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[FR Doc. 04-13617 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 2001-24; FAR Case 2004-004;
Item I]

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: 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) 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.

DATES: *Effective Date:* June 18, 2004.

Comment Date: Interested parties
should submit comments to the FAR
Secretariat at the address shown below
on or before August 17, 2004, to be
considered in the formulation of a final
rule.

ADDRESSES: Submit printed comments
to General Services Administration,
FAR Secretariat (MVA), 1800 F Street,
NW., Room 4035, ATTN: Laurie Duarte,
Washington, DC 20405. Submit
electronic comments via the Internet to
the U.S. Government's Web site at <http://www.regulations.gov>, or to GSA's e-
mailbox at farcase.2004-004@gsa.gov.

Please submit comments only and cite
FAC 2001-24, FAR case 2004-004, in
all correspondence related to this case.

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,
Procurement Analyst, at (202) 208-
1168. Please cite FAC 2001-24, FAR
case 2004-004.

SUPPLEMENTARY INFORMATION:

A. Background

Section 1431 of the National Defense
Authorization Act for Fiscal Year 2004
(Pub. L. 108-136) enacts
Governmentwide authority to treat
certain performance-based contracts or
task orders for services as commercial
items if the—

(1) Value of the contract or task order
is estimated not to exceed \$25,000,000;

(2) Contract or task order sets forth
specifically each task to be performed
and, for each task—

a. Defines the task in measurable,
mission-related terms;

b. Identifies the specific end products
or output to be achieved; and

c. Contains firm, fixed prices for
specific tasks to be performed or
outcomes to be achieved; and

(3) Source of the services provides
similar services to the general public
under terms and conditions similar to
those offered to the Federal
Government.

Implementation of section 1431 also
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 data will be collected using the
Federal Procurement Data System-Next
Generation (FPDS-NG). By November
24, 2006, OMB will be required to report
to the Committees on Governmental
Affairs and on Armed Services of the
Senate and the Committees on
Government Reform and on Armed
Services of the House of Representatives
on the implementation of Section 1431.
The report shall include data on the use
of such authority both Governmentwide
and for each department and agency.
The authority of section 1431 expires on
November 24, 2013, ten years after
enactment. 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—

• Revise the commercial items
definition in FAR 2.101 and 52.202-1;

• Add a new record requirement for
reporting commercial performance-
based contracts or task orders to FAR
4.601;

• Incorporate the conditions for using
FAR Part 12 for any performance-based
contract or task order for services in
FAR 12.102; and

• Add performance-based terms as
required by section 1433, and

• Add a cross reference to FAR
12.102(g) in FAR 37.601.

The reference to the definition of
performance-based contracting in the
proposed language is a change from the
statutory requirement. Section 1431
provides for a contract or task order to
be treated as a contract for commercial
items if: "The contract or task order sets
forth specifically each task to be
performed and for each task—defines
the task in measurable, mission-related
terms; identifies the specific end
products or output to be achieved; and
contains firm, fixed prices for specific
tasks to be performed or outcomes to be
achieved." However, the two
requirements of law regarding how
tasks, products, or outputs are described
are being implemented by requiring
contracts or task orders to meet the
definition of performance-based
contracting at FAR 2.101. This language
and that at 12.102 paragraphs (g)(1)(iv)
and (v) and in (g)(2) are to ensure
consistency with the overarching policy
in FAR 37.601 that applies to
performance-based contracting for
services.

Section 1431 recommends that the
Federal Procurement Data System
(FPDS) or other reporting mechanism
collect this data. The FPDS is the only
Governmentwide system that can
potentially collect this data. This system
currently tracks performance-based
contracts and task orders awarded. A
petition was made to the FPDS-NG
Change Control Board to incorporate a
change to report data on services treated
as commercial items under the
conditions stated in section 1431 when
using performance-based contracting
techniques.

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 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, we have prepared an Initial Regulatory Flexibility Analysis that is summarized as follows:

The rule (1) amends the commercial items definition in FAR 2.101 and 52.202–1; (2) adds a new record requirement for reporting commercial performance-based contracts or task orders to FAR 4.601; (3) incorporates the conditions for using FAR Part 12 for any performance-based contract or task order for services in FAR 12.102; and (4) adds performance-based terms as required by section 1433, and (5) adds a cross reference to FAR 12.102(g) in FAR 37.601. The rule will apply to all large and small entities that seek award of performance-based service contracts that are not commercial services as defined by FAR 2.101 and 52.202–1. Although these changes were made to implement section 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (P.L. 108–136), the impact of these changes are positive and may provide (1) new contracting opportunities to small businesses that otherwise would not have been available if their services did not meet the definition of commercial item in FAR 2.101 and 52.202–1; and (2) contracting flexibility for the acquisition community when using PBC techniques.

The FAR Secretariat has submitted a copy of the IRFA 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 2, 4, 12, 37, and 52 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 2001–24, 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.*

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 implement sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) which became effective November 24, 2003. 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 2, 4, 12, 37, and 52

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 12, 37, and 52 as set forth below:

■ 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b) in the definition “Commercial item” by revising the introductory text of paragraph (6) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Commercial item means—

* * * * *

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—

* * * * *

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.601 by adding paragraph (d)(6) to read as follows:

4.601 Record requirements.

* * * * *

(d) * * *

(6) Contracts or task orders treated as commercial items pursuant to 12.102(g).

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.102 by adding paragraph (g) to read as follows:

12.102 Applicability.

* * * * *

(g)(1) In accordance with section 14313 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) (41 U.S.C. 437), the contracting officer also may use Part 12 for any acquisition performance-based contracting for services that does not meet the definition of commercial item in FAR 2.101, if the contract or task order—

(i) Is entered into on or before November 24, 2013;

(ii) Has a value of \$25 million or less;

(iii) Meets the definition of performance-based contracting at FAR 2.101;

(iv) Includes a quality assurance surveillance plan;

(v) Includes performance incentives where appropriate;

(vi) Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and

(vii) 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.

(2) In exercising the authority specified in paragraph (g)(1) of this section, the contracting officer should tailor paragraph (a) of the clause at FAR 52.212–4 as may be necessary to ensure the contract’s remedies adequately protect the Government’s interests.

PART 37—SERVICE CONTRACTING

■ 5. Revise section 37.601 to read as follows:

37.601 General.

(a) Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed or outcomes achieved meet contract standards. Performance-based contracts or task orders—

(1) Describe the requirements in terms of results required rather than the methods of performance of the work;

(2) Use measurable performance standards (*i.e.*, in terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a));

(3) Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407); and

(4) Include performance incentives where appropriate.

(b) See 12.102(g) for the use of Part 12 procedures for performance-based contracting.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.202–1 by revising the date of the clause and the introductory text of paragraph (c)(6) of the clause to read as follows:

52.202–1 Definitions.

* * * * *

Definitions (Jun 2004)

* * * * *

(c) * * *

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—

* * * * *

[FR Doc. 04–13618 Filed 6–17–04; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2 and 52

[FAC 2001–24; FAR Case 2002–013; Item II]

RIN 9000–AJ83

Federal Acquisition Regulation; Definitions Clause

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 clarify the applicability of FAR definitions to solicitation provisions and contract clauses.

DATES: *Effective Date:* July 19, 2004.

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. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. Please cite FAC 2001–24, FAR case 2002–013.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to delete the list of definitions from the clause at FAR 52.202–1 and to replace the list with general policy regarding the applicability of FAR definitions to solicitation provisions and contract clauses.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 69 FR 2988, January 21, 2004. Three comments were received from one respondent. The first two comments requested clarification as to whether the second and third sentences of FAR 2.201 and Alternate I of the clause at FAR 52.202–1 are being deleted. This text has been deleted, and the proposed and final rules reflect this. The third comment suggested correcting the Web address in FAR 52.202–1. We agree. The Web address has been changed. The proposed rule has been converted to a final rule with this change and other minor editorial changes.

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 the principle of how definitions apply is already expressed in FAR Part 2. Since this principle is not as clearly expressed

in the FAR Part 52 clauses, the rule repeats the principle in a clause to clarify this issue for offerors and contractors.

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 and 52

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Revise section 2.201 to read as follows:

2.201 Contract clause.

Insert the clause at 52.202–1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Revise section 52.202–1 to read as follows:

52.202–1 Definitions.

As prescribed in 2.201, insert the following clause:

Definitions (Jul 2004)

(a) When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—

(1) The solicitation, or amended solicitation, provides a different definition;

(2) The contracting parties agree to a different definition;

(3) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or

(4) The word or term is defined in FAR Part 31, for use in the cost principles and procedures.

(b) The FAR Index is a guide to words and terms the FAR defines and shows where each