

their actions could be construed as acts of Government officials unless, in the judgment of the agency, no harm can come from failing to identify themselves; and

(c) Require suitable marking of all documents or reports produced by contractors.

### PART 37—SERVICE CONTRACTING

7. Section 37.102 is revised to read as follows:

#### 37.102 Policy.

(a) Agencies shall generally rely on the private sector for commercial services (see OMB Circular No. A-76, Performance of Commercial Activities and subpart 7.3).

(b) Agencies shall not award a contract for the performance of an inherently governmental function (see subpart 7.5).

(c) Non-personal service contracts are proper under general contracting authority.

8. Section 37.114 is added to read as follows:

#### 37.114 Special acquisition requirements.

Contracts for services which require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority. Agencies must ensure that—

(a) A sufficient number of qualified Government employees are assigned to oversee contractor activities, especially those that involve support of government policy or decision making. During performance of service contracts, the functions being performed shall not be changed or expanded to become inherently governmental.

(b) A greater scrutiny and an appropriate enhanced degree of management oversight is exercised when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see 7.503(c)).

(c) All contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or

Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8, 51, and 52

[FAC 90-37; FAR Case 91-108; Item II]

RIN 9000-AF71

#### Federal Acquisition Regulation; Javits-Wagner-O'Day Program (JWOD)

**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 have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify that the Government's obligation to purchase items from statutorily mandated sources of supply also applies when contractors purchase items for Government use. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** March 26, 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-37, FAR case 91-108.Q02

#### SUPPLEMENTARY INFORMATION:

##### A. Background

A proposed rule was published in the Federal Register at 59 FR 14454, March 28, 1994. The rule amended FAR Parts 8, 51, and 52 to clarify that the statutory obligation for Government agencies to purchase certain items from the Committee for Purchase from People Who are Blind or Severely Disabled also

applies when contractors purchase items for Government use.

Five substantive comments from three sources were received during the public comment period. Clarifying revisions have been made to §§ 51.101(c) and 52.208-9 of the rule as a result of the public comments.

##### 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 under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it merely clarifies that contractors must purchase certain items from the same statutorily mandated sources that Government agencies are required to use, when a contractor is performing an agency's supply function.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 8, 51, and 52

Government procurement.

Dated: January 11, 1996.

Edward C. Loeb,

*Acting Director, Office of Federal Acquisition Policy.*

Therefore, 48 CFR parts 8, 51, and 52 are amended as set forth below:

1. The authority citation for 48 CFR parts 8, 51, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Section 8.001 is amended by revising paragraphs (a)(2) (ii) and (iii) and adding paragraph (c) to read as follows:

#### 8.001 Priorities for use of Government supply sources.

(a) \* \* \*

(2) \* \* \*

(ii) Mandatory Federal Supply Schedules (see subpart 8.4);

(iii) Optional use Federal Supply Schedules (see subpart 8.4); and

\* \* \* \* \*

(c) The statutory obligation for Government agencies to satisfy their

requirements for supplies available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supply items for Government use.

3. Section 8.003 is added to read as follows:

**8.003 Contract clause.**

The contracting officer shall insert the clause at 52.208-9, Contractor Use of Mandatory Sources of Supply, in solicitations and contracts which require a contractor to purchase supply items for Government use that are available from the Committee for Purchase from People Who Are Blind or Severely Disabled. The contracting officer shall identify in the contract schedule the items which must be purchased from a mandatory source and the specific source.

**PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS**

4. Section 51.101 is amended by adding paragraph (c) to read as follows:

**51.101 Policy.**

(c) Contracting officers shall authorize contractors purchasing supply items for Government use that are available from the Committee for Purchase from People Who Are Blind or Severely Disabled (see subpart 8.7) to purchase such items from the Defense Logistics Agency (DLA), the General Services Administration (GSA), and the Department of Veterans Affairs (VA) if they are available from these agencies through their distribution facilities. Mandatory supplies that are not available from DLA/GSA/VA shall be ordered through the appropriate central nonprofit agency (see 52.208-9(c)).

5. Section 51.102 is amended in the first sentence of the introductory text of paragraph (a) by inserting after the word "sources" the phrase "in accordance with 51.101 (a) or (b),"; adding a new second sentence; and revising paragraph (c)(3) to read as follows:

**51.102 Authorization to use Government supply sources.**

(a) \* \* \* A written finding is not required when authorizing use of the Government supply sources in accordance with 51.101(c). \* \* \*

\* \* \* \* \*

(c) \* \* \*

(3) Approval for the contractor to use Department of Veterans Affairs (VA) supply sources from the Deputy Assistant Secretary for Acquisition and Materiel Management (Code 90), Office of Acquisition and Materiel

Management, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420;

\* \* \* \* \*

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

6. Section 52.208-9 is added to read as follows:

**52.208-9 Contractor Use of Mandatory Sources of Supply.**

As prescribed in 8.003, insert the following clause:

Contractor Use Of Mandatory Sources Of Supply (Mar 1996)

(a) Certain supplies to be provided under this contract for use by the Government are required by law to be obtained from the Committee for Purchase from People Who Are Blind or Severely Disabled (Javits-Wagner-O' Day Act (JWOD) (41 U.S.C. 48)). Additionally, certain of these supplies are available from the Defense Logistics Agency (DLA), the General Services Administration (GSA), or the Department of Veterans Affairs (VA). The Contractor shall obtain mandatory supplies to be provided for Government use under this contract from the specific sources indicated in the contract schedule.

(b) The Contractor shall immediately notify the Contracting Officer if a mandatory source is unable to provide the supplies by the time required, or if the quality of supplies provided by the mandatory source is unsatisfactory. The Contractor shall not purchase the supplies from other sources until the Contracting Officer has notified the Contractor that the mandatory source has authorized purchase from other sources.

(c) Price and delivery information for the mandatory supplies is available from the Contracting Officer for the supplies obtained through the DLA/GSA/VA distribution facilities. For mandatory supplies that are not available from DLA/GSA/VA, price and delivery information is available from the appropriate central nonprofit agency. Payments shall be made directly to the source making delivery. Points of contract for JWOD central nonprofit agencies are:

- (1) National Industries for the Blind (NIB)  
1901 North Beauregard Street, Suite 200  
Alexandria, VA 22311-1705 (703) 998-0770
- (2) NISH, 2235 Cedar Lane, Vienna, VA  
22182-5200 (703) 560-6800

(End of clause)

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 9**

[FAC 90-37; FAR Cases 93-301 and 93-306; Item III]

**RIN 9000-AF40**

**Federal Acquisition Regulation; Made in America Labels/Unfair Trade Practices**

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

**ACTION:** Interim rule adopted as final.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to implement sections 201 and 202 of the Defense Production Act. Section 201 directs that the FAR be amended to address the responsibility of contractors who engage in unfair trade practices as defined in section 201. Section 202 directs that the FAR be amended to address the responsibility of persons that intentionally affix a label bearing a fraudulent "Made in America" inscription to a product sold in or shipped to the United States. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** January 26, 1996.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ralph De Stefano (202) 501-1758 in reference to these combined FAR cases. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-37, FAR cases 93-301 and 93-306.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule implements the requirements of sections 201 and 202 of the Defense Production Act. Section 201 of the Defense Production Act (Public Law 102-558) provides that any contractor who has engaged in unfair trade practices may be found to lack such business integrity to affect the contractor's responsibility to perform a Government contract or subcontract. Section 201 defines "unfair trade