52.212–3 Offeror Representations and Certifications—Commercial Items.

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Offeror Representations and Certifications—Commercial Items (FEB 2012)

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■ 20. Amend section 52.212–4 by revising the date of the clause; and removing from paragraph (t)(4) ''via the Internet at *http://www.ccr.gov*'' and adding ''via CCR accessed through *https://www.acquisition.gov*'' in its place. The revised text reads as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

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Contract Terms and Conditions—Commercial Items (FEB 2012)

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[FR Doc. 2011–33414 Filed 12–30–11; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 8, 11, 13, 16, 18, and 36

[FAC 2005–55; FAR Case 2005–037; Item III; Docket 2006–0020, Sequence 26]

RIN 9000–AK55

Federal Acquisition Regulation; Brand-Name Specifications

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the Office of Management and Budget memoranda on brand-name specifications.

DATES: *Effective Date:* February 2, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–55, FAR Case 2005–037.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 71 FR 57357 on September 28, 2006, to implement Office of Management and Budget (OMB) memoranda and policies on the use of brand-name specifications. Eight respondents submitted 32 comments in response to the interim rule. The public comments were considered in development of this final rule.

Prior to the interim rule, on April 11, 2005, OMB issued a memorandum on the use of brand-name specifications that was designed to reinforce the need to maintain vendor- and technology-neutral contract specifications and provide for maximum competition by limiting the use of brand-name specifications. OMB encouraged agencies to mitigate brand-name usage and publicize the justification for using brand-names in solicitations. OMB issued a second memorandum on April 17, 2006, providing additional implementation guidance for publication of brand-name justifications.

Subsequent to the interim rule, OMB issued two additional memoranda addressing the use of brand-name specifications. One, entitled ''Appropriate Use of Brand Name or Equal Purchase Descriptions,'' dated November 28, 2007, reminded agencies of the need to comply with the requirements included in the interim rule and establish internal controls to monitor compliance. The last memorandum, published December 19, 2007, entitled ''Reminder-Ensuring Competition When Acquiring Information Technology and Using Common Security Configurations,'' summarized the FAR requirements on the use of brand-name purchase descriptions and again asked agencies to establish internal controls. All four of the OMB memoranda were considered in developing this final rule.

However, the need to stabilize the FAR baseline because of changes to be made by other pending FAR cases has delayed publication of this final rule. Publication in the **Federal Register** at 76 FR 14548 on March 16, 2011, of the interim rule for FAR Case 2007–012, Requirements for Acquisitions Pursuant to Multiple-Award Contracts, enabled the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) to move ahead with this final rule. Some of the changes made to the interim rule by this final rule are due solely to the revised baseline.

This final rule amends FAR subparts 6.3, 8.4, 13.1, 13.5, and 16.5 to clarify that when applicable, the documentation or justification and posting requirements for brand-name items only apply to the portion of the acquisition that requires the brand-name item. FAR subparts 8.4 and 16.5 are amended to require screening of the brand-name justifications for contractor proprietary data, and FAR subpart 16.5 is amended to require contracting officers to post the justification for an order peculiar to one manufacturer under indefinite-delivery contracts.

II. Discussion and Analysis

The Councils reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. What To Post

Comments: The interim rule specifically requested comments on whether agencies should be required to post brand-name justifications (a) For orders against indefinite-delivery contracts, including Governmentwide Acquisition Contracts (GWACs), (b) for orders against SmartBUY agreements and other strategic sourcing vehicles, and (c) to renew software-license agreements that are required to receive software updates. Several respondents addressed these questions as follows.

Most respondents expressed a strong belief that all Government procurements should be subject to the same brand-name-or-equal rules, at the basic-contract level and at the order level. One respondent stated that a single posting requirement will go a long way toward leveling the playing field. Other respondents believed that it would be unfair to allow agencies to avoid the brand-name justification rule by ordering against indefinite-delivery contracts.

One respondent distinguished between an agency-only indefinite-delivery contract and GWACs, which can be used by multiple agencies. The respondent did not think that an agency should be required to post brand-name justifications for orders under an internal indefinite-delivery contract, because all requirements should have been met at the time of posting the initial requirement for the basic indefinite-delivery contract, even if a competitive solicitation leads to a *de facto* brand-name indefinite-delivery contract. Further, this respondent read the FAR to contain a loophole that allows an ordering agency to avoid the posting requirements, as well as any

requirement to prepare a justification, when placing orders for brand-name products against a GWAC. Other respondents suggested that the FAR should incorporate a requirement for brand-name justification documentation and posting for GWACs only. Some respondents stated that orders issued against indefinite-delivery contracts should be included in the rule to the extent that the original indefinite-delivery action was not supported by a class justification and approval. The existence of the product on an indefinite-delivery contract does not, according to respondents, justify its acquisition if the facts supporting the product selection were not documented in the original indefinite-delivery procurement process.

Respondents were not in agreement as to whether orders under SmartBUY and other strategic-sourcing agreements should be subject to the posting requirement. One respondent believes that, because these are vehicles of choice, the determination to procure a brand-name product is made at the order level and should be supported by a posted justification for the order. Other respondents disagreed, stating that the posting requirement should be satisfied prior to the award of the basic agreement, not for individual orders.

Respondents did not consider that posting should be required for the renewal of software-licensing agreements because only the original equipment manufacturer has the software code to support the equipment and, therefore, there is no ability to compete. Respondents pointed out that FAR 13.106–1(b)(1) mentions license agreements separately from brand-name requirements, which respondents considered to strengthen the argument that software-license renewals should not be subject to the posting requirement.

Response: The justification for use of a brand-name specification and posting of the justification should take place when the requirement for the brand-name item is determined. This will result in different timing for multiple-award contracts from single-award contracts, *e.g.,* requirements contracts. By definition, a requirements contract is with a single source. Therefore, the requirement for the source's brand-name item is determined prior to award of the basic contract, and the justification for purchasing a brand-name item should be completed prior to award of the requirements contract. On the other hand, a multiple-award contract offers buyers products from a variety of sources, some of which may offer particular brand-name products. The existence of a brand-name item on a multiple-award contract does not imply that it is the only such item available for purchase. In this case, the requirement for a single manufacturer's brand-name item is determined at the time of the order, not at the time that the multiple-award contract is placed. Therefore, the justification for the brand-name item would be required when placing the order. For example, if an agency determined that it needed 50 Dell computers to be compatible with the agency's existing Dell capabilities, then it might place an order against a Federal Supply Schedule (FSS) contract for Dell brand-name computers. The agency placing the order would be responsible for justifying the brand-name purchase, because it is at the order level that it is determined that the requirement is for Dell computers, versus other brand-name computers that are also available on FSS contracts.

There is a benefit to posting a purchase description for an order peculiar to one manufacturer because it provides for greater transparency and accountability regarding the use of brand-name specifications. Agencies can no longer avoid the posting requirement for orders simply by placing an order against an indefinite-delivery contract, unless it is a requirements contract with a single source. Orders with a purchase description for an order peculiar to one manufacturer issued against a GWAC or multiple-agency contract now are also included in the posting requirement. Posting is required if a justification covering the requirements in the order had not previously been approved for the original contract in accordance with FAR 6.302–1(c). The posting requirement for orders under indefinite-delivery contracts, GWACs, and multiple-agency contracts is reflected in changes at FAR subpart 16.5.

The exception to the synopsis requirement for orders at FAR 16.505(a)(1) is revised by directing the contracting officer to follow the requirements of FAR 16.505(a)(4) for a proposed order peculiar to one manufacturer. FAR 16.505(a)(4) is added to require the contracting officer to document or prepare a justification when limiting competition for an item peculiar to one manufacturer, unless the justification covering the requirements in the order had been previously approved under the contract or unless the base contract is a single-award contract awarded under full and open competition. Under the final rule, agencies must post the solicitation, and any justification and supporting documentation on the agency Web site used (if any) to solicit offers if the order is $25,000 or more; or provide the justification and supporting documentation along with the solicitation to all awardees under the indefinite-delivery contract. The agency is required to keep a copy of the brand-name justification in the official contract file.

With regard to orders placed pursuant to the SmartBUY program, the Councils concluded that agencies utilizing SmartBUY will be required to comply with the procedures of the SmartBUY blanket purchase agreements (BPAs).

If an acquisition specifies a brand-name item, the justification or documentation shall be posted, as required, with the solicitation or request for quotation (RFQ) (see FAR 5.102(a)(6), 8.405–6 or 16.505). As such, if an acquisition for renewal of a software-license agreement requires a brand-name justification or documentation and a solicitation or RFQ, then the justification or documentation shall be posted, as required, with the solicitation or RFQ. Any exception to this requirement should cite the applicable FAR reference. For example, an order placed under an FSS contract for a software-license renewal that cites logical follow-on as the circumstance (see FAR 8.405–6(a)(1)(i)(C)) for placing the order would not require a brand-name justification. However, if the order exceeds the simplified acquisition threshold, the limited-source justification is required to be posted (see FAR 8.405–6(a)(2)). The parenthetical reference to exclusive licensing agreements at FAR 13.106–1(b)(1), as cited by the respondents, does not provide the applicable FAR reference for an exception to posting the brand-name justification or documentation required for an acquisition for renewal of software-license agreements.

B. Where To Post Justifications

Comment: One respondent stated that ''agencies shall use GSA e-Buy to post RFQs, eliminating FedBid, thus assuring adequate notice and competition.'' Another respondent stated that e-Buy should be used consistently for FSS purchases because ''(u)se of FedBizOpps invites additional interest outside of the FSS community and creates confusion as to whether the acquisition is conducted under FAR parts 8, 13, 15, etc. procedures.''

Response: Agencies are required to post brand-name justifications or documentation to (1) the Governmentwide Point of Entry (GPE) system at *www.fedbizopps.gov* with the solicitation or (2) the e-Buy system at

http://www.ebuy.gsa.gov with the RFQ when using the GSA's FSS. The interim rule applied the posting requirement to acquisitions exceeding $25,000 that use brand-name specifications, including simplified acquisitions, sole-source procurements, and multiple-award FSS orders. If an agency uses a third-party system such as FedBid for posting notices or soliciting offers for orders under the multiple-award FSS, the official posting location is still e-Buy. If publication of the justification or documentation with the solicitation is inappropriate because one of the exceptions in FAR 8.405–6(b)(3)(ii) or 16.505(a)(4)(iii)(C) applies, then agencies should retain a copy of the justification or documentation in the contract file.

C. Posting Increases Acquisition Lead Time

Comment: One respondent noted that requiring posting of a brand-name justification, as well as creating an e-Buy solicitation for orders over $25,000, will add to lead time. The respondent stated that, in many cases, the posting of requirements could necessitate some type of legal or other review of the brand-name justification to ensure against unintentional disclosure of sensitive information. According to the respondent, ''While classified information clearly falls within an exception to the posting rule, the primary concern is with the identification of sensitive information that does not carry a classification. It should not be the Contracting Officer's responsibility to determine the appropriateness of this information for release to the public.'' The respondent recommended that the posting requirement should only be imposed on orders over the simplified acquisition threshold, and then only if the requirements and technical personnel are required to certify that the information regarding the need for the brand-name is appropriate for public release.

Response: The Councils agree that posting of a brand-name justification, as well as creating an e-Buy solicitation for orders over $25,000, may increase the procurement lead time and will have to be factored during acquisition planning. However, these actions foster competition, broaden industry participation and increase transparency of the acquisition process. The Councils note that the $25,000 threshold for posting a brand-name justification was established in the memoranda issued by OMB. FAR 5.102(a)(6) assigns overall responsibility to the contracting officer, as a core member of the acquisition team, for ensuring the brand-name justification, to be included with the solicitation, is properly screened and redacted, as necessary, prior to posting. Moreover, the contracting officer, when deemed necessary, may consult with the appropriate subject matter expert(s) when determining the appropriateness of information for public release.

D. What posting requirements are applicable to BPAs issued under FSS contracts and orders placed under the BPAs?

Comment: Some respondents believed the interim rule resulted in confusion as to the applicability of the requirements to the placement of orders under BPAs versus the placement of BPAs. Respondents stated that some contracting officers may apply the posting language to solicitations for BPAs, while other contracting officers may only apply the brand-name specification posting requirement to RFQs for orders and not to BPAs. Respondents believed that the intent should be clear.

Response: In this final rule, the Councils have clarified FAR subpart 8.4 to require that the documentation or justification for use of a brand-name specification must be completed and approved at the time the requirement for a brand-name item is determined. FAR 8.405–6 is revised to make it clear that the justification for a brand-name item is required at the order level when a justification for the brand item was not completed for the BPA or does not adequately cover the requirements in the order.

E. Interim Rule Prohibits Agency Use of Brand-Name Specifications When Placing Orders

Comment: A respondent stated that the requirement to post a brand-name justification should be applied only at the order level and never to the establishment of a BPA under an FSS contract.

Response: The Councils determined that it is appropriate to post the justification and documentation for brand-names at the time the requirement is established, *i.e.,* when a single-source contract is created or when an order is being placed against a multiple-award contract. Thus, the requirement to post a brand-name justification would not apply to the creation of a BPA unless it was a single-source BPA issued against an FSS contract. See also responses to comments in section II.A. and D.

F. Limiting Consideration to Brand-Names

Comment: A respondent was concerned that the interim rule goes beyond limiting consideration to brand-names and actually prohibits agencies from utilizing brand-name specifications when placing orders. To fix that, the respondent suggested that the FAR must be clearer in separating the initial-needs description from the actual ordering process because, without the ability to name products by brands, contracting officers will be unable to fill specific orders correctly. Also, respondents claimed that the requirement to post brand-name justifications for FSS orders in excess of $25,000 reduces the ability to use streamlined acquisition procedures to place FSS orders.

Response: To implement the OMB memorandum, the interim rule restricted use of oral orders over $25,000 against FSS when purchase descriptions contained brand-name specifications. The Councils recognize that the interim rule required that an RFQ be issued for a proposed order when the purchase description specifies a brand-name requirement. That requirement is consistent with the OMB memoranda and is retained in the final rule to reinforce the need to maintain vendor- and technology-neutral specifications to provide for maximum competition. However, additional clarification is needed, and the Councils have revised FAR 8.405–1(e) to specify that an RFQ is required when a purchase description specifies a brand-name for a proposed order issued under a FSS.

The interim rule does not prohibit the use of brand-name specifications when placing orders. However, the FAR could be clearer, and the Councils have made changes at FAR subparts 8.4 and 16.5, to reflect the documentation or justification and posting requirements that apply to the purchase description for proposed orders when placed against FSS contracts and indefinite-delivery contracts.

G. When a Brand-Name Product Is Included in the Agency's Enterprise Architecture, an Additional Justification Should Not Be Required

Comment: One respondent noted that a Government agency is now required to have an Enterprise Architecture for its information-technology (IT) systems. Once the Enterprise Architecture has been approved, the respondent believed that contracting officers should be able to purchase brand-name IT equipment described and identified within the

Enterprise Architecture without any justification, bypassing the posting requirement. The respondent proposed that, as a minimum, there should be provision for standardized maintenance agreements with a single company.

Response: If an agency's Enterprise Architecture includes brand-name IT equipment, this fact will be a critical element in the brand-name justification. It does not eliminate the requirement for the justification or posting the justification.

H. Posting an RFQ Is Not Always Required When Using a Brand-Name Specification for Orders

Comment: The interim rule, according to respondents, confused limiting consideration to brand-names with selecting a brand-name item. Respondents stated that the OMB memoranda were reasonably focused on the use of brand-name specifications at the requirements and solicitation stages, not at the ordering stage. Respondents believed that it is illogical to require an agency to post an RFQ or brand-name specification justification after a source selection, ''including when the source selection necessarily results in the order of a brand-name good or service.''

Response: The final rule incorporates appropriate language at FAR 16.505 and 8.405–6 to reflect that the justification and posting requirements apply at the time the requirement for the brand-name item is determined. Therefore, posting an RFQ with its associated brand-name justification will not be required at the order level for certain contracts or FSS BPAs (see also response to comments in section II.A.).

I. Ties to Synopsis Exceptions for Open-Market Purchases

Comment: Respondents stated that, for open-market purchases, the requirement to post the brand-name justification is tied to solicitations synopsized through GPE and, therefore, any solicitation not synopsized through GPE by virtue of the exceptions to the notice requirements at 5.202 technically will not need to be published.

Response: The respondents' analysis correctly reflects that, if a solicitation is not synopsized through the GPE based on one of the exceptions at FAR 5.202, the associated brand-name justification or documentation is not required to be published through the GPE.

J. Clarify Thresholds, Cross-References, and Documentation Requirements

Comment: One respondent recommended that FAR 5.102(a)(6) be revised to clarify whether the posting requirement applies when the acquisition in total exceeds $25,000 (regardless of the amount attributed to brand-name specifications) or only when the brand-name component of it exceeds $25,000.

The respondent also recommended that FAR 5.102(a)(6) should have a reference to FAR 8.405–6(d) which requires documentation and justification for restricting competition when ordering under the FSS. The respondent stated that FAR 5.102(a)(6) requires the contracting officer to post the documentation required by FAR 13.106–1(b) when an acquisition contains brand-name specifications. However, there are no documentation requirements at FAR 13.106–1(b).

Response: No change is required at FAR 5.102(a)(6) to clarify the thresholds or to reference to FAR 8.405–6(d). The justification and posting requirements for orders containing brand-name specifications placed under FSS contracts are adequately covered under FAR 8.405–6(b).

The Councils have revised FAR 6.302–1(c), 13.106–1(b), 8.405–6(b)(4), and 13.501(a) to address requirements for documentation, justification, and approval for the portion of the acquisition which is brand-name.

There are adequate documentation requirements at FAR 13.106–1(b). For purchases not exceeding the simplified acquisition threshold, FAR 13.106–1(b) requires that the contracting officer document the circumstances (*e.g.,* brand-name) when it is determined that only one source is reasonably available. For sole-source (including brand-name) acquisitions of commercial items in excess of the simplified acquisition threshold, FAR 13.106–1(b) provides the cross reference to FAR 13.501(a) for the documentation.

Comment: One respondent indicated that FAR 8.405–1(c)(2) seems to contradict the $25,000 posting threshold because the title of FAR 8.405–1(c) is ''Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold.'' The respondent believed that the documentation or justification requirements for FSS orders containing brand-name specifications apply to any such order greater than $3,000, when in fact, they apply only to orders exceeding $25,000.

Response: FAR 8.405–1(c) was revised by FAR Case 2007–012. As a result of the case, FAR 8.405–1(c)(2) is now a separate paragraph at FAR 8.405–1(e), and the documentation or justification and posting requirements for FSS orders at the applicable thresholds are located at FAR 8.405–6(b). The documentation requirement starts at $3,000; the posting requirement starts at $25,000.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. 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 addresses internal Federal agency procedures. The rule will benefit small business entities by providing the opportunity for review of brand-name justification and approval documents for contracts and orders awarded noncompetitively or with limited competition, thereby increasing the opportunity for competition for future awards.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 5, 6, 8, 11, 13, 16, 18, and 36

Government procurement.

Dated: December 21, 2011.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 5, 6, 8, 11, 13, 16, 18, and 36 which was published in the **Federal Register** at 71 FR 57357,

September 28, 2006, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 5, 6, 8, 11, 13, 16, 18, and 36 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 5.202 by revising paragraph (a)(6) to read as follows:

5.202 Exceptions.

* * * * *

(a) * * *

(6) The proposed contract action is an order placed under subpart 16.5. When the order contains brand-name specifications, see especially 16.505(a)(4);

* * * * *

PART 6—COMPETITION REQUIREMENTS

■ 3. Amend section 6.302–1 by revising paragraph (c) to read as follows:

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

* * * * *

(c) *Application for brand-name descriptions.* (1) An acquisition or portion of an acquisition that uses a brand-name description or other purchase description to specify a particular brand-name, product, or feature of a product, peculiar to one manufacturer—

(i) Does not provide for full and open competition, regardless of the number of sources solicited; and

(ii) Shall be justified and approved in accordance with 6.303 and 6.304.

(A) If only a portion of the acquisition is for a brand-name product or item peculiar to one manufacturer, the justification and approval is to cover only the portion of the acquisition which is brand-name or peculiar to one manufacturer. The justification should state it is covering only the portion of the acquisition which is brand-name or peculiar to one manufacturer, and the approval level requirements will then only apply to that portion;

(B) The justification should indicate that the use of such descriptions in the acquisition or portion of an acquisition is essential to the Government's requirements, thereby precluding consideration of a product manufactured by another company; and

(C) The justification shall be posted with the solicitation (see 5.102(a)(6)).

(2) Brand-name or equal descriptions, and other purchase descriptions that permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use.

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 4. Amend section 8.405–1 by revising paragraph (e) to read as follows:

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

* * * * *

(e) When an order contains brand-name specifications, the contracting officer shall post the RFQ on e-Buy along with the justification or documentation, as required by 8.405–6. An RFQ is required when a purchase description specifies a brand-name.

* * * * *

■ 5. Amend section 8.405–6 by—

■ a. Removing from paragraph (b)(2)(ii) ''threshold see'' and adding ''threshold, see'' in its place; and

■ b. Adding paragraphs (b)(2)(iii), (b)(3)(i)(C), and (b)(4).

The added and revised text reads as follows:

8.405–6 Limiting sources.

* * * * *

(b) * * *

(2) * * *

(iii) The documentation or justification must be completed and approved at the time the requirement for a brand-name item is determined. In addition, the justification for a brand-name item is required at the order level when a justification for the brand-name item was not completed for the BPA or does not adequately cover the requirements in the order.

(3) * * *

(i) * * *

(C) The documentation in paragraph (b)(2)(i) and the justification in paragraph (c) of this subsection is subject to the screening requirement in paragraph (a)(2)(iii) of this section.

* * * * *

(4) When applicable, the documentation and posting requirements in paragraphs (b)(2) and (3) of this subsection apply only to the portion of the order or BPA that requires a brand-name item. If the justification and approval is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 6. Amend section 11.105 by adding paragraph (c) to read as follows:

11.105 Items peculiar to one manufacturer.

* * * * *

(c) For orders under indefinite-quantity contracts, see 16.505(a)(4).

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 7. Amend section 13.106–1 by revising paragraph (b) to read as follows:

13.106–1 Soliciting competition.

* * * * *

(b) *Soliciting from a single source.* (1) *For purchases not exceeding the simplified acquisition threshold.* (i) Contracting officers may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available (*e.g.,* urgency, exclusive licensing agreements, brand-name or industrial mobilization).

(ii) Where a single source is identified to provide a portion of a purchase because that portion of the purchase specifies a particular brand-name item, the documentation in paragraph (b)(1)(i) of this section only applies to the portion of the purchase requiring the brand-name item. The documentation should state it is covering only the portion of the acquisition which is brand-name.

(2) *For purchases exceeding the simplified acquisition threshold.* The requirements at 13.501(a) apply to sole-source (including brand-name) acquisitions of commercial items conducted pursuant to subpart 13.5.

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

* * * * *

■ 8. Amend section 13.501 by revising the introductory text of paragraph (a)(2) to read as follows:

13.501 Special documentation requirements.

(a) * * *

(2) Justifications and approvals are required under this subpart for sole-source (including brand-name) acquisitions or portions of an acquisition requiring a brand-name. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

* * * * *

PART 16—TYPES OF CONTRACTS

■ 9. Amend section 16.505 by—
■ a. Revising paragraph (a)(1);
■ b. Redesignating paragraphs (a)(4) through (a)(10) as paragraphs (a)(5) through (a)(11), respectively; and
■ c. Adding a new paragraph (a)(4).

The revised and added text reads as follows:

16.505 Ordering.

(a) * * *

(1) In general, the contracting officer does not synopsize orders under indefinite-delivery contracts; except see 16.505(a)(4) and (11), and 16.505(b)(2)(ii)(D).

* * * * *

(4) The following requirements apply when procuring items peculiar to one manufacturer:

(i) The contracting officer must justify restricting consideration to an item peculiar to one manufacturer (*e.g.,* a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, 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.

(ii) Requirements for use of items peculiar to one manufacturer shall be justified and approved using the format(s) and requirements from paragraphs (b)(2)(ii)(A), (B), and (C) of this section, modified to show the brand-name justification. A justification is required unless a justification covering the requirements in the order was previously approved for the contract in accordance with 6.302–1(c) or unless the base contract is a single-award contract awarded under full and open competition. Justifications for the use of brand-name specifications must be completed and approved at the time the requirement for a brand-name is determined.

(iii)(A) For an order in excess of $25,000, the contracting officer shall—

(*1*) Post the justification and supporting documentation on the agency Web site used (if any) to solicit offers for orders under the contract; or

(*2*) Provide the justification and supporting documentation along with the solicitation to all contract awardees.

(B) The justifications for brand-name acquisitions may apply to the portion of the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

(C) The requirements in paragraph (a)(4)(iii)(A) of this section do not apply when disclosure would compromise the national security (*e.g.,* would result in disclosure of classified information) or create other security risks.

(D) The justification is subject to the screening requirement in paragraph (b)(2)(ii)(D)(*4*) of this section.

* * * * *

PART 18—EMERGENCY ACQUISITIONS

18.105 [Amended]

■ 10. Amend section 18.105 by removing ''(see 16.505(a)(7))'' and adding ''(see 16.505(a)(8))'' in its place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.600 [Amended]

■ 11. Amend section 36.600 by removing ''(see 16.505(a)(8))'' and adding ''(see 16.505(a)(9))'' in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 12, and 16

[FAC 2005–55; FAR Case 2009–043; Item IV; Docket 2010–0100, Sequence 1]

RIN 9000–AL74

Federal Acquisition Regulation; Time-and-Materials and Labor-Hour Contracts for Commercial Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Government Accountability Office (GAO) recommendations to: ensure that time-and-materials and labor-hour contracts are used to acquire commercial services only when no other contract type is suitable; and instill discipline in the determination of contract type with a view toward managing the risk to the Government.

DATES: *Effective Date:* February 2, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Lori Sakalos, Procurement Analyst, at (202) 208–0498, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–55, FAR Case 2009–043.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 75 FR 59195 on September 27, 2010. The due date for public comments was November 26, 2010.

Eleven comments were received from four respondents. The comments are separated into eight categories, addressed in the following sections.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule.

A. Summary of Significant Changes

Changes were made to the proposed rule as a result of the public comments and the publication of FAR Case 2007–012 in the **Federal Register** at 76 FR 14548 on March 16, 2011. Specifically, all text in the proposed rule under FAR 8.405–2(e) has been relocated to FAR 8.404(h). FAR Case 2007–012 strengthened competition requirements for orders placed under the Federal Supply Schedules. As a result, FAR 8.405–2(e)(2)(ii) has been deleted and references to FAR part 12 at FAR subpart 8.4 have been removed.

Additional changes were made during deliberation of the final rule to require these same safeguards on the use of time-and-materials (T&M) and labor-hour (LH) orders for Blanket Purchase Agreements awarded under the Federal Supply Schedule Program.

B. Analysis of Public Comments

Respondents submitted comments covering the following seven categories: (1) Cross references; (2) Combine guidance from this case with FAR Case 2007–012; (3) Eliminate redundant material; (4) Clarify contract types; (5) Potential for rule to limit the use of T&M contracts; (6) Requirement for determination and findings at the order level; and (7) Address fixed-price level-of-effort (FP LOE) contracts.