cost and pricing

data. By linking the threshold for cost or pricing data on non-commercial modifications of commercial items with the TINA threshold at FAR 15.403-4, whenever the TINA threshold is adjusted the threshold for cost or pricing data on non-commercial modifications of commercial items will be automatically adjusted as well.

Item III—Amendments to Incorporate New Wage Determinations (FAR Case 2008-014)

The final rule amends the Federal Acquisition (FAR) to correct an inconsistency between FAR 15.206(c) and 22.404-5(c)(3), by revising the language at 22.404-5(c). This change requires the contracting officer to amend solicitations to incorporate new Davis Bacon wage determinations (WD) and furnish the wage rate information only to all offerors that have not been eliminated from the competition, if the closing date for receipt of offers has already passed. The revision is necessary to ensure consistency with FAR 15.206(c), and eliminate a possible scenario where incorporation of an updated WD into the solicitation process, could cause an unnecessary and counterproductive reevaluation of proposals already eliminated from competition. This change is consistent with the intent of the Department of Labor regulations, ensuring that the most current WD is placed in the contract at the time of award for

compliance at the start of contract performance.

Item IV—Least Developed Countries that are Designated Countries (FAR Case 2008–021)

This final rule amends the Federal Acquisition Regulation (FAR) to revise the definition of designated country, adding Liberia and removing Cape Verde. Least Developed Countries form a subset of designated countries. The list of Least Developed Countries is derived from a United Nations list of Least Developed Countries. The United States Trade Representative has updated the list of Least Developed Countries that are treated as designated countries. In acquisitions that are covered by the World Trade Organization Government Procurement Agreement, contracting officers must acquire only U.S.-made or designated country end products, or U.S. or designated-country services, unless offers of such end products or services are not received or are insufficient to fulfill the requirement (FAR 25.403(c)).

Item V—Federal Food Donation Act of 2008 (Pub. L. 110–247) (FAR Case 2008–017) (Interim)

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 26, 31, and 52 to encourage executive agencies and their contractors to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States. This change implements the Federal Food Donation Act of 2008 (Pub. L. 110–247) which encourages executive agencies and their contractors, in contracts for the provision, service, or sale of food to encourage the contractors, to the maximum extent practicable and safe, to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States. The rule is effective for all solicitations and contracts greater than \$25,000 for the provision, service, or sale of food in the United States issued on or after the effective date of the rule.

Item VI—Technical Amendments

Editorial changes are made at FAR 3.503–2, 47.103–1, and 52.225–11.

Dated: March 13, 2009

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-31 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 2005-31 is effective March 19, 2009, except for Items I and III, which are effective April 20, 2009.

Dated: March 12, 2009.

Amy G. Williams,

Acting Deputy Director, Defense Procurement and Acquisition Policy (Defense Acquisition Regulations System).

Dated: March 11, 2009.

Rodney P. Lantier,

Acting Senior Procurement Executive & Acting Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, U.S. General Services Administration.

Dated: March 11, 2009.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 17, 19, and 52

[FAC 2005–31; FAR Case 2006–032; Item I; Docket 2007–0002; Sequence 11]

RIN 9000–AK78

Federal Acquisition Regulation; FAR Case 2006–032, Small Business Size Rerepresentation

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 the Small Business Administration's (SBA) final rule published on November 15, 2006 (71 FR 66434) entitled, Small Business Size Regulations; Size for Purposes of Governmentwide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status

Determinations. The purpose of the SBA rule is to improve the accuracy of small business size status reporting over the life of certain contracts.

DATES: *Effective Date:* April 20, 2009.

Applicability date: This rule applies to solicitations issued and contracts awarded on or after April 20, 2009. All long-term contracts as defined in this rule, awarded to small business concerns prior to June 30, 2007, that have not yet been modified to include FAR 52.219–28, must be modified to include FAR 52.219–28 within 90 days after the effective date of this final rule.

FOR FURTHER INFORMATION CONTACT: Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–31, FAR case 2006–032.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 72 FR 36852 on July 5, 2007, to implement the Small Business Administration's (SBA) final rule published on November 15, 2006 (71 FR 66434) entitled, Small Business Size Regulations; Size for Purposes of Governmentwide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations.

Four commenters submitted comments on the interim rule. The comments recommend substantive changes to the rule, request clarification, and recommend editorial changes to the language for clarity and consistency. A discussion of these comments and the changes made to the rule as a result of them is provided below:

Comment: One commenter states that the interim rule is ineffective at preventing ongoing misrepresentation and miscoding on individual contracts because it does not impose a time limit on when existing contracts have to be modified in order to incorporate the small business rerepresentation requirements. This time period could easily be several years, until the time that the base period runs out and the agency must face the choice to exercise options. The commenter recommends that the rule be modified to impose a reasonable period of 30–90 days requiring all contracts to be modified for inclusion of the rerepresentation requirements, and further provide that these requirements will be included by