

■ 1. The authority citation for 48 CFR parts 2, 4, 5, and 13 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. Amend section 2.101(b)(2) by removing the definition “Federal Acquisition Computer (Network FACNET) Architecture.”

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.502 by revising paragraph (b)(2) to read as follows:

4.502 Policy.

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(b) * * *

(2) Are implemented only after considering the full or partial use of existing infrastructures;

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PART 5—PUBLICIZING CONTRACT ACTIONS

5.101 [Amended]

■ 4. Amend section 5.101 by removing from paragraph (a)(2)(ii) the words “or Federal Acquisition Computer Network (FACNET)”.

■ 5. Amend section 5.102 by revising paragraph (a)(3) to read as follows:

5.102 Availability of solicitations.

(a) * * *

(3) The contracting officer must ensure that solicitations transmitted using electronic commerce are forwarded to the GPE to satisfy the requirements of paragraph (a)(1) of this section.

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■ 6. Amend section 5.201 by revising paragraph (b)(2) to read as follows:

5.201 General.

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(b) * * *

(2) When transmitting notices using electronic commerce, contracting officers must ensure the notice is forwarded to the GPE.

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5.203 [Amended]

■ 7. Amend section 5.203 in paragraph (b) by removing the words “via FACNET or for which” and adding the word “where” in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.104 [Amended]

■ 8. Amend section 13.104 by removing from paragraph (b) the words “using either FACNET or”.

■ 9. Amend section 13.105 by revising paragraph (a) to read as follows:

13.105 Synopsis and posting requirements.

(a) The contracting officer must comply with the public display and synopsis requirements of 5.101 and 5.203 unless an exception in 5.202 applies.

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

13.106–1 Soliciting competition.

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(f) *Inquiries.* An agency should respond to inquiries received through any medium (including electronic commerce) if doing so would not interfere with the efficient conduct of the acquisition.

13.106–2 [Amended]

■ 11. Amend section 13.106–2 by removing from paragraph (b)(4) introductory text the words “FACNET or”.

13.106–3 [Amended]

■ 12. Amend section 13.106–3 by removing from paragraph (c) the words “FACNET or”.

13.307 [Amended]

■ 13. Amend section 13.307 by removing from paragraph (b)(1) “via FACNET,” and the comma after “electronically”.

[FR Doc. 07–5479 Filed 11–6–07; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–21; FAR Case 2001–004; Item V; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

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 current SCA exemption and to add a SCA exemption for contracts for certain additional services that meet specific criteria.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2001–004, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. To search for any document, first select under “Step 1,” “Documents with an Open Comment Period” and select under “Optional Step 2,” “Federal Acquisition Regulation” as the agency of choice. Under “Optional Step 3,” select “Rules”. Under “Optional Step 4,” from the drop down list, select “Document Title” and type the FAR case number “2001–004”. Click the “Submit” button. Please include your name and company name (if any) inside the document.

You may also search for any document by clicking on the “Search for Documents” tab at the top of the screen. Select from the agency field “Federal Acquisition Regulation”, and type “2001–004” in the “Document Title” field. Select the “Submit” button.

- 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 2005–21, FAR case 2001–004, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–21, FAR case 2001–004. For information pertaining to status or publication

schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

On January 18, 2001, the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration, issued a final rule amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the SCA (66 FR 5327). The Councils opened FAR case 2001-004 to implement the Department of Labor (DoL) rule.

The FAR currently exempts contracts (or subcontracts) principally for the maintenance, calibration, or repair of certain equipment if—

- The items of equipment are items which are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.
- The contract services are furnished at prices which are, or are based on, established catalog or market prices (see 29 CFR 4.123(e)(1)(ii)(B)).
- The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for equivalent employees servicing the same equipment of commercial customers.
- The contractor certifies in the contract that it meets these criteria.

This interim FAR rule incorporates slight revisions to this current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

The interim FAR rule does not refer to these services as commercial services, because the specified criteria are not exactly the same as the FAR definition of "commercial item." Rather than redefining "commercial item," this rule imposes the DoL criteria and does not utilize the term "commercial services."

In addition to this first category of service contracts, in order to implement the new DoL regulations, the FAR interim rule establishes a new category of exemption for contracts for certain services that includes the following:

- Automobile or other vehicle (e.g., aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).
- Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

- Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

- Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

- Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

- Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

- Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

In order for these contracts for services to be exempt, the contract must meet all the criteria for the other services in the first category (substituting "services" for "item of equipment" in the first criterion, and removing other specific references to "equipment" and "manufacturer"), but the contract must also meet the following criteria:

- The services under the contract (or subcontract) will be awarded on a sole-source basis or the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.

- Each service employee who will perform the services under the contract (or subcontract) will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract (or subcontract).

- The contracting officer (or contractor with respect to a subcontract) determines in advance, based on the nature of the contract (or subcontract) requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions. If the services are currently being performed under contract (or

subcontract), the contracting officer (or contractor with respect to a subcontract) shall consider the practices of the existing contractor (or subcontractor) in making a determination regarding the conditions.

- The apparent successful offeror certifies, the contracting officer has no reason to doubt the certification, and the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

- In the competitive range, if discussions are to be conducted (see FAR 15.306)(c)); or

- Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

Council representatives discussed with DoL the implementation of the DoL rule for these contracts for services at the point of receipt of offers. The FAR rule attempts to minimize the occurrence of the situation in which it will be necessary to revise the solicitation after receipt of offers to remove the exemption provision and require use of the SCA clauses, even though the apparent successful offeror certified to criteria for the exemption. The FAR rule uses the term "substantially all" to indicate that there could be a slightly different interpretation of the phrase "all or nearly all" than at the beginning of the process. DoL concurs that the contracting officer will have the discretion to interpret this term, as long as the intention reflected in the preamble to the SCA regulations (66 FR 5327) controls the contracting officer's exercise of discretion. DoL also concurs that it is not necessary to consider offerors that did not certify if these offerors were not in the competitive range or not responsive. Therefore, the FAR rule adds this condition when considering whether substantially all offerors have certified.

The exemption for the second category of contracts for services does not apply to solicitations and contracts (subcontracts)—

- Awarded under the Javits-Wagner-O'Day Act, 41 U.S.C. 47.

- For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services that meet all of the criteria); or

- Subject to Section 4(c) of the Service Contract Act (see 22.1002-3).

Whether the contracts for services fall in the first or second category, the Department of Labor retains the right to review those contracts that claim exemption from the SCA. If the Department of Labor determines after award of the contract (or subcontract)

that any condition for exemption has not been met, the exemption shall be deemed inapplicable, and the contract (or subcontract) becomes subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

In accordance with Section 29 of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulatory Council (FAR Council) has obtained the approval of the Administrator of the Office of Federal Procurement Policy for the inclusion of two nonstatutory certifications in this interim FAR rule, as required by the Department of Labor Regulations at 29 CFR 4.123(e)(1)(ii)(D) and (e)(2)(ii)(G).

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 exempts certain service contracts from the Service Contract Act for both contractors and subcontractors. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This interim rule implements 29 CFR 4.123(e) of the Department of Labor (DoL) regulation regarding Administrative limitations, variance, tolerances, and exemptions. Paragraph (e) provides exemption for contracts for certain services that meet specific criteria.

The objective of the DoL final rule was to further the commitment of the Administration to be more commercial-like, encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce our commitment to reduce Government-unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards.

The interim FAR rule should have a positive economic impact on the small contractors and subcontractors that meet the exemption criteria to be exempt from the SCA for certain services, because it may provide additional opportunities for work on Federal projects; enable these contractors to compete in a more commercial-like environment, and alleviate the burden of complying with Government-unique terms and conditions for these types of contracts.

Pursuant to Section (4)(b) of the SCA, the Secretary of Labor may grant reasonable exemptions to the provisions of the SCA, but only in special circumstances where the exemption is necessary and proper in the public interest, and is in accord with the

remedial purposes of the Act to protect prevailing labor standards.

This interim FAR rule will apply to all large and small entities that seek award of Federal service contracts in the service categories identified. The Councils relied on the DoL regulatory flexibility analysis (66 FR 5339), which determined that a majority of contracts affected by the proposed exemption would likely be performed by small businesses. Federal Procurement Data System (FPDS) does not provide an accurate estimate of the contracts potentially covered by the exemption, but DoL estimates that the total value of the exempt contracts could be relatively small, and that the SCA would no longer apply to only a relatively small number of contracts that currently contain SCA wage determination provisions.

The interim rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of this interim rule. However, the exemption is expected to have a positive impact on small entities, because it does not contain any new reporting or recordkeeping or other compliance requirements applicable to small business. Rather, the exemption would relieve small businesses and other contractors from the requirements of the SCA on certain contracts.

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 4, 15, 17, 22, 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 2005–21, FAR case 2001–004), in the 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 incorporate the Department of Labor's final rule, which was effective March 19, 2001, into the Federal Acquisition Regulation. Although there has been delay while

seeking appropriate implementation of the DoL final rule, industries that provide services in these categories are seeking to take advantage of the offered exemptions without further delay. 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 4, 15, 17, 22, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 15, 17, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 15, 17, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

4.1201 [Amended]

■ 2. Amend section 4.1201 by removing from paragraph (c) “52.212–3(k)” and adding “52.212–3(l)” in its place.

■ 3. Amend section 4.1202 by revising paragraph (q) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(q) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

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PART 15—CONTRACTING BY NEGOTIATION

15.102 [Amended]

■ 4. Amend section 15.102 by removing from paragraph (b) “52.212–3(k)” and adding “52.212–3(l)” in its place.

PART 17—SPECIAL CONTRACTING METHODS

17.109 [Amended]

■ 5. Amend section 17.109 by removing from paragraph (b)(1) “, as amended”.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 6. Amend section 22.1003–4 by removing paragraph (b)(4); and by adding paragraphs (c) and (d) to read as follows:

22.1003-4 Administrative limitations, variations, tolerances, and exemptions.

* * * * *

(c) *Contracts for maintenance, calibration or repair of certain equipment.*— (1) *Exemption.* The Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to furnish maintenance, calibration, or repair of the following types of equipment, if the conditions at paragraph (c)(2) of this subsection are met:

(i) Automated data processing equipment and office information/word processing systems.

(ii) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, “Medical Diagnostic Equipment;” Class 6525, “X-Ray Equipment;” FSC Group 66, Class 6630, “Chemical Analysis Instruments;” and Class 6665, “Geographical and Astronomical Instruments;” are largely composed of the types of equipment exempted in this paragraph).

(iii) Office/business machines not otherwise exempt pursuant to paragraph (c)(1)(i) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

(2) *Conditions.* The exemption at paragraph (c)(1) of this subsection applies if all the following conditions are met for a contract (or a subcontract):

(i) The items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of such equipment. As defined at 29 CFR 4.123(e)(1)(ii)(B)—

(A) An established catalog price is a price included in a catalog price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be

substantiated from sources independent of the manufacturer or contractor.

(iii) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(iv) The apparent successful offeror certifies to the conditions in paragraph (c)(2)(i) through (iii) of this subsection. (See 22.1006(e).)

(3) *Affirmative determination and contract award.* (i) For source selections where the contracting officer has established a competitive range, if the contracting officer determines that one or more of the conditions in paragraphs 22.1003-4 (c)(2)(i) through (iii) of an offeror’s certification will not be met, the contracting officer shall identify the deficiency to the offeror before receipt of the final proposal revisions. Unless the offeror provides a revised offer acknowledging applicability of the Service Contract Act or demonstrating to the satisfaction of the contracting officer an ability to meet all required conditions for exemption, the offer will not be further considered for award.

(ii) The contracting officer shall determine in writing the applicability of this exemption to the contract before contract award. If the apparent successful offeror will meet all conditions in paragraph (c)(2) of this subsection, the contracting officer shall make an affirmative determination and award the contract without the otherwise applicable Service Contract Act clause(s).

(iii) If the apparent successful offeror does not certify to the conditions in paragraph (c)(2)(i) through (iii) of this subsection, the contracting officer shall incorporate in the contract the Service Contract Act clause (see 22.1006(a)(2)) and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

(4) *Department of Labor determination.* (i) If the Department of Labor determines after award of the contract that any condition for exemption in paragraph (c)(2) of this subsection has not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Department of Labor determination. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) shall be followed.

(ii) If the Department of Labor determines after award of the subcontract that any conditions for

exemption in paragraph (c)(2) of this subsection have not been met, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

(d) *Contracts for certain services.*— (1) *Exemption.* Except as provided in paragraph (d)(5) of this subsection, the Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to provide the following services, if the conditions in paragraph (d)(2) of this subsection are met:

(i) Automobile or other vehicle (e.g., aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).

(ii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(iii) Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

(iv) Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

(v) Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

(vi) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(vii) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

(2) *Conditions.* The exemption for the services in paragraph (d)(1) of this subsection applies if all the following conditions are met for a contract (or a subcontract):

(i)(A) The contract will be awarded on a sole-source basis; or

(B) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award

based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.

(ii) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

(iii) The contract services are furnished at prices that are, or are based on, established catalog or market prices. As defined at 29 CFR 4.123(e)(2)(ii)(C)—

(A) An established catalog price is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(iv) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(v) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing commercial customers.

(vi) The contracting officer (or contractor with respect to a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions in paragraph (d)(2)(ii) through (v) of this subsection. If the services are currently being performed under contract, the contracting officer (or contractor with respect to a subcontract) shall consider the practices of the existing contractor in making a determination regarding the conditions in paragraphs (d)(2)(ii) through (v) of this subsection.

(vii)(A) The apparent successful offeror certifies that the conditions in paragraphs (d)(2)(ii) through (v) will be met; and

(B) For other than sole source awards, the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306(c)); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

(3) *Contract award or resolicitation.* (i) If the apparent successful offeror does not certify to the conditions, the contracting officer shall insert in the contract the applicable Service Contract Act clause(s) (see 22.1006(a)(2)) and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

(ii) The contracting officer shall award the contract without the otherwise applicable Service Contract Act clause(s) if—

(A) The apparent successful offeror certifies to the conditions in paragraphs (d)(2)(ii) through (v) of this subsection;

(B) The contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)); and

(C) The contracting officer has no reason to doubt the certification.

(iii) If the conditions in paragraph (d)(3)(ii) of this subsection are not met, then the contracting officer shall resolicit, amending the solicitation by removing the exemption provision from the solicitation (see 22.1006(e)(4)), and inserting in the contract the applicable Service Contract Act clause(s) (see 22.1006(a)(2)) and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

(4) *Department of Labor determination.* (i) If the Department of Labor determines after award of the contract that any conditions for exemption at paragraph (d)(2) of this subsection have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) shall be followed.

(ii) If the Department of Labor determines that any conditions in paragraph (d)(2) of this subsection have not been met with respect to a subcontract, the exemption shall be deemed inapplicable and the contractor may be responsible for ensuring that the

subcontractor complies with the Act, effective as of the date of the subcontract award.

(5) *Exceptions.* The exemption at paragraph (d)(1) of this subsection does not apply to solicitations and contracts (subcontracts)—

(i) Awarded under the Javits-Wagner-O'Day Act, 41 U.S.C. 47 (see Subpart 8.7).

(ii) For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services); or

(iii) Subject to Section 4(c) of the Service Contract Act (see 22.1002–3).

22.1003–5 [Amended]

■ 7. Amend section 22.1003–5 by removing from paragraph (k) “22.1003–4(b)(4)” and adding “22.1003(c)(1) and (d)(1)(iv)” in its place.

22.1003–6 [Amended]

■ 8. Amend section 22.1003–6 by removing from paragraph (b)(2) “22.1003–4(b)(4)” and adding “22.1003(c)(1) and (d)(1)(iv)” in its place.

■ 9. Amend section 22.1004 by revising paragraph (h) to read as follows:

22.1004 Department of Labor responsibilities and regulations.

* * * * *

(h) Practice before the Administrative Review Board (29 CFR part 8).

■ 10. Amend section 22.1006 by—

■ a. Revising the section heading;

■ b. Revising paragraph (a);

■ c. Removing from paragraphs (c)(1) and (c)(2) “as amended,”; and

■ d. Revising paragraph (e) to read as follows:

22.1006 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.222–41, Service Contract Act of 1965, in solicitations and contracts if the contract is subject to the Act and is—

(i) Over \$2,500; or

(ii) For an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be \$2,500 or less.

(2) If the solicitation includes the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, or 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, the contracting officer shall not insert the clause at 52.222–41 (or any of the associated Service Contract Act clauses

prescribed in this section for possible use when 52.222-41 applies) in the resultant contract unless the contracting officer determines, in accordance with paragraphs (c)(3) or (d)(3) of subsection 22.1003-4, that the Service Contract Act applies to the contract. (In such case, do not insert the clause at 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, or 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in the contract, in accordance with the prescription at paragraph (e)(2) or (e)(4) of this subsection).

* * * * *

(e)(1) The contracting officer shall insert the provision at 52.222-48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that include the clause at 52.222-41, Service Contract Act of 1965, but the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(c).

(2) The contracting officer shall insert the clause at 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, in solicitations that include the provision at 52.222-48, and resulting contracts in which the contracting officer has determined, in accordance with 22.1003-4(c)(3), that the Service Contract Act does not apply.

(3) Insert the provision at 52.222-52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that include the clause at 52.222-41, Service Contract Act of 1965, but the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(d).

(4) The contracting officer shall insert the clause at 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in solicitations that include the provision at 52.222-52, and resulting contracts in which the contracting officer has determined, in accordance with 22.1003-4(d)(3), that the Service Contract Act does not apply.

* * * * *

22.1008-2 [Amended]

■ 11. Amend section 22.1008-2 by removing from the last sentence of paragraph (d)(1) “, as amended”.

22.1018 [Amended]

■ 12. Amend section 22.1018 by removing from paragraph (b) “, as amended”.

22.1019 [Amended]

■ 13. Amend section 22.1019 by removing from paragraphs (a), in the first sentence, and (c) “, as amended”.

22.1020 [Amended]

■ 14. Amend section 22.1020 by removing “, as amended”.

22.1022 [Amended]

■ 15. Amend section 22.1022 by removing “Assistant” and “Board of Service Contract Appeals” and adding “Deputy” and “Administrative Review Board” in their places, respectively.

22.1023 [Amended]

■ 16. Amend section 22.1023 by removing “, as amended”.

22.1026 [Amended]

■ 17. Amend section 22.1026 by removing “as amended,”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-1 [Amended]

■ 18. Amend section 52.212-1 by revising the date of the clause to read “(Nov 2007)”; and by removing from paragraph (b)(8) “52.212-3(k)” and adding “52.212-3(l)” in its place.

■ 19. Amend section 52.212-3 by—

■ a. Revising the date of the clause;

■ b. Removing from the introductory text of the clause “paragraph (k)” and “through (j)” and adding “paragraph (l)” and “through (k)” in its place, respectively;

■ c. Redesignating paragraph (k) as paragraph (l); removing from the newly designated paragraph (l)(1) “paragraph (k)(2)” and adding “paragraph (l)(2)” in its place, and in the newly designated paragraph (l)(2), in the bracketed paragraph, removing “through (j)” and adding “through (k)” in its place; and

■ d. Adding a new paragraph (k) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS
“(Nov 2007)”

* * * * *

(k) *Certificates regarding exemptions from the application of the Service Contract Act.* (Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the

exempt services.) [The contracting officer is to check a box to indicate if paragraph (k)(1) or (k)(2) applies.]

☐ (1) Maintenance, calibration, or repair of certain equipment as described in FAR 22.1003-4(c)(1). The offeror ☐ does ☐ does not certify that—

(i) The items of equipment to be serviced under this contract are used regularly for other than Governmental purposes and are sold or traded by the offeror in substantial quantities to the general public in the course of normal business operations;

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices (see FAR 22.1003-4(c)(2)(ii)) for the maintenance, calibration, or repair of such equipment; and

(iii) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract will be the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

☐ (2) Certain services as described in FAR 22.1003-4(d)(1). The offeror ☐ does ☐ does not certify that—

(i) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(ii) The contract services will be furnished at prices that are, or are based on, established catalog or market prices (see FAR 22.1003-4(d)(2)(iii));

(iii) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(iv) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract is the same as that used for these employees and equivalent employees servicing commercial customers.

(3) If paragraph (k)(1) or (k)(2) of this clause applies—

(i) If the offeror does not certify to the conditions in paragraph (k)(1) or (k)(2) and the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation, the offeror shall notify the Contracting Officer as soon as possible; and

(ii) The Contracting Officer may not make an award to the offeror if the offeror fails to execute the certification in paragraph (k)(1) or (k)(2) of this clause or to contact the Contracting Officer as required in paragraph (k)(3)(i) of this clause.

* * * * *

■ 20. Amend section 52.212-5 by—

■ a. Revising the date of the clause;

■ b. Revising paragraph (c)(1), redesignating paragraph (c)(5) as (c)(7), and adding new paragraphs (c)(5) and (c)(6); and

■ c. Revising paragraph (e)(1)(vi), and redesignating paragraph (e)(1)(viii) as

(e)(1)(x), and adding new paragraphs (e)(1)(viii) and (e)(1)(ix).
 ■ 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 “(Nov 2007)”

* * * * *
 (c) * * *

(1) 52.222–41, Service Contract Act of 1965 “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * * * *

(5) 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements “[Insert Abbreviated Month and Year of Date of Publication in the **Federal Register**]” (41 U.S.C. 351, *et seq.*).

(6) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * * * *

(e)(1) * * *
 (vi) 52.222–41, Service Contract Act of 1965 “[Insert Abbreviated Month and Year of Date of Publication in the **Federal Register**]” (41 U.S.C. 351, *et seq.*).
 * * * * *

(viii) 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements “(Nov 2007)” (41 U.S.C. 351, *et seq.*).

(ix) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * * * *

■ 21. Amend section 52.213–4 by revising the date of the clause; and revising the first sentence of paragraph (b)(1)(vi) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *
 TERMS AND CONDITIONS—SIMPLIFIED
 ACQUISITIONS (OTHER THAN
 COMMERCIAL ITEMS) “(Nov 2007)”

* * * * *
 (b) * * *
 (1) * * *

(vi) 52.222–41, Service Contract Act of 1965 “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * *

* * * * *

■ 22. Amend section 52.222–41 by—

- a. Revising the section heading;
- b. Revising the clause heading and the date; and
- c. Amending paragraph (a) by—
- 1. Revising the introductory text;

- 2. Revising the definitions “Act” and “Contractor”;
 - 3. Removing from the definition “Service employee” the words “, as used in this clause,”; and
 - 4. Removing from paragraph (f) “Board of Service Contract Appeals” and adding “Administrative Review Board” in its place.
- The revised text reads as follows:

52.222–41 Service Contract Act of 1965.

* * * * *

SERVICE CONTRACT ACT OF 1965 “(Nov 2007)”

(a) *Definitions.* As used in this clause—
 Act means the Service Contract Act of 1965 (41 U.S.C. 351, *et seq.*)

Contractor when this clause is used in any subcontract, shall be deemed to refer to the subcontractor, except in the term “Government Prime Contractor.”
 * * * * *

■ 23. Revise section 52.222–48 to read as follows:

52.222–48 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

As prescribed in 22.1006(e)(1), insert the following provision:

EXEMPTION FROM APPLICATION OF
 THE SERVICE CONTRACT ACT TO
 CONTRACTS FOR MAINTENANCE,
 CALIBRATION, OR REPAIR OF CERTAIN
 EQUIPMENT CERTIFICATION “(Nov 2007)”

(a) The offeror shall check the following certification:

CERTIFICATION

The offeror ☐ does ☐ does not certify that—

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror in substantial quantities to the general public in the course of normal business operations;

(2) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(i) An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(ii) An “established market price” is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror; and

(3) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract are the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also

constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1003–4(c)(3) that the Service Contract Act—

(1) Will not apply to this offeror, then the Service Contract Act of 1965 clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, in this solicitation will not be included in any resultant contract awarded to this offeror, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision—

(1) The clause in this solicitation at 52.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, will not be included in any resultant contract awarded to this offeror; and

(2) The offeror shall notify the Contracting Officer as soon as possible, if the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

■ 24. Add sections 52.222–51, 52.222–52, and 52.222–53 to read as follows:

52.222–51 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements.

As prescribed in 22.1006(e)(2), insert the following clause:

EXEMPTION FROM APPLICATION OF
 THE SERVICE CONTRACT ACT TO
 CONTRACTS FOR MAINTENANCE,
 CALIBRATION, OR REPAIR OF CERTAIN
 EQUIPMENT—REQUIREMENTS “(Nov 2007)”

(a) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the Contractor in substantial quantities to the general public in the course of normal business operations.

(b) The services shall be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(1) An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(2) An “established market price” is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract shall be the same as that used for these employees and for equivalent employees servicing the same equipment of commercial customers.

(d) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor shall determine the applicability of this exemption to any subcontract on or before subcontract award. In making a judgment that the exemption applies, the Contractor shall consider all factors and make an affirmative determination that all of the conditions in paragraphs (a) through (c) of this clause will be met.

(e) If the Department of Labor determines that any conditions for exemption in paragraphs (a) through (c) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) will be followed.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts for exempt services under this contract.

(End of clause)

52.222–52 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

As prescribed in 22.1006(e)(3), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES—CERTIFICATION “(Nov 2007)”

(a) The offeror shall check the following certification:

CERTIFICATION

The offeror ☐ does ☐ does not certify that—

(1) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(2) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An “established market price” is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror;

(3) Each service employee who will perform the services under the contract will

spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(4) The offeror uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the offeror uses for these employees and for equivalent employees servicing commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1003–4(d)(3) that the Service Contract Act—

(1) Will not apply to this offeror, then the Service Contract Act of 1965 clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at FAR 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in this solicitation will not be included in any resultant contract awarded to this offer, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision—

(1) The clause of this solicitation at 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, will not be included in any resultant contract to this offeror; and

(2) The offeror shall notify the Contracting Officer as soon as possible if the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

52.222–53 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements.

As prescribed in 22.1006(e)(4), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES—REQUIREMENTS “(Nov 2007)”

(a) The services under this contract are offered and sold regularly to non-Governmental customers, and are provided by the Contractor to the general public in substantial quantities in the course of normal business operations.

(b) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is

regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An “established market price” is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(d) The Contractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the Contractor uses for these employees and for equivalent employees servicing commercial customers.

(e)(1) Any subcontract for these exempt services shall be awarded on a sole-source basis; or

(2) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost in selecting the Contractor.

(f) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor shall determine in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely subcontractors, that all or nearly all likely subcontractors will meet the conditions in paragraphs (a) through (d) of this clause. If the services are currently being performed under a subcontract, the Contractor shall consider the practices of the existing subcontractor in making a determination regarding the conditions in paragraphs (a) through (d) of this clause. If the Contractor has reason to doubt the validity of the certification, the requirements of the Service Contract Act shall be included in the subcontract.

(g) If the Department of Labor determines that any conditions for exemption at paragraphs (a) through (e) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures in at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

(h) The Contractor shall include the substance of this clause, including this paragraph (h), in subcontracts for exempt services under this contract.

(End of clause)

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