

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2010-0076, Sequence 1]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005-39; 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 (Councils) in this Federal Acquisition Circular (FAC) 2005-39. 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 2005-39 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 2005-39**

Item	Subject	FAR case	Analyst
I .....	Extend Use of Simplified Acquisition Procedures for Certain Commercial Items .....	2009-035	Jackson.
II .....	Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items.	2008-012	Chambers.
III .....	Use of Standard Form 26 - Award/Contract .....	2008-040	Jackson.
IV .....	Enhanced Competition for Task- and Delivery-Order Contracts-Section 843 of the Fiscal Year 2008 National Defense Authorization Act.	2008-006	Clark.
V .....	Trade Agreements—Costa Rica, Oman, and Peru .....	2008-036	Sakalos.
VI .....	Payments Under Fixed-Price Architect-Engineer Contracts .....	2008-015	Neurauter.
VII .....	Technical Amendment .....		

**SUPPLEMENTARY INFORMATION:**

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

FAC 2005-39 amends the FAR as specified below:

**Item I—Extend Use of Simplified Acquisition Procedures for Certain Commercial Items (FAR Case 2009-035)**

This final rule amends the FAR to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010. The rule extends for two more years the commercial items test program in FAR subpart 13.5. The program was to expire January 1, 2010.

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

This final rule adopts, with minor changes, the interim rule published in the **Federal Register** at 74 FR 11826 on March 19, 2009. The interim rule amended the FAR to implement section 814 of the NDAA for FY 2008. Section 814 requires the harmonization of the threshold for cost or pricing data on non-commercial modifications of commercial items with the Truth in Negotiations Act (TINA) threshold for

cost or 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—Use of Standard Form 26 - Award/Contract (FAR Case 2008-040)**

This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR subparts 15.5 and 53.2 to clarify that block 18 of the form should not be used to award a negotiated procurement. No change is made to existing policy or procedures.

**Item IV—Enhanced Competition for Task- and Delivery-Order Contracts—Section 843 of the Fiscal Year 2008 National Defense Authorization Act (FAR Case 2008-006)**

This final rule adopts, with changes, the interim rule published in the **Federal Register** at 73 FR 54008 on September 17, 2008. The interim rule amended FAR subpart 16.5 to implement section 843 of the NDAA for FY 2008. The provisions of section 843 include (1) Limitation on single award task- or delivery-order contracts greater than \$100 million; (2) Enhanced

competition for task and delivery orders in excess of \$5 million; and (3) Restriction on protests in connection with issuance or proposed issuance of a task or delivery order except for a protest on orders on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued, or a protest of an order valued in excess of \$10 million. Several changes are made to the FAR as result of public comments on the interim rule. FAR 16.503 is amended to clarify that a requirements contract is awarded to one contractor. FAR 16.504(c)(1)(ii)(D)(3) is amended to clarify that the agency-head determination to award a single-award task- or delivery-order contract over \$100 million does not apply to an architect-engineer task- or delivery-order contract awarded pursuant to FAR subpart 36.6. The Councils also revised FAR 16.504(c)(1)(ii)(D)(3) to state that the requirement for a determination for a single-award contract greater than \$100 million is in addition to any applicable requirements of FAR subpart 6.3. This change is made to clarify that the determination for a single award task- or delivery-order contract greater than \$100 million is required in addition to the Justification and Approval (J&A) required by FAR subpart 6.3 when a procurement will be

conducted as other than full and open competition.

**Item V—Trade Agreements—Costa Rica, Oman, and Peru (FAR Case 2008–036)**

The Councils have adopted as final, without change, an interim rule published in the **Federal Register** at 74 FR 28426 on June 15, 2009, amending the FAR to implement the Dominican Republic—Central America—United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

This final rule allows contracting officers to purchase the goods and services of Costa Rica, Oman, and Peru without application of the Buy American Act if the acquisition is subject to the applicable trade agreements.

**Item VI—Payments Under Fixed-Price Architect-Engineer Contracts (FAR Case 2008–015)**

This rule amends FAR 52.232–10, Payments under Fixed-Price Architect-Engineer Contracts, to revise and clarify the retainage requirements. The contracting officer can withhold up to 10 percent of the payment due in any billing period when the contracting officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. However, withholding the entire 10 percent is not required, and no withholding is required if the contractor's performance has been satisfactory. The changes clarify that retainage is optional and any amounts retained should not be held over beyond the satisfactory completion of the instant contract.

**Item VII—Technical Amendment**

An editorial change has been made at FAR 14.202–4(a)(3).

Dated: March 15, 2010.

**Al Matera,**

*Director, Acquisition Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-39 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 2005-39 is effective March 19, 2010, except for Items III, IV, and VI, which are effective April 19, 2010.

Dated: March 12, 2010.

**Linda W. Neilson,**

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

Dated: March 11, 2010.

**Rodney P. Lantier,**

*Acting Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.*

Dated: March 8, 2010.

**William P. McNally,**

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

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 13**

**[FAC 2005–39; FAR Case 2009–035; Item I; Docket 2010–0080, Sequence 1]**

**RIN 9000–AL52**

**Federal Acquisition Regulation; FAR Case 2009–035, Extend Use of Simplified Acquisition Procedures for Certain Commercial Items**

**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 revise subpart 13.5, “Test Program for Certain Commercial Items,” to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010 (Pub. L. 111–84). The rule extends the program for two more years. The program was to expire January 1, 2010.

**DATES:** Effective Date: March 19, 2010.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at (202) 208–4949. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–39, FAR case 2009–035.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule amends the FAR to revise section 13.500(d) to implement section 816 of the NDAA for FY 2010. Section 816 of the NDAA for FY 2010 strikes out “2010” in subsection (e) of section 4202 of the Clinger-Cohen Act of 1996 (Division D of Pub. L. 104–106, 10 U.S.C. 2304 note) as amended by section 822 of the NDAA for FY 2008 (Pub. L. 110–181) and inserts “2012.” FAR subpart 13.5 authorizes as a test program, the use of simplified procedures for the acquisition of certain commercial items in amounts greater than the simplified acquisition threshold, but not exceeding \$5.5 million, (\$11 million for acquisitions described in FAR 13.500(e)) including options, if the contracting officer can reasonably expect that offers will include commercial items. FAR subpart 13.500(d) authorizes the contracting officer to issue solicitations under this subpart until January 1, 2010. This final rule extends this authority to January 1, 2012.

**B. Decision to Issue a Final Rule**

This case implements section 816 of the NDAA for FY 2010. It merely extends the end date of the Commercial Item Test Program from January 1, 2010, to January 1, 2012. Therefore, because there is no change in policy or procedure, the Councils determined to issue a final rule without comment.

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.

**C. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Pub. L. 98–577, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–39, FAR Case 2009–035) in correspondence.

**D. 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