



# Federal Register

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**Wednesday,  
July 27, 2005**

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**Part IV**

**Department of  
Defense**

**General Services  
Administration**

**National Aeronautics  
and Space  
Administration**

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**48 CFR Chapter 1, Parts 2, 4, 8, 14, et al.  
Federal Acquisition Regulations; Interim  
Rules and Final Rules**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Circular 2005–05;  
Introduction**

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

**ACTION:** Summary presentation of interim and final 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) 2005–05. 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.acqnet.gov/far>.

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

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2005–05 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.acqnet.gov/far>.

Item	Subject	FAR case	Analyst
I .....	Definition of Information Technology (Interim) .....	2004–030	Davis.
II .....	Documentation Requirement for Limited Sources under Federal Supply Schedules .....	2005–004	Nelson.
III .....	Payment Withholding .....	2004–003	Olson.
IV .....	Confirmation of HUBZone Certification (Interim) .....	2005–009	Cundiff.
V .....	Government Property Rental and Special Tooling .....	2002–015	Parnell.
VI .....	Technical Amendment.		

**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 2005–05 amends the FAR as specified below:

**Item I—Definition of Information Technology (FAR Case 2004–030)**

This interim rule amends FAR 2.101(b) to revise the definition of “information technology” to reflect the recent changes to the definition resulting from the enactment of Public Law 108–199.

The new language at Section 535(b) of Division F of Public Law 108–199 permanently revises the term “information technology,” which is defined at 40 U.S.C. 11101, to add “analysis” and “evaluation” and to clarify the term “ancillary equipment.” This permanent change to the terminology necessitated this interim rule to amend the FAR.

**Item II—Documentation Requirement for Limited Sources under Federal Supply Schedules (FAR Case 2005–004)**

On June 18, 2004, DoD, GSA, and NASA published FAR case 1999–603 (69 FR 34231) amending the FAR to incorporate ordering procedures for orders against Federal Supply Schedules (FSS), including the documentation requirements for justifying sole source orders. The rule inadvertently established these justification and approval requirements

for sole source orders instead of when an ordering activity restricts consideration of schedule contractors to less than the required number. This rule corrects that oversight. The final rule also based the content of the documentation requirements on that in FAR 6.303–2. By doing so, the rule established some unintentional and inapplicable content requirements, especially for orders under the simplified acquisition threshold (SAT). This rule corrects those unintended changes by establishing the standard for justifying restricted orders under the SAT and accurately specifying the justification content for restricted orders above the SAT. The rule will clarify the procedures for ordering activities.

**Item III—Payment Withholding (FAR Case 2004–003)**

Contracting officers and contracting officer’s representatives who award or administer Time-and-Materials or Labor-Hour contracts or orders should be familiar with this amendment. Also, contractor personnel who are responsible for managing invoicing for those types of contracts should be aware of this new requirement. The amendment removes the mandatory requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials contract, unless it is necessary to withhold payment to protect the Government’s interest or otherwise prescribed in the contract Schedule. It requires the use of a contract modification in order to make payment withholding and, in the event withholding is required, the contractor

is responsible to withhold the amounts from its billings.

**Item IV—Confirmation of HUBZone Certification (FAR Case 2005–009)**

This interim rule amends FAR 19.703 and the clause at 52.219–9 to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended. This change is expected to increase subcontracting opportunities for certified HUBZone small business concerns and ensure accurate reporting of awards to HUBZone small business concerns under Government contracts.

**Item V—Government Property Rental and Special Tooling (FAR Case 2002–015)**

This final rule amends FAR Parts 45 and 52 to clarify the basis for determining rental charges for the use of Government property. The change, which is intended to promote the dual use of such property, will impact contracting officers and property administrators responsible for the management of Government property and contractors that desire to use Government property for commercial purposes.

**Item VI—Technical Amendment**

An editorial change is made at FAR 4.1102 in order to update a reference.

Dated: July 20, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

### Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-05 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 2005-05 is effective August 26, 2005, except for Items I, II, IV, and VI which are effective July 27, 2005.

Dated: July 15, 2005.

**Deidre A. Lee,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: July 19, 2005.

**Patricia A. Brooks,**

*Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.*

Dated: July 14, 2005.

**Tom Luedtke,**

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

[FR Doc. 05-14665 Filed 7-26-05; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 2

[FAC 2005-05; FAR Case 2004-030; Item I]

RIN 9000-AK21

#### Federal Acquisition Regulation; Definition of Information Technology

**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 revise the definition of "information technology" to reflect the changes to the definition resulting from the enactment of Public Law 108-

199, Consolidated Appropriations Act, 2004. The new language at Section 535(b) of Division F of Public Law 108-199 permanently revises the term "information technology," which is defined at 40 U.S.C. 11101(6), to add "analysis" and "evaluation" and to clarify the term "ancillary equipment."

**DATES:** *Effective Date:* July 27, 2005.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before September 26, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-05, FAR case 2004-030, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.
- E-mail: [farcase.2004-030@gsa.gov](mailto:farcase.2004-030@gsa.gov). Include FAC 2005-05, FAR case 2004-030, in the subject line of the message.
- 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 2005-05, FAR case 2004-030, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

**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. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202, or Mr. Bill Sain, Procurement Analyst, at (703) 602-0293. Please cite FAC 2005-05, FAR case 2004-030.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule implements the changes to the FAR definition of "information technology" resulting from the enactment of Section 535(b), Division F, of Public Law 108-199, Consolidated Appropriations Act, 2004. The public law was effective January 23, 2004. The rule modifies the definition of "information technology" at FAR 2.101(b) to include "analysis" and "evaluation." The rule also modifies the term "information technology" to include peripheral equipment designed

to be controlled by the central processing unit of a computer, and clarifies the term "ancillary equipment" to include imaging peripherals, input, output, and storage devices necessary for security and surveillance.

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 interim rule revises the definition of information technology resulting from the enactment of Public Law 108-199, Consolidated Appropriation Act 2004. This is a minor technical change to the definition. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. However, the Councils will consider comments from small entities concerning the affected FAR Part 2 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 2005-05, FAR case 2004-030), 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 the changes resulting from the enactment of Section 535(b), Division F, of Public Law 108-199, Consolidated Appropriations Act, 2004, that were effective January 23, 2004. 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 Part 2

Government procurement.

Dated: July 20, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR part 2 as set forth below:

PART 2—DEFINITIONS OF WORDS AND TERMS

1. The authority citation for 48 CFR part 2 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).

2. In section 2.101, amend paragraph (b), in the definition "Information technology," by adding the words "analysis, evaluation," after the word "storage," revising paragraph (2) of the definition; and in paragraph (3)(ii), adding "analysis, evaluation," after the word "storage,". The revised text reads as follows:

2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

Information technology \* \* \*

(1) \* \* \*

(2) The term "information technology" includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.

\* \* \* \* \*

[FR Doc. 05-14666 Filed 7-26-05; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 8

[FAC 2005-05; FAR Case 2005-004; Item II]

RIN 9000-AK23

Federal Acquisition Regulation; Documentation Requirement for Limited Sources Under Federal Supply Schedules

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 make editorial and restructuring changes to clarify the procedures when an ordering activity limits consideration of schedule contractors.

DATES: Effective Date: July 27, 2005.

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. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2005-05, FAR case 2005-004.

SUPPLEMENTARY INFORMATION:

A. Background

On June 18, 2004, DoD, GSA, and NASA published FAR case 1999-603 (69 FR 34231) amending the FAR to incorporate ordering procedures for orders against Federal Supply Schedules (FSS), including the documentation requirements for justifying sole source orders. The rule inadvertently established these justification and approval requirements for sole source orders instead of when an ordering activity restricts consideration of schedule contractors to less than the required number. This rule corrects that oversight. The final rule also based the content of the documentation requirements on that in FAR 6.303-2. By doing so, the rule established some unintentional and inapplicable content requirements, especially for orders under the simplified acquisition threshold (SAT). This rule corrects those unintended changes by establishing the standard for justifying restricted orders under the SAT and accurately specifying the justification content for restricted orders above the SAT.

The Councils agreed that the changes made did not substantively change the intent of the subpart but are merely a clarification and, therefore, publication for public comment is not required.

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 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 Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 8 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 2005-05, FAR case 2005-004), 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.

List of Subjects in 48 CFR Part 8

Government procurement.

Dated: July 20, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR part 8 as set forth below:

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

1. The authority citation for 48 CFR part 8 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).

2. Amend section 8.401 by revising the definition "Multiple Award Schedule (MAS)" to read as follows:

8.401 Definitions.

\* \* \* \* \*

Multiple Award Schedule (MAS) means contracts awarded by GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, at varying prices. The primary statutory authorities for the MAS program are Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.) and Title 40 U.S.C. 501, Services for Executive Agencies.

\* \* \* \* \*

3. Amend section 8.405-1 in the second sentence of the introductory text of paragraph (c) by adding "at least three schedule contractors through" after the word "surveying"; and adding paragraph (e) to read as follows:

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

\* \* \* \* \*

(e) Minimum documentation. The ordering activity shall document—

(1) The schedule contracts considered, noting the contractor from which the supply or service was purchased;

(2) A description of the supply or service purchased; and

(3) The amount paid.

■ 4. Amend section 8.405-2 by adding paragraph (e) to read as follows:

**8.405-2 Ordering procedures for services requiring a statement of work.**

\* \* \* \* \*

(e) *Minimum documentation.* The ordering activity shall document—

(1) The schedule contracts considered, noting the contractor from which the service was purchased;

(2) A description of the service purchased;

(3) The amount paid;

(4) The evaluation methodology used in selecting the contractor to receive the order;

(5) The rationale for any tradeoffs in making the selection;

(6) The price reasonableness determination required by paragraph (d) of this subsection; and

(7) The rationale for using other than—

(i) A firm-fixed price order; or

(ii) A performance-based order.

**8.405-3 [Amended]**

■ 5. Amend section 8.405-3 in paragraph (b)(2)(i) by removing the word “additional”.

■ 6. Revise the section heading and text of section 8.405-6 to read 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 of schedule contractors to fewer than required in 8.405-1 or 8.405-2.

(b) Circumstances that may justify restriction include—

(1) Only one source is capable of responding due to the unique or specialized nature of the work;

(2) The new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order must not have been previously issued under sole source or limited source procedures;

(3) The item is peculiar to one manufacturer. A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer; or

(4) An urgent and compelling need exists, and following the ordering procedures would result in unacceptable delays.

(c) When an ordering activity restricts consideration of schedule contractors to fewer than that required in 8.405-1 or 8.405-2, the ordering activity shall procure such requirements under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraphs (d) and (f) of this subsection.

(d) *Orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold as defined in 2.101.* For proposed orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, the ordering activity contracting officer shall document the circumstances when restricting consideration of schedule contractors to fewer than required in 8.405-1 or 8.405-2.

(e) *Orders exceeding the simplified acquisition threshold.* (1) For proposed orders exceeding the simplified acquisition threshold, the requiring activity shall assist the ordering activity contracting officer in the preparation of the justification. The justification shall cite that the acquisition is conducted under the authority of the Multiple Award Schedule Program (see 8.401).

(2) As a minimum, each justification shall include the following information:

(i) Identification of the agency and the contracting activity, and specific identification of the document as a “Limited Source Justification.”

(ii) Nature and/or description of the action being approved.

(iii) A description of the supplies or services required to meet the agency’s needs (including the estimated value).

(iv) Identification of the justification rationale (see 8.405-6(b)) and, if applicable, a demonstration of the proposed contractor’s unique qualifications to provide the required supply or service.

(v) A determination by the ordering activity contracting officer that the order represents the best value consistent with 8.404(d).

(vi) A description of the market research conducted among schedule holders and the results or a statement of the reason market research was not conducted.

(vii) Any other facts supporting the justification.

(viii) A statement of the actions, if any, the agency may take to remove or overcome any barriers that preclude the agency from meeting the requirements of 8.405-1 and 8.405-2 before any

subsequent acquisition for the supplies or services is made.

(ix) The ordering activity contracting officer’s certification that the justification is accurate and complete to the best of the contracting officer’s knowledge and belief.

(x) Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government’s minimum needs or requirements or other rationale for limited sources) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(f) *Justification approvals.* (1) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$500,000, the ordering activity contracting officer’s certification that the justification is accurate and complete to the best of the ordering activity contracting officer’s knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order exceeding \$500,000, but not exceeding \$10 million, the justification must be approved by the competition advocate of the activity placing the order, or by an official named in paragraph (f)(3) or (f)(4) of this subsection. This authority is not delegable.

(3) For a proposed order exceeding \$10 million, but not exceeding \$50 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$75 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (f)(4) of this subsection.

(4) For a proposed order exceeding \$50 million (or, for DoD, NASA, and the Coast Guard, over \$75 million), the justification must be approved by the senior procurement executive of the agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, acting as the senior procurement executive for the Department of Defense.

**8.405-7 [Removed]**

■ 7. Remove section 8.405-7.

**8.405-8 [Redesignated as 8.405-7]**

■ 8. Redesignate section 8.405-8 as 8.405-7.

[FR Doc. 05-14667 Filed 7-26-05; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 14, 32, and 52**

[FAC 2005-05; FAR Case 2004-003; Item III]

RIN 9000-AJ94

**Federal Acquisition Regulation;  
Payment Withholding**

**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) by removing the mandatory requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials contract, unless it is necessary to withhold payment to protect the Government's interest or otherwise prescribed in the contract schedule. The final rule also amends FAR guidance that requires the use of a contract modification to withhold payment and to state that the withhold is to be made by the contractor.

**DATES:** *Effective Date:* August 26, 2005.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 501-3221. Please cite FAC 2005-05, FAR case 2004-003.

**SUPPLEMENTARY INFORMATION:****A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 29838, May 25, 2004, with request for public comments. The proposed rule would permit contracting officers to use their judgment regarding whether to withhold payments under time-and-materials and labor-hour contracts so that the withhold would be applied only when necessary to protect

the Government's interests. The proposed rule also made it clear that normally there should not be a need to withhold payments when dealing with contractual release requirements in a timely manner. Six respondents submitted comments on the proposed FAR rule. Three of the six respondents supported the proposed rule, two of the six respondents supported it but with certain additional changes that would align it with the Defense Federal Acquisition Regulations Supplement (DFARS) rule that was published in the **Federal Register** at 68 FR 69631, December 15, 2003, and one of the six respondents requested clarification. A discussion of the comments is provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule with changes to the proposed rule. Differences between the proposed rule and final rule are discussed in Comments 1 and 2, below.

*Align With DFARS*

1. *Comment:* While five respondents supported the proposed rule, two stated that it is not consistent with the changes to relax the requirements included in the DFARS rule published in the **Federal Register** at 68 FR 69631, December 15, 2003. That rule stated that, if it was necessary to withhold payment to protect the Government's interest, the contracting officer would issue a modification requiring the contractor to withhold 5 percent of the amount due, up to a maximum of \$50,000. One of the respondents stated the DFARS guidance should be applicable Governmentwide "because requiring withholds to protect the interests of the Government is a serious matter, necessitating, in our opinion, the execution of a formal contract modification." In addition, the same respondent believes that, in most situations, it would be more efficient and less costly for both contractors and the Government if contractors take the withhold prior to submission of their invoices.

*Councils' response:* Concur. The Councils believes that, based on the analysis performed for the DFARS rule, it would be more efficient and less costly for both contractors and the Government if contractors take the withhold prior to the submission of their vouchers. In addition, in order to make it clear that the Government is exercising its right to a payment withhold to protect its interests, a contract modification should be issued requiring the withhold of payment under time-and-materials and labor-hour contracts. Therefore, the Councils

have revised the guidance at FAR 32.111(a)(7)(iii) and the clause at FAR 52.232-7(a)(2) to require the use of a modification to withhold payment and to allow for the withhold to be made by the contractor instead of by the Government payment office. The Councils note that this clause does not preclude the Government from withholding other amounts due to non-performance, delivery of non-conforming goods, or other failure(s) to comply with contract requirements.

*Task Order Versus Entire Contract*

2. *Comment:* A respondent stated that the proposed rule is unclear as to whether the \$50,000 ceiling on withholding applies to an individual task or to an entire contract. It recommended the proposed rule be clarified to identify the basis for application of the ceiling. The respondent added that it had previously recommended in an audit report that the \$50,000 ceiling be applied to each order where orders are closed separately. The respondent's recommendation is based on the belief that the clarification will assist contracting officers in performing their jobs.

*Councils' response:* The Councils agree that it would assist both contractors and the Government if the proposed rule were clarified as to whether the withhold ceiling applies to an entire contract or to individual orders. Such a clarification would reduce any possible confusion by either party as to the applicability of the ceiling and thus remove the potential for disagreements. The Councils agree that the withhold ceiling applies to the entire contract. Therefore, the Councils have revised the guidance at FAR 32.111(a)(7)(iii) and the clause at FAR 52.232-7(a)(2) to clarify that the withhold ceiling applies to the total contract.

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 rule applies only to time-and-materials and labor-hour contracts. Time-and-

materials or labor-hour contracts with small business represent only approximately 2 percent of all contracts. In addition, the rule eases the impact of the current FAR by permitting the contracting officer to use judgment in deciding whether to withhold payments, thus the number of contracts affected is a subset of the 2 percent figure. This change is expected to have a small but beneficial impact on small businesses.

### 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 14, 32, and 52

Government procurement.

Dated: July 20, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 14, 32, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 14, 32, 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 14—SEALED BIDDING

##### 14.408-3 [Amended]

■ 2. Amend section 14.408-3 in paragraph (b) by removing “See 32.111(c)(1),” and adding “See 32.111(b)(1),” in its place.

#### PART 32—CONTRACT FINANCING

■ 3. Amend section 32.111 by—

■ a. Removing from the end of paragraph (a)(5) the word “and”;

■ b. Removing the period from the end of paragraph (a)(6) and adding “; and” in its place;

■ c. Adding paragraph (a)(7);

■ d. Removing paragraph (b); and

■ e. Redesignating paragraphs (c) and (d) as (b) and (c), respectively.

The added text reads as follows:

##### 32.111 Contract clauses for non-commercial purchases.

(a) \* \* \*

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

(i) If the nature of the work to be performed requires the contractor to

furnish material that is regularly sold to the general public in the normal course of business by the contractor and the price is under the limitations prescribed in 16.601(b)(3), the contracting officer shall use the clause with its Alternate I.

(ii) If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the contracting officer may use the clause with its Alternate II.

(iii) If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(2) of the clause permits the contracting officer to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of \$50,000 under the contract. The contracting officer shall ensure that the modification specifies the percentage and total amount of the withhold payment. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (f) of the clause.

\* \* \* \* \*

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.232-7 by—

■ a. Removing from the introductory text “32.111(b)” and adding “32.111(a)(7)” in its place;

■ b. Revising the date of the clause; and

■ c. Revising paragraph (a)(2).

The revised text reads as follows:

##### 52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

\* \* \* \* \*

##### PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (AUG 2005)

\* \* \* \* \*

(a) \* \* \*

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer may unilaterally issue a contract modification requiring the Contractor to withhold amounts from its billings until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interests. The Contracting Officer may require a withhold of 5 percent of the amounts due under paragraph (a), but the total amount withheld for the contract shall not exceed \$50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (f) of this clause.

\* \* \* \* \*

##### 52.232-8 [Amended]

■ 5. In the introductory text of section 52.232-8, remove “32.111(c)(1)” and add “32.111(b)(1)” in its place.

##### 52.232-9 [Amended]

■ 6. In the introductory text of section 52.232-9, remove “32.111(c)(2)” and add “32.111(b)(2)” in its place.

##### 52.232-10 [Amended]

■ 7. In the introductory text of section 52.232-10, remove “32.111(d)(1)” and add “32.111(c)(1)” in its place.

##### 52.232-11 [Amended]

■ 8. In the introductory text of section 52.232-11, remove “32.111(d)(2)” and add “32.111(c)(2)” in its place.

[FR Doc. 05-14668 Filed 7-26-05; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 19 and 52

[FAC 2005-05; FAR Case 2005-009; Item IV]

RIN 9000-AK22

#### Federal Acquisition Regulation; Confirmation of HUBZone Certification

**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 an interim rule amending the Federal Acquisition Regulation (FAR) to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended.

**DATES:** *Effective Date:* July 27, 2005.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before September 26, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-05, FAR case

2005–009, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2005-009@gsa.gov](mailto:farcase.2005-009@gsa.gov). Include FAC 2005–05, FAR case 2005–009 in the subject line of the message.

- 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 2005–05, FAR case 2005–009, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

**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. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2005–05, FAR case 2005–009.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Title 15 of the United States Code, section 632 requires that a qualified Historically Underutilized Business Zone (HUBZone) small business concern be certified by the Small Business Administration (SBA). A Department of Defense Inspector General report D–2003–019 “DoD Contractor Subcontracting With Historically Underutilized Business Zones (HUBZones) Small Businesses” found that prime contractors were overstating their HUBZone accomplishments because subcontractor’s representations were not being verified. The FAR is being revised to clarify that prime contractors must confirm a subcontractor representing itself as a HUBZone small business concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended.

The specific changes revise FAR 19.703 and the clause at 52.219–9 to clarify that contractors shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the Central Contractor Registration or by contacting the SBA.

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 this rule change will have a positive effect on small businesses who are certified HUBZone small business concerns and are losing subcontracting opportunities taken by another company falsely claiming to be a certified HUBZone small business concern. The FAR Secretariat has submitted a copy of the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration. The analysis is summarized as follows:

Title 15 of the United States Code, section 632 requires that a qualified Historically Underutilized Business Zone (HUBZone) small business concern be on the list of qualified HUBZone small business concerns maintained by the Small Business Administration. A Department of Defense Inspector General report D–2003–019 “DoD Contractor Subcontracting With Historically Underutilized Business Zones (HUBZones) Small Businesses” found that prime contractors were overstating their HUBZone accomplishments because subcontractor’s representations were not being verified. This interim rule revises the Federal Acquisition Regulation to require prime contractors to verify that its HUBZone small business concerns are qualified as required by 15 U.S.C. 632 *et seq.*, as amended.

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 certified HUBZone small business concerns will have additional subcontracting opportunities previously taken by other companies falsely claiming to be certified HUBZone small business concerns.

Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 19 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 2005–05, FAR case 2005–009), 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 because some subcontractors incorrectly claim to be certified HUBZone small business concerns. Since prime contractors are not currently required to verify their subcontractors’ HUBZone certifications through the SBA prior to reporting their subcontracting awards to DoD, many real HUBZone small business concerns are losing opportunities that they should have. This also results in the reporting of inaccurate data on the HUBZone program to Congress and SBA. Awards to improperly certified subcontractors can be stopped immediately, if prime contractors make a simple check on the CCR database or contact SBA. 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 19 and 52

Government procurement.

Dated: July 20, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 19 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19 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 19—SMALL BUSINESS PROGRAMS

- 2. Amend section 19.703 by—
- a. Removing “HUBZone small business,” from the first sentence of paragraph (b);
  - b. Removing the last sentence of paragraph (b); and
  - c. Adding paragraph (c) to read as follows:

##### 19.703 Eligibility requirements for participating in the program.

\* \* \* \* \*

(c)(1) The contractor shall confirm that a subcontractor representing itself

as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting the SBA. Options for contacting the SBA include—

(i) HUBZone web page at [http://dsbs.sba.gov/dsbs/dsp\\_searchhubzone.cfm](http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm);

(ii) In writing to the AA/HUB at U.S. Small Business Administration, 409 3rd Street, S.W., Washington DC 20416; or

(iii) E-mail at [hubzone@sba.gov](mailto:hubzone@sba.gov).

(2) Protests challenging HUBZone small business concern size status must be filed in accordance with 13 CFR 121.411.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 52.212–5 by—
- a. Revising the date of the clause; and
- b. Removing from paragraph (b)(8)(i) “(JAN 2002)” and adding “(JUL 2005)”.

The revised and added text reads as follows:

### 52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (JUL 2005)

\* \* \* \* \*

- 4. Amend section 52.219–9 by—
- a. Revising the date of the clause;
- b. Redesignating paragraph (e)(4) as paragraph (e)(5); and
- c. Adding a new paragraph (e)(4).

The revised and added text reads as follows:

### 52.219–9 Small Business Subcontracting Plan.

\* \* \* \* \*

SMALL BUSINESS SUBCONTRACTING PLAN (JUL 2005)

\* \* \* \* \*

(e) \* \* \*

(4) Confirm that a subcontractor representing itself as a HUBZone small business concern is identified as a certified HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting SBA.

\* \* \* \* \*

[FR Doc. 05–14669 Filed 7–26–05; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 45 and 52

[FAC 2005–05; FAR Case 2002–015; Item V]

RIN 9000–AJ99

### Federal Acquisition Regulation; Government Property Rental and Special Tooling

**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 incorporate a class deviation regarding use and charges, which has been applicable to the Department of Defense since 1998. This deviation is appropriate for application across the Federal Government. The change clarifies the basis for determining the rental charges for the use of Government property and is intended to promote the dual use of such property. The final rule specifically impacts contracting officers, property administrators, and contractors responsible for the management of Government property.

**DATES:** *Effective Date:* August 26, 2005.

**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 2005–05, FAR case 2002–015.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 69 FR 42544, July 15, 2004, to incorporate two Department of Defense class deviations, 98–O0010, Use and Charges, and 98–O0011, Special Tooling, into FAR Part 45 and make appropriate revisions to FAR 52.245–9, Use and Charges, and FAR 52.245–17, Special Tooling. The final rule establishes, as the basis for rental charges, the time property is actually used for commercial purposes, rather

than the time available for use; permits contractors to obtain property appraisals from independent appraisers; permits appraisal-based rentals for all property; and allows contracting officers to consider alternate bases for determining rentals. The final rule does not change the requirements for special tooling as originally proposed by the Councils because the Councils are now considering deleting the clause in its entirety rather than revising it based on comments received on the proposed rule. The Councils plan to solicit comments on the proposed deletion of the FAR clause at 52.245–17, Special Tooling, under another proposed rule.

Four respondents provided public comments. Consideration of these comments resulted in only minor administrative changes to the proposed rule. The resolution of the comments follows:

#### Summary of Comments Received/Disposition

1. *Proposed Rule (PR): 52.245–9.* Deviation to the clause at 52.245–9 sets a fair and equitable method for applying a rent usage when Government property is used for commercial purposes or existing Government property is used for future contracts and equitable adjustment is needed to eliminate unfair competitive advantage.

Concur.

2. *PR: 52.245–17.* All respondents proposed the elimination of the special tooling clause. The Councils plan to solicit comments on the proposed deletion of the FAR clause at 52.245–17, Special Tooling, under another proposed rule.

3. *PR: 52.245–9(h).* Amend paragraph (h) to strike “person” and replace it with “contractor.” Rationale is that a company would control their personnel through their administrative procedures when wrong is discovered and the Government may control the contractor in a like manner.

Nonconcur. The legal basis for this citation, 18 U.S.C. 641, applies to an individual, as well as a corporate entity.

4. *PR: 52.245–9.* It may make sense to provide a time frame where an immediate need for usage of property from another contract becomes imminent and use of the property would not interfere with the owning contract, and the ACO is not available for authorization, a period of 48 hours, documented by the losing contract, would be allowed for transfer of tooling and use of such tooling be paid for at a higher rate than the proposed schedule. Tooling would be returned immediately if authorization were not received.

Nonconcur. While there may be some instances where it would appear to be beneficial to allow contractors to make such a decision, other business and regulatory factors, including those associated with competition and appropriations law, must be considered before alternative use is allowed. This decision should be reserved to the Administrative Contracting Officer.

5. *PR: 45.106*. Add at 45.106(h)(3), "Contractors shall be encouraged to submit plans and enter into advance agreements to minimize unnecessary delays, administrative costs and possible legal exposure." Approved plans for use and charges of a contract, program, site, or entity would be beneficial to both the Government and the contractor in that the clause, as now written, will cause unnecessary delays, administrative cost and legal exposure. This type of plan would be similar to a site scrap plan as now provided for in FAR Part 45.

Nonconcur. Approval of commercial use, as part of a general plan or agreement, limits the Government's ability to regulate that said use serves the best interests of the Government. It may also restrict the Government's right to recall that property when needed to satisfy what the Government determines to be a greater need, *e.g.*, war fighting, civil defense, disaster assistance.

6. *PR: 45.306-5*. Eliminate the policy at 45.306-5 for special tooling.

The Councils plan to solicit comments on the proposed deletion of FAR 52.245-17, Special Tooling, and the related coverage at 45.306-5 under another proposed rule.

7. *PR: 52.245-9(a)*. Change the definition of Government property to mean all "real and personal" property.

Nonconcur. This change is unnecessary.

8. *PR: 52.245-9(c)*. Revise the exception of the use of Government property in this paragraph to be described as "production" material. Non-production material (expendable items) may be suitable for rental in some circumstances.

Nonconcur. There is no FAR classification differentiating between production material and non-production expendables. Rather, when an item does not lose its identity or is not consumed during the production process, it should not be classified as material. The property is more appropriately classified as equipment, agency peculiar property, or another class of property dependent upon its nature and use.

9. *PR: 52.245-9(d)(2)*. Change estimated rental charge for "other" property to "personal" property.

Nonconcur. This change is unnecessary.

10. *PR: 52.245-9(g)*. Request an additional requirement that the Government shall disclose any intent to revoke use authorization prior to agreeing to contractor use. A practice of full disclosure is necessary as part of good relations and business practices, otherwise contractors may acquire resources unnecessarily.

Nonconcur. There are many reasons why the Government may choose to revoke a use agreement. Not all of these are known at the time of approval. Some may involve emergency conditions that could not be anticipated at the initiation of an agreement. Therefore, it is not in the Government's best interest to limit its options by tacitly agreeing that there is no intention to revoke use.

11. *PR: 52.245-9(h)*. Delete the section that states that unauthorized use of Government property can subject a person to consequences under 18 U.S.C. 641. There is no need to restate this law, or any other law, in a regulation. The contractor has an obligation to establish internal controls to prevent unauthorized use, and including a reference to the United States Code is unnecessary.

Nonconcur. We believe that it is beneficial to advise those who use Government property of the ramifications of unauthorized use. The repetition of the legal authority has precedent in other parts of the FAR, particularly when criminal liability is the result of inappropriate action. See also Comment No. 3, above.

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 rule only clarifies FAR coverage to clarify the basis for determining rental charges for the use of Government property and is intended to promote the dual use of such property. Therefore, this rule will allow small businesses more flexibility in the use of Government property.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0075.

### List of Subjects in 48 CFR Parts 45 and 52

Government procurement.

Dated: July 20, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 45 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 45 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 45—GOVERNMENT PROPERTY

■ 2. Amend section 45.106 by adding paragraph (h) to read as follows:

#### 45.106 Government property clauses.

\* \* \* \* \*

(h)(1) Insert the clause at 52.245-9, Use and Charges—

(i) In fixed-price or labor-hour solicitations and contracts under which the Government will furnish property for performance of the contract;

(ii) In all cost-reimbursement and time-and-materials solicitations and contracts; and

(iii) In solicitations and contracts when a consolidated facilities contract or a facilities use contract is contemplated.

(2) The contracting officer may modify the clause if an alternative rental methodology is used in accordance with 45.403.

#### 45.302-6 [Amended]

■ 3. Amend section 45.302-6 by removing paragraph (c); and redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively.

■ 4. Revise section 45.403 to read as follows:

#### 45.403 Rental—Use and Charges clause.

(a) The contracting officer shall charge contractors rent for using Government production and research property, except as prescribed in 45.404 and 45.405. Rent shall be computed in accordance with the clause at 52.245-9, Use and Charges. If the agency head determines it to be in the Government's interest, an alternative method for computing rent may be used.

(b) The contracting officer shall ensure the collection of any rent due the Government from the contractor.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Revise section 52.245–9 to read as follows:

### 52.245–9 Use and Charges.

As prescribed in 45.106(h), insert the following clause:

#### USE AND CHARGES (AUG 2005)

(a) *Definitions.* As used in this clause:

*Acquisition cost* means the acquisition cost recorded in the Contractor's property control system or, in the absence of such record, the value attributed by the Government to a Government property item for purposes of determining a reasonable rental charge.

*Government property* means all property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both Government-furnished property and contractor-acquired property as defined in FAR 45.101.

*Real property* means land and rights in land, ground improvements, utility distribution systems, and buildings and other structures. It does not include foundations and other work necessary for installing special tooling, special test equipment, or equipment.

*Rental period* means the calendar period during which Government property is made available for nongovernmental purposes.

*Rental time* means the number of hours, to the nearest whole hour, rented property is actually used for nongovernmental purposes. It includes time to set up the property for such purposes, perform required maintenance, and restore the property to its condition prior to rental (less normal wear and tear).

(b) *Use of Government property.* The Contractor may use the Government property without charge in the performance of—

(1) Contracts with the Government that specifically authorize such use without charge;

(2) Subcontracts of any tier under Government prime contracts if the Contracting Officer having cognizance of the prime contract—

(i) Approves a subcontract specifically authorizing such use; or

(ii) Otherwise authorizes such use in writing; and

(3) Other work, if the Contracting Officer specifically authorizes in writing use without charge for such work.

(c) *Rental.* If granted written permission by the Contracting Officer, or if it is specifically provided for in the Schedule, the Contractor may use the Government property (except material) for a rental fee for work other than that provided in paragraph (b) of this clause. Authorizing such use of the Government property does not waive any rights of the Government to terminate the Contractor's right to use the Government property. The rental fee shall be determined in accordance with the following paragraphs.

(d) *General.* (1) Rental requests shall be submitted to the Administrative Contracting Officer (ACO), identify the property for which rental is requested, propose a rental period, and compute an estimated rental charge by using the Contractor's best estimate of rental time in the formulae described in paragraph (e) of this clause.

(2) The Contractor shall not use Government property for nongovernmental purposes, including Independent Research and Development, until a rental charge for real property, or estimated rental charge for other property, is agreed upon. Rented property shall be used only on a non-interference basis.

(e) *Rental charge.*—(1) *Real property and associated fixtures.* (i) The Contractor shall obtain, at its expense, a property appraisal from an independent licensed, accredited, or certified appraiser that computes a monthly, daily, or hourly rental rate for comparable commercial property. The appraisal may be used to compute rentals under this clause throughout its effective period or, if an effective period is not stated in the appraisal, for one year following the date the appraisal was performed. The Contractor shall submit the appraisal to the ACO at least 30 days prior to the date the property is needed for nongovernmental use. Except as provided in paragraph (e)(1)(iii) of this clause, the ACO shall use the appraisal rental rate to determine a reasonable rental charge.

(ii) Rental charges shall be determined by multiplying the rental time by the appraisal rental rate expressed as a rate per hour. Monthly or daily appraisal rental rates shall be divided by 720 or 24, respectively, to determine an hourly rental rate.

(iii) When the ACO believes the appraisal rental rate is unreasonable, the ACO shall promptly notify the Contractor. The parties may agree on an alternative means for computing a reasonable rental charge.

(iv) The Contractor shall obtain, at its expense, additional property appraisals in the same manner as provided in

paragraph (e)(1)(i) if the effective period has expired and the Contractor desires the continued use of property for nongovernmental use. The Contractor may obtain additional appraisals within the effective period of the current appraisal if the market prices decrease substantially.

(2) *Other Government property.* The Contractor may elect to compute the rental charge using the appraisal method described in paragraph (e)(1) of this clause subject to the constraints therein or the following formula in which rental time shall be expressed in increments of not less than one hour with portions of hours rounded to the next higher hour: The rental charge is calculated by multiplying 2 percent of the acquisition cost by the hours of rental time, and dividing by 720.

(3) *Alternative methodology.* The Contractor may request consideration of an alternative basis for computing the rental charge if it considers the monthly rental rate or a time-based rental unreasonable or impractical.

(f) *Rental payments.* (1) Rent is due 60 days following completion of the rental period or as otherwise specified in the contract. The Contractor shall compute the rental due, and furnish records or other supporting data in sufficient detail to permit the ACO to verify the rental time and computation. Payment shall be made by check payable to the Treasurer of the United States and sent to the contract administration office identified in this contract, unless otherwise specified by the Contracting Officer.

(2) Interest will be charged if payment is not made by the date specified in paragraph (f)(1) of this clause. Interest will accrue at the "Renegotiation Board Interest Rate" (published in the **Federal Register** semiannually on or about January 1<sup>st</sup> and July 1<sup>st</sup>) for the period in which the rent is due.

(3) The Government's acceptance of any rental payment under this clause, in whole or in part, shall not be construed as a waiver or relinquishment of any rights it may have against the Contractor stemming from the Contractor's unauthorized use of Government property or any other failure to perform this contract according to its terms.

(g) *Use revocation.* At any time during the rental period, the Government may revoke nongovernmental use authorization and require the Contractor, at the Contractor's expense, to return the property to the Government, restore the property to its pre-rental condition (less normal wear and tear), or both.

(h) *Unauthorized use.* The unauthorized use of Government property can subject a person to fines,

imprisonment, or both, under 18 U.S.C. 641.  
(End of clause)

**52.245-10 [Amended]**

■ 6. Amend section 52.245-10 in the introductory paragraph by removing “45.302-6(d)” and adding “45.302-6(c)” in its place.

**52.245-11 [Amended]**

■ 7. Amend section 52.245-11 in the introductory paragraph by removing “45.302-6(e)(1)” and adding “45.302-6(d)(1)” in its place.

[FR Doc. 05-14670 Filed 7-26-05; 8:45 am]  
BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 4**

[FAC 2005-05; Item VI]

**Federal Acquisition Regulation; Technical Amendment**

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

**ACTION:** Final rule.

**SUMMARY:** This document makes an amendment to the Federal Acquisition Regulation (FAR) in order to make an editorial correction.

**DATES:** *Effective Date:* July 27, 2005.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS

Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-05, Technical Amendment.

**List of Subjects in 48 CFR Part 4**

Government procurement.

Dated: July 20, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 4 as set forth below:

**PART 4—ADMINISTRATIVE MATTERS**

■ 1. The authority citation for 48 CFR part 4 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).

**4.1102 [Amended]**

■ 2. Amend section 4.1102 by removing from paragraph (c)(1)(ii) “52.204-7(g)(1)(i)(3)” and adding “52.204-7(g)(1)(i)(C)” in its place.

[FR Doc. 05-14671 Filed 7-26-05; 8:45 am]

BILLING CODE 6820-EP-S

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

**Federal Acquisition Regulation; Small Entity Compliance Guide**

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-05 which amend the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005-05 which precedes this document. These documents are also available via the Internet at <http://www.acqnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT** Laurieann Duarte, FAR Secretariat, (202) 501-4755. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005-05

Item	Subject	FAR case	Analyst
I .....	Definition of Information Technology (Interim) .....	2004-030	Davis.
II .....	Documentation Requirement for Limited Sources under Federal Supply Schedules .....	2005-004	Nelson.
III .....	Payment Withholding .....	2004-003	Olson.
*IV .....	Confirmation of HUBZone Certification (Interim) .....	2005-009	Cundiff.
V .....	Government Property Rental and Special Tooling .....	2002-015	Parnell.
VI .....	Technical Amendment.		

**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 2005-05 amends the FAR as specified below:

**Item I—Definition of Information Technology(FAR Case 2004-030)**

This interim rule amends FAR 2.101(b) to revise the definition of “information technology” to reflect the recent changes to the definition resulting from the enactment of Public Law 108-199.

The new language at Section 535(b) of Division F of Public law 108-199

permanently revises the term “information technology,” which is defined at 40 U.S.C. 11101, to add “analysis” and “evaluation” and to clarify the term “ancillary equipment.” This permanent change to the terminology necessitated this interim rule to amend the FAR.

**Item II—Documentation Requirement for Limited Sources under Federal Supply Schedules (FAR Case 2005–004)**

On June 18, 2004, DoD, GSA, and NASA published FAR case 1999–603 (69 FR 34231) amending the FAR to incorporate ordering procedures for orders against Federal Supply Schedules (FSS), including the documentation requirements for justifying sole source orders. The rule inadvertently established these justification and approval requirements for sole source orders instead of when an ordering activity restricts consideration of schedule contractors to less than the required number. This rule corrects that oversight. The final rule also based the content of the documentation requirements on that in FAR 6.303–2. By doing so, the rule established some unintentional and inapplicable content requirements, especially for orders under the simplified acquisition threshold (SAT). This rule corrects those unintended changes by establishing the standard for justifying restricted orders under the SAT and accurately specifying the justification content for restricted orders above the SAT. The rule will clarify the procedures for ordering activities.

**Item III—Payment Withholding (FAR Case 2004–003)**

Contracting officers and contracting officer's representatives who award or administer Time-and-Materials or Labor-Hour contracts or orders should be familiar with this amendment. Also, contractor personnel who are responsible for managing invoicing for those types of contracts should be aware of this new requirement. The amendment removes the mandatory requirement that a contracting officer withhold 5 percent of the payments due under a time-and-materials contract, unless it is necessary to withhold payment to protect the Government's interest or otherwise prescribed in the contract Schedule. It requires the use of a contract modification in order to make payment withholding and, in the event withholding is required, the contractor is responsible to withhold the amounts from its billings.

**Item IV—Confirmation of HUBZone Certification (FAR Case 2005–009)**

This interim rule amends FAR 19.703 and the clause at 52.219–9 to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business

concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended. This change is expected to increase subcontracting opportunities for certified HUBZone small business concerns and ensure accurate reporting of awards to HUBZone small business concerns under Government contracts.

**Item V—Government Property Rental and Special Tooling (FAR Case 2002–015)**

This final rule amends FAR Parts 45 and 52 to clarify the basis for determining rental charges for the use of Government property. The change, which is intended to promote the dual use of such property, will impact contracting officers and property administrators responsible for the management of Government property and contractors that desire to use Government property for commercial purposes.

**Item VI—Technical Amendment**

An editorial change is made at FAR 4.1102 in order to update a reference.

Dated: July 20, 2005.

**Julia B. Wise,**

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[FR Doc. 05–14672 Filed 7–26–05; 8:45 am]

**BILLING CODE 6820–EP–S**