

transform itself to more effectively achieve its mission.

#### Item VI—Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001–018)

This final rule increases the threshold at FAR 42.709(b) and FAR 42.709–6 from \$500,000 to \$550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement. The threshold was increased to reflect inflation and is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(l).

The rule is of importance to contracting officers and contractors who negotiate contracts and modifications, and determine costs in accordance with FAR Part 31 contract cost principles.

#### Item VII—Technical Amendments

Editorial changes are made at FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1), and in the introductory text of FAR provision 52.219–1 in order to update references.

Dated: December 9, 2004.

**Laura Auletta,**

*Director, Contract Policy Division.*

#### Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–26 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 2001–26 is effective December 20, 2004, except for Item I, which is effective January 1, 2005, and Items II, III, V, and VI, which are effective January 19, 2005.

Dated: December 6, 2004.

**Deidre A. Lee,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: December 8, 2004.

**David A. Drabkin,**

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

Dated: December 2, 2004.

**Tom Luedtke,**

*Deputy Chief Acquisition Officer, National Aeronautics and Space Administration.*

[FR Doc. 04–27632 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 4, 14, 15, and 52

[FAC 2001–26; FAR Case 2002–024; Item I]

RIN 9000–AJ80

#### Federal Acquisition Regulation; Electronic Representations and Certifications

**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 require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply.

**DATES:** *Effective Date:* January 1, 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. Gerald Zaffos, Procurement Analyst, at (202) 501–6091. Please cite FAC 2001–26, FAR case 2002–024.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 4012, January 27, 2004. The 60-day comment period for the proposed rule ended March 29, 2004. Forty-five comments were received. Some of the comments merely agreed with the concept of ORCA; others pointed out typographical errors. The substantive comments are discussed below.

1. *Comment:* Should a contracting officer check for paper reps and certs and, failing to find them, check for electronic ones? Or, should a contracting officer only check for electronic ones if the offeror falls within a particular class of small business?

*Council's response:* The inclusion of the FAR provisions at 52.204–8 or 52.212–3(j) (as described in the final rule) in a solicitation would alert both the vendor and the contracting officer that the electronic completion of

representations and certifications on the Online Representations and Certifications Application (ORCA) module is required for the specific contracting action.

2. *Comment:* Without reps and certs, how would a Contracting Officer know what class of small business an offeror is?

*Council's response:* ORCA includes the socio-economic representations and certifications (such as FAR 52.219–1, Small Business Program Representations.) A vendor would revise its responses in either FAR 52.204–8 or 52.212–3(j) (as described in the final rule) if its responses in ORCA is incorrect for the present solicitation.

3. *Comment:* The possibility of parallel paper and electronic systems offers myriad chances for error. What if paper and electronic versions differ? What if an offeror from the class of small businesses not required to build an electronic record chooses to build an electronic record? What if someone required to build an electronic record submits paper reps and certs instead?

*Council's response:* The provisions at FAR 52.204–8 and 52.212–3(j) make it clear that vendors are required to complete the representations and certifications in ORCA. Those certifications and representations would take precedence over any other representations and certifications received (for the same provisions included in ORCA) for the specific contract action unless the offeror indicates he is amending those answers in accordance with the referenced provisions.

4. *Comment:* Since contractors are currently using the CCR database, the EEO database, PRO-Net, and EPLS (consolidated under “BPN.com”), will there be a future consideration for a contractor to have access and use the contractor's reps and certs rather than have the contractor continuing to request a new reps and certs package for the same sources that are on the “BPN” reps and certs database?

*Council's response:* Vendors will have access to ORCA. Please also note that the PRO-Net system has been retired, with its key capabilities being incorporated into CCR.

5. *Comment:* An additional clarification at FAR 12.301 is needed for oral solicitations. FAR 13.106–1(c) states the contracting officer shall solicit quotations orally to the maximum extent practicable. FAR 5.101(a)(2)(ii) exempts contracting officers from posting \$10K–\$25K requirements if oral solicitations are used. Otherwise, the requirement has to be posted for 10 days - a millennium in the customer's

eyes. In contrast, FAR 12.301(a)(2) says we have to use FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, in all commercial solicitations. Recommend verbiage be added to stating, “...other than oral...” just before the first “solicitation” in FAR 12.301(b). It would then read, “To implement this Act, the contracting officer shall insert the following provisions in other than oral solicitations for ....” If this isn’t the best place for it, then I would recommend similar verbiage in FAR 12.301(b)(2) to clear up this ambiguity.

*Council’s response:* This comment will be separately considered by the Councils for appropriate action.

6. *Comment:* The requirement for a physical affirmation (check box) that the representations and certifications posted to BPN are current appears unnecessary. Respondent recommends the following language: “The Offeror has completed the annual representations and certifications electronically via the Business Partner Network (BPN) web site at <http://orca.bpn.gov>, however, submits the following changes pertaining to this specific solicitation as identified below (insert changes, identifying change by clause number, title, and date). These amended representation(s) and/or certifications are also incorporated in this offer and are current, accurate, and complete as of the date of this proposal.” This (a) addresses the true intent of the proposed language; (b) eliminates additional physical check boxes; and (c) reinforces the fact that the vendor is being held responsible for the currency of their online reps and certs information.

*Council’s response:* We concur and have revised the applicable provisions accordingly.

7. *Comment:* Should FAR 52.222–38, Compliance with Veteran’s Employment Reporting Requirements, be included in FAR 14.213(b)?

*Council’s response:* We concur. The final rule and ORCA reflect the addition of this provision.

8. *Comment:* Can the electronic representations and certifications be incorporated with the Central Contractor Registration (CCR) file so as not to cause an additional burden on contractors already registered in the CCR?

*Council’s response:* The ORCA portion of the BPN was built to supplement the data in CCR. Because CCR is now used for more than contracting purposes, we decided to not require additional representation and certification information from all CCR registrants, as it is only necessary for

contracting offices. To alleviate the burden on the vendors, company information collected in CCR is electronically provided and pre-populated into ORCA. The vendor is not asked to re-enter any information that is found in CCR. The only information the vendor needs to supply in ORCA is directly related to representations and certifications.

9. *Comment:* Our contracts are for low dollar amounts and I cannot see the contractors doing all this preliminary work just for a small amount of business for them. All of this may work for higher dollar business. Can there be a dollar value attached?

*Council’s response:* The provisions included in ORCA have applicability at different dollar values with the majority applying to items over the micro-purchase level. As such, ORCA must be applied to all acquisitions over the micro-purchase threshold. (However, in accordance with FAR 4.1102, micro-purchases can also be exempted from Central Contractor Registration (CCR) requirements.)

10. *Comment:* If vendors already access CCR, why is ORCA available only through the Business Partner Network? It seems it would be easier to include the necessary fields for ORCA into CCR so that vendors would not have to access two systems.

*Council’s response:* ORCA is available through the BPN because it is part of the BPN, as is CCR. However, just like CCR, it can be reached directly via the URL <http://orca.bpn.gov>. To alleviate the burden on the vendor, company information collected in CCR is electronically provided and pre-populated into ORCA. The vendor is not asked to re-enter any information that is found in CCR.

11. *Comment:* Does a contractor first submit online reps and certs when he/she receives a solicitation and decides to submit an offer; or are the CCR database administrators going to notify its registrants and instruct them to go to the “Online Representations and Certifications Application (ORCA)” at [bpn.gov](http://bpn.gov) and enter in the reps and certs?

*Council’s response:* The first time the vendor responds to a solicitation that includes either FAR 52.204–8 or 52.212–3(j), the vendor would be required to complete the online representations and certifications. However, the Government plans an extended outreach effort, including notifications from CCR, in order to publicize ORCA’s availability and required use.

12. *Comment:* Informational language in the proposed rule stated, “Small businesses that are exempted from

registering in the CCR database are also exempted from submitting representations and certifications electronically.” This statement is confusing. We are not aware of any business class exceptions to CCR registration. The exception to CCR registration at FAR 4.1102 does not apply to the entity doing business with the Government inasmuch as it applies to the type of acquisition or contract being awarded at the time. Even if a contractor was awarded a contract that happened to be exempt from the CCR requirement, the exception does not then apply for subsequent or new awards, if the new award does not meet one of the exceptions.

*Council’s response:* We concur. The informational language has been corrected in the final rule.

13. *Comment:* We think that contractors may become frustrated or confused if, after completing reps and certs on line, they are then required to fill out reps and certs in another contract, just because that particular contract is exempt from the CCR requirements. Perhaps there should be direction to the CO to check ORCA before deciding which reps and certs clause to include in a solicitation for an award that may be exempt from CCR. If the contractor has already completed the annual reps and certs, then the annual reps and certs clause(s) could be used in the solicitation. If not, then the CO would include all applicable reps and certs required for the solicitation. However, since reps and certs are required for every award (except for micropurchases), there should be no exceptions for annual reps and certs. All solicitations should include the annual reps and certs clause. We believe that even contractors who may have had a contract exempted from CCR will eventually have to be registered in the CCR and therefore will be able to submit annual reps and certs.

*Council’s response:* Concur. Final rule includes language to encourage ORCA use when CCR is not required and provides further instructions if the offeror has already completed representations and certifications in ORCA.

14. *Comment:* Perhaps the requirement for annual reps and certs should be moved from FAR Parts 12, 14, and 15 and moved to FAR Part 4, in a new Subpart, 4.12 (after 4.11, Central Contractor Registration). Alternatively, revise Subpart 4.11 to be a subpart titled Business Partner Network, with two sections. The scope of the subpart would prescribe policies and procedures for requiring contractor registration in the CCR database, and

submission of annual representations and certifications.

*Council's response:* We concur. The final rule adds a new Subpart 4.12 that addresses these requirements.

15. *Comment:* We have a concern about the submission process of the "Online Representations and Certification Application (ORCA)". In reading the ORCA procedures, we noted that contractors would be required to have a Marketing Partner Identification Number (MPIN) in order to enter information into ORCA. This is a number created by the vendor during the registration process in the CCR. We have a concern about this requirement. The MPIN is not a mandatory field in the CCR and it is likely that quite a few contractors did not create an MPIN at the time of CCR registration. It is possible that a lot of contractors will now have to go back to CCR and create an MPIN. We suggest allowing that the Trading Partner Identification Number (TPIN) issued by CCR be used instead, or change the MPIN field in CCR to a mandatory one. While this may be outside the scope of this case, this is something that should be looked into.

*Council's response:* The TPIN, for security reasons, is not provided to anyone (including other government systems) other than the Point of Contact provided by the registrant in its CCR record. The MPIN is required for vendors to use other Government systems (such as the Past Performance Information Retrieval System (PPIRS) and Federal Technical Data Solution (FedTeDS)), so its use for ORCA is consistent. However, it is true that currently the MPIN is an optional field in CCR. The suggestion to make it mandatory has been provided to the CCR Program Manager for consideration. Additionally, vendor outreach is planned for the implementation of ORCA, which will include instructions on the MPIN and its use.

16. *Comment:* Why is there no reference to annual representations and certifications in FAR Part 13 for use with non-commercial item acquisitions. We assume that either FAR 52.214-30 or 52.215-7 would be used. We recommend adding language similar to that at the proposed FAR 15.209(g) to FAR 13.302-5(d).

*Council's response:* Although FAR Part 13 does not specifically discuss representations and certifications, FAR 13.003(g)(1) states that any appropriate combination of procedures in FAR parts 13, 14, 15, 35, or 36 may be used for non-commercial items that do not exceed the simplified acquisition

threshold. This would include using ORCA.

17. *Comment:* We recommend adding language similar to that at the proposed FAR 15.209(g) to FAR 14.201-9(e).

*Council's response:* By adding new Subpart 4.12, there is no need to add language to FAR 14.201-9(e).

18. *Comment:* FAR 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products. This particular certification, which is listed as a certification that is not to be included in a solicitation that includes the annual reps and certs clause, doesn't seem appropriate as an annual certification because it contains contract specific fill-ins for the CO. This is only used for acquisition of certain products, which the CO must identify in the solicitation. How can this be an "annual certification?"

*Council's response:* For the majority of vendors completing FAR 52.222-18, the answer would likely be the same: that they do not supply any end products from the identified countries. Vendors that have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

19. *Comment:* We think the language in the "Annual Reps and Certs" clauses should be revised to make it clear to offerors that any reps and certs posted on the BPN that do not apply or are different because of a particular solicitation must be identified. We are especially concerned that offerors understand that while they may be certified as a small business under one NAICS code, they may not be small under another one.

*Council's response:* We concur. The language included in the new Subpart 4.12 and in the provisions at FAR 52.204-8 and 52.212-3(j) makes it clear that offerors are required to indicate in the specific solicitation differences from the representations and certifications in ORCA.

20. *Comment:* When using ORCA, will contractors indicate their business size for the NAICS that they most commonly do business under and then be required to update the listing and business size when additional NAICS are used for particular situations? Or will they just indicate how many employees/dollars and then have the Government make assessments based on the particular NAICS that pertains to each solicitation?

*Council's response:* The vendor can provide up to 20 NAICS in CCR and consequently ORCA. Every NAICS the vendor provides to CCR is listed in

ORCA. Size determination is automatically calculated (using annual revenue and number of employees) and displayed for each NAICS given. Additionally, the vendor-provided annual revenue and number of employees is shown. Contracting officers can use that information to calculate size status for NAICS not provided.

21. *Comment:* Vendors may be reluctant to publish TIN numbers because of concerns that it would be accessible to other parties.

*Council's response:* TIN numbers are never displayed in ORCA. The notice "TIN on File with CCR" is shown in place of the actual TIN.

22. *Comment:* An offeror's response to the Buy American Act certification would depend on the type of product being provided by the vendor.

*Council's response:* Vendors can list all of their foreign end products and the associated countries in ORCA. If in response to a solicitation a vendor offers a foreign end product not listed in ORCA, the vendor would provide the information in accordance with either provision FAR 52.204-8 or 52.212-3(j).

23. *Comment:* The proposed FAR 52.214-30 and 52.215-7 clauses are nearly identical (one referring to sealed bids and the other referring to negotiation and offerors). Consider combining the two proposed clauses into a single clause.

*Council's response:* Concur. The two provisions have been combined into new provision FAR 52.204-8.

24. *Comment:* Will the BPN Web site for the representations and certifications also accommodate agency-specific reps and certs, such as DFARS 252.247-7022?

*Council's response:* At this time ORCA only contains FAR level representations and certifications. Agency specific provisions are included in RFPs as required by Agency policies and regulations. However, this recommendation has been forwarded to the ORCA Program Manager for possible future inclusion in ORCA.

25. *Comment:* It would appear that Certificates of Current Cost and Pricing Data (when required - i.e., non-competitive RFPs) would need to be included within RFPs, outside of their place within the Reps and Certs.

*Council's response:* We concur. The certification at FAR 15.406-2, Certificate of Current Cost or Pricing Data, is not included in ORCA.

26. *Comment:* Reps and Certs concerning Limited Rights Data/Restricted Software would have to remain and RFP-specific requirement to

be called out by a contractor in some other portion of their proposal.

*Council's response:* ORCA allows the vendor to enter multiple Limited Rights Data and Restricted Computer Software into their record. A vendor that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

27. *Comment:* Information pertaining to Place of Performance would have to be RFP-specific and identified by contractors in another portion of their proposal.

*Council's response:* ORCA allows the vendor to enter multiple Places of Performance. A vendor that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

28. *Comment:* The identification of "authorized negotiators," often included within Reps and Certs, is RFP-specific information for most contractors, and would have to be identified elsewhere in a contractor's proposal.

*Council's response:* ORCA does not provide for identification of authorized negotiators. This requirement is solicitation specific.

29. *Comment:* There are a number of issues regarding the handling of subcontractor Reps and Certs: (a) prime contractors could be given controlled access to the CCR database, to determine whether and what Reps and Certs have been completed by a subcontractor; (b) prime contractors could rely on a written affirmation/certification from subcontractors that they have completed the all-encompassing Reps and Certs; and (c) giving prime contractors access to the CCR database is probably the best solution, otherwise, there is a large amount of information that prime contractors would still have to get from subcontractors: business size, DUNS #, taxpayer ID #, whether they are debarred, or whether they are subject to the Cost Accounting Standards, for several examples.

*Council's response:* ORCA is available to the public to search and view. However, as previously stated, a vendor's TIN Number is never publicly displayed on ORCA.

30. *Comment:* Contractors must be required to update their BPN annual revenue size certifications whenever they complete a fiscal year, and must be required to update their BPN number of employees size certifications on a monthly basis in order for such certifications to be current, accurate, and complete. Otherwise the BPN reps

and certs will be most likely be out-of-date, inaccurate, and incomplete, resulting in increased costs for both the procuring agency (increased number of size protests and related GAO protests) and offerors (costs associated with preparing offer for procurement where concern is ultimately found to be ineligible for award).

*Council's response:* In accordance with the provisions at FAR 52.204-8 and 52.212-3(j) (whichever is included in the solicitation), the vendor's offer constitutes affirmation that the information in ORCA is current, accurate, and complete as of the date of the offer. The offeror assumes the risk of out-of-date, inaccurate, or incomplete information by submission of his offer.

31. *Comment:* FAR 52.219-1 also contains reps and certs with respect to offers from HUBZone joint ventures, which are contract-specific reps and certs that cannot be submitted through the BPN (FAR 52.219-1(b)(6)(ii)). If the rule is adopted as proposed, the HUBZone joint venture reps and certs must be added to another FAR clause so that affected entities can make the required joint venture reps and certs with respect to particular contracts.

*Council's response:* We disagree. Vendors that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j) (whichever is included in the solicitation).

32. *Comment:* Under the proposed rule, firms will not have to submit FAR 52.219-2, Equal Low Bids, on a contract-by-contract basis. However, under FAR 52.219-2, a concern must identify the labor surplus area (LSA) "in which the costs to be incurred on account of manufacturing or production (by the bidder or first-tier subcontractors) amount to more than 50 percent of the contract price." Such a representation can only be made on a contract-by-contract basis. FAR clause 52.219-2 must be included in each particular contract. We recommend that proposed FAR 14.213(b)(9) be deleted.

*Council's response:* We disagree. For the majority of vendors completing FAR 52.219-2, the answer would likely be the same regardless of the solicitation. Vendors that have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204-8 or 52.212-3(j), (whichever is included in the solicitation).

33. *Comment:* Under the proposed rule, firms will not have to submit FAR 52.219-22, Small Disadvantaged Business Status, on a contract-by-contract basis. However, this clause

allows a firm that has not been certified as small disadvantaged business (SDB) to claim entitlement to SDB preferences while an application for SDB certification is pending (FAR 52.219-22(b)(1)(ii)). Procedures are currently in place for expediting SBA's review of an SDB application when an applicant is the apparent successful offeror (FAR 19.304(c)(2), 19.304(d); 13 CFR 124.1001(c)(2) and 124.1010). It is unclear if concerns can only represent themselves as SDBs in BPN if they have in fact already been certified as SDBs by SBA. If that is the case, then the provisions of FAR clause 52.219-22(b)(1)(ii) must be included in all solicitations so that firms can take advantage of the regulatory provisions which allow concerns to claim entitlement to SDB preferences while an SDB application is pending.

*Council's response:* We disagree. FAR 52.219-22(b)(1)(ii) is included in ORCA. A vendor can initially indicate that it has submitted a completed application to SBA and then update the representation if and when it is certified. A vendor can also indicate a change in status in either FAR 52.204-8 or 52.212-3(j), as appropriate.

Therefore, this final rule amends FAR parts 2, 4, 14, 15 and 52 to require offerors to—

- Provide representations and certifications electronically via the BPN Website at <http://orca.bpn.gov>;
- Update the representations and certifications as necessary, but at least annually to ensure they are kept current, accurate and complete; and
- Make changes that affect only one solicitation by completing the appropriate sections of either FAR 52.204-8 or 52.212-3(j); whichever is included in the solicitation.

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, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as follows:

1. A succinct statement of the need for, and the objectives of, the rule.

The FAR requires small businesses to provide representations and certifications for individual solicitations. However, FAR 15.209(g) and FAR 14.213 do permit annual submissions if authorized by individual agencies. This rule establishes the requirement for annual submissions by electronic means.

In an effort to broaden use and reliance upon e-business applications, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are working with the Office of Federal Procurement Policy to eliminate the need to maintain paper-based sources of contractor information. The objective of this rule is to eliminate the need for offerors to submit the same information (*i.e.*, representations and certifications) to different Government contracting and payment offices. By the offerors providing this information to a centralized location, it is anticipated that this rule will have a significant positive impact on small businesses by reducing their overall administrative burden.

#### 2. Legal basis for the rule.

There is no statutory basis for this rule but, rather, an e-Government Integrated Acquisition Environment's (IAE) initiative to re-use data as much as possible throughout the Federal procurement workspace (*i.e.*, "submit once, use many" times).

3. Description of, and, where feasible, estimate of the number of small entities to which the rule will apply.

The rule applies to small business offerors that also are required to register in the Central Contractor Registration (CCR) database. The reason for the link with CCR is that, as part of the online representations and certifications process, the software will use information that an offeror has already provided into the CCR database. The offeror will provide the additional information needed. Therefore, small businesses that are exempted from registering in the CCR database are also exempted from submitting representations and certifications electronically. The following CCR exceptions also apply to this rule:

(a) The purchase uses a Governmentwide commercial purchase card as the purchasing mechanism.

(b) Registration (see 4.401) in the CCR database, or use of CCR data, could compromise the safeguarding of classified information or national security.

(c) The contract is awarded by—

(1) A deployed contracting officer in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(7); or

(2) A contracting officer in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, *e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121).

(d) The contract is to support unusual or compelling needs.

(e) The award made is to a foreign vendor for work performed outside the United States, if it is impractical to obtain CCR registration before award.

Based on Governmentwide data, approximately, 20,825 small businesses were awarded contracts of \$25,000 or more in fiscal year 2002. It is estimated that a majority of them will be subject to the rule. Many of these businesses are already among the over 240,000 registrants in CCR. Information is not available to identify the

additional number of small businesses that were awarded contracts of less than \$25,000, or were awarded basic agreements, basic ordering agreements, or blanket purchase agreements.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The Office of Management and Budget has already approved the current FAR information and recordkeeping requirement for obtaining representations and certifications under OMB Control Number 9000-0034. The rule decreases the collection requirements since the rule requires offerors to provide representations and certifications annually into a centralized database, in lieu of providing this information with each solicitation.

Administrative or financial personnel that have general knowledge of the contractor's business are able to register by providing the pertinent information into the Business Partner Network website.

5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the rule.

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

6. Description of any significant alternatives to the final rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.

There are no significant practical alternatives that will accomplish the objective of this rule. Continued reliance on a paper-based system would unnecessarily promote inefficiency associated with paper-based processes. The successful phase-in of CCR by the Department of Defense demonstrates that the Federal contracting community, including small businesses, is successfully transitioning to greater use of electronic tools and their associated efficiencies to conduct business.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

### C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule contains information collection requirements; however, these changes do not impose additional information collection requirements to the paperwork burdens previously approved under the Office of Management and Budget (OMB) Control Numbers 9000-0018, 9000-0024, 9000-0025, 9000-0047, 9000-0090, 9000-0094, 9000-0097, 9000-0130, 9000-0134, 9000-0139, 9000-0150, and 9000-0155, since the rule requires offerors to provide representations and certifications annually into a centralized database, in lieu of providing the same information with each solicitation.

### List of Subjects in 48 CFR Parts 2, 4, 14, 15, and 52

Government procurement.

Dated: December 9, 2004.

**Laura Auletta,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 14, 15, and 52 is revised to read as follows:

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

### PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definitions "Business Partner Network (BPN)" and "Online Representations and Certifications Application (ORCA)" to read as follows:

#### 2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

*Business Partner Network (BPN)*

means an integrated electronic infrastructure the Government uses to manage (*i.e.*, collect, validate, access and maintain) the information it needs to transact business with its contractors. The BPN is located at <http://www.bpn.gov>.

\* \* \* \* \*

*Online Representations and Certifications Application (ORCA)* means the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government. ORCA is part of the Business Partner Network (BPN). ORCA is located at <http://orca.bpn.gov>.

\* \* \* \* \*

### PART 4—ADMINISTRATIVE MATTERS

#### 4.1101 Definition.

■ 3. Amend section 4.1101 by revising the section heading to read as set forth above; and removing the definition "Business Partner Network."

■ 4. Add Subpart 4.12 to read as follows:

#### Subpart 4.12—Annual Representations and Certifications

Sec.

4.1200 Scope.

4.1201 Policy.

4.1202 Solicitation provision and contract clause.

#### 4.1200 Scope.

This subpart prescribes policies and procedures for requiring prospective contractors to submit Annual

Representations and Certifications via the Online Representations and Certifications Application (ORCA), a part of the Business Partner Network (BPN), to—

(a) Eliminate the administrative burden for contractors of submitting the same information to various contracting offices; and

(b) Establish a common source for this information to procurement offices across the Government.

#### 4.1201 Policy.

(a) Prospective contractors shall complete electronic annual representations and certifications at <http://orca.bpn.gov> in conjunction with required registration in the Central Contractor Registration (CCR) database (see FAR 4.1102).

(b) Prospective contractors shall update the representations and certifications submitted to ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update to ORCA.

#### 4.1202 Solicitation provision and contract clause.

Except for commercial item solicitations issued under FAR Part 12, insert in solicitations the provision at 52.204–8, Annual Representations and Certifications. When the clause at 52.204–7, Central Contractor Registration, is included in the solicitation, do not include the following representations and certifications:

(a) 52.203–2, Certificate of Independent Price Determination.

(b) 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.

(c) 52.204–3, Taxpayer Identification.

(d) 52.204–5, Women-Owned Business (Other Than Small Business).

(e) 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.

(f) 52.214–14, Place of Performance—Sealed Bidding.

(g) 52.215–6, Place of Performance.

(h) 52.219–1, Small Business Program Representations (Basic & Alternate I).

(i) 52.219–2, Equal Low Bids.

(j) 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.

(k) 52.219–21, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program.

(l) 52.219–22, Small Disadvantaged Business Status (Basic & Alternate I).

(m) 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products.

(n) 52.222–22, Previous Contracts and Compliance Reports.

(o) 52.222–25, Affirmative Action Compliance.

(p) 52.222–38, Compliance with Veterans' Employment Reporting Requirements.

(q) 52.222–48, Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment—Contractor Certification.

(r) 52.223–4, Recovered Material Certification.

(s) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).

(t) 52.223–13, Certification of Toxic Chemical Release Reporting.

(u) 52.225–2, Buy American Act Certificate.

(v) 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate (Basic, Alternate I & II).

(w) 52.225–6, Trade Agreements Certificate.

(x) 52.226–2, Historically Black College or University and Minority Institution Representation.

(y) 52.227–6, Royalty Information (Basic & Alternate I).

(z) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

### PART 14—SEALED BIDDING

#### 14.201–6 [Amended]

■ 5. Amend section 14.201–6 by removing and reserving paragraph (u).

#### 14.213 [Removed]

■ 6. Remove section 14.213.

### PART 15—CONTRACTING BY NEGOTIATION

#### 15.209 [Amended]

■ 7. Amend section 15.209 by removing and reserving paragraph (g).

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.204–8 to read as follows:

#### 52.204–8 Annual Representations and Certifications.

As prescribed in 4.1202, insert the following provision:

#### ANNUAL REPRESENTATIONS AND CERTIFICATIONS (JAN 2005)

(a)(1) If the clause at 52.204–7, Central Contractor Registration, is included in this solicitation, paragraph (b) of this provision applies.

(2) If the clause at 52.204–7 is not included in this solicitation, and the offeror is currently registered in CCR, and has completed the ORCA electronically, the offeror may choose to use paragraph (b) of this provision instead of completing the corresponding individual representations and certifications in the solicitation. The offeror shall indicate which option applies by checking one of the following boxes:

[ ] (i) Paragraph (b) applies.

[ ] (ii) Paragraph (b) does not apply and the offeror has completed the individual representations and certifications in the solicitation.

(b) The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) website at <http://orca.bpn.gov>. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [offeror to insert changes, identifying change by clause number, title, date]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR Clause #	Title	Date	Change
_____	_____	_____	_____

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.

(End of Provision)

■ 9. Amend section 52.212–1 by revising the date of the provision and paragraph (b)(8) to read as follows:

#### 52.212–1 Instructions to Offerors—Commercial Items.

\* \* \* \* \*

INSTRUCTIONS TO OFFERORS—  
COMMERCIAL ITEMS (JAN 2005)

\* \* \* \* \*

(b) *Submission of offers.* \* \* \*

(8) A completed copy of the representations and certifications at FAR 52.212–3 (see FAR 52.212–3(j) for those representations and certifications that the offeror shall complete electronically);

\* \* \* \* \*

■ 10. Amend section 52.212–3 by revising the date of the provision; adding an introductory paragraph and paragraph (j) to read as follows:

**52.212–3 Offeror Representations and Certifications—Commercial Items.**

\* \* \* \* \*

OFFEROR REPRESENTATIONS AND  
CERTIFICATIONS—COMMERCIAL ITEMS  
(JAN 2005)

An offeror shall complete only paragraph (j) of this provision if the offeror has completed the annual representations and certifications electronically at <http://orca.bpn.gov>. If an offeror has not completed the annual representations and certifications electronically at the ORCA website, the offeror shall complete only paragraphs (b) through (i) of this provision.

\* \* \* \* \*

(j)(1) *Annual Representations and Certifications.* Any changes provided by the offeror in paragraph (j) of this provision do not automatically change the representations and certifications posted on the Online Representations and Certifications Application (ORCA) website.

(2) The offeror has completed the annual representations and certifications electronically via the ORCA website at <http://orca.bpn.gov>. After reviewing the ORCA database information, the offeror verifies by submission of this offer that the representations and certifications currently posted electronically at FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, have been entered or updated in the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201), except for paragraphs \_\_\_\_\_.

[Offeror to identify the applicable paragraphs at (b) through (i) of this provision that the offeror has completed for the purposes of this solicitation only, if any.]

These amended representation(s) and/or certification(s) are also

*incorporated in this offer and are current, accurate, and complete as of the date of this offer.*

*Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.]*

(End of provision)

**52.214–30 [Removed and Reserved]**

■ 11. Remove and reserve section 52.214–30.

**52.215–7 [Removed and Reserved]**

■ 12. Remove and reserve section 52.215–7.

[FR Doc. 04–27633 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 2, 9, 22, 28, 44, and 52**

[FAC 2001–26; FAR Case 2002–023; Item II]

RIN 9000-AJ78

**Federal Acquisition Regulation;  
Excluded Parties List System  
Enhancement**

**AGENCY:** 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 publish an electronic list of parties excluded from doing business with the Federal Government online identified as the Excluded Parties List System (EPLS). This will obviate the need to publish the hard copy of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (List of Parties) produced by the Government Printing Office.

**DATES:** *Effective Date:* January 19, 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. Craig Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001–26, FAR case 2002–023.

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

This final rule incorporates the Excluded Parties List System into the FAR and enables agencies to directly enter data on parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies or the Government Accountability Office. GSA maintains that direct entry by the acting agency will improve the reliability of the system, eliminate the need for a hard copy list, provide access to the archival data, and enhance the ability to verify entries by permitting a search by exact name and social security number where the agencies entering the data have the authority to collect, retain, and publish the party's social security number.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 67353, December 1, 2003. The Councils received comments in response to the proposed rule from six respondents. Several respondents concurred in the rule as written. Other comments are categorized as follows:

1. One respondent recommended that the names of the parties listed in the EPLS be linked to the Central Contractor Registry (CCR) accessible on the Internet at <http://www.ccr.gov/index.cfm>. The Councils partially concur; however, in light of impending review of the CCR and the Business Partner Network (BPN) by their Program Manager, within the next six months to ascertain the capabilities of these systems, no change was made at the present time.

2. One respondent pointed out a technological glitch in conducting searches using the EPLS search engine for a field for DUNS number that is not a required entry. He points out that if the searcher has a DUNS number and searches for that given DUNS number but the agency data entry person has not entered the number, the search results will indicate no such entry or “No records were found matching this criteria.” Searchers could readily interpret this search engine response as an indication that the party to which Dun and Bradstreet assigned a DUNS number is not listed in EPLS when what such search results could also mean is that there is no data actually entered into a non-mandatory field. He suggested adding a cautionary note to FAR 9.404 or 9.105-1(c)(1). The Councils acknowledge the validity of his concern but decline to add a cautionary note to the FAR. The Councils acknowledge that while obtaining a DUNS number is a