

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 17, 22, and 36

[FAC 2001-10; FAR Case 2001-016; Item
II]

RIN 9000-AJ14

**Federal Acquisition Regulation;
Executive Order 13202, Preservation of
Open Competition and Government
Neutrality Towards Government
Contractors' Labor Relations on
Federal and Federally Funded
Construction Projects**

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

ACTION: Final rule; termination of stay of interim rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published in the **Federal Register** at 66 FR 27414, May 16, 2001, an interim rule implementing Executive Order (E.O.) 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects. As a result of a permanent injunction against the E.O. and pending litigation to resolve the dispute, the Councils published an interim rule in the **Federal Register** at 67 FR 10527, March 7, 2002, staying the heart of the rule. The Federal Acquisition Regulatory (FAR) Council intended the stay would last until final judicial resolution of the dispute. The FAR Council requested comments on the FAR interim rule stay. This final rule terminates the stay and adopts the May 16, 2001, interim rule as final without change.

DATES: Effective November 22, 2002, the stay of 48 CFR 36.202(d) is terminated. As of November 22, 2002, the interim rule amending 48 CFR parts 17, 22, and 36 published on May 16, 2001 (66 FR 27414), is adopted as final without change.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at

(202) 501-1900. Please cite FAC 2001-10, FAR case 2001-016.

SUPPLEMENTARY INFORMATION:**A. Background**

On February 17, 2001, President George W. Bush signed Executive Order (E.O.) 13202 revoking E.O. 12836 of February 1, 1993, and Presidential Memorandum of June 5, 1997, entitled "Use of Project Labor Agreements for Federal Construction Projects." The E.O. was published in the **Federal Register** at 66 FR 11225, February 22, 2001, and amended by E.O. 13208 published in the **Federal Register** at 66 FR 18717, April 11, 2001.

The E.O. 13202 is intended to improve the internal management of the Executive branch by—

- Promoting and ensuring open competition on Federal and federally funded or assisted construction projects;
- Maintaining Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects;
- Reducing construction costs to the Government and to the taxpayers;
- Expanding job opportunities, especially for small and disadvantaged businesses;
- Preventing discrimination against Government contractors or their employees based upon labor affiliation or lack thereof, thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects; and
- Preventing the inefficiency that may result from the disruption of a previously established contractual relationship in particular cases.

To implement Executive Order 13202, as amended, an interim rule was published in the **Federal Register** on May 16, 2001, 66 FR 27414, as part of Federal Acquisition Circular 97-26. Consistent with Executive Order 13202, as amended, FAR 36.202(d) of that interim rule specified that agencies could not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to agreements with one or more labor organizations. It also permitted agency heads to exempt a project from the requirements of the Executive order under special circumstances, but specified that such an exemption could not be related to a possible or an actual labor dispute. FAR 36.202(d) also provided for the exemption of a project governed by a project labor agreement in place as of February 17, 2001, which had a construction contract awarded as of February 17, 2001.

In response to the interim rule, the Councils received 179 letters. All but one of the respondents supported the rule. The one respondent (Building and Construction Trades Department, AFL-CIO) that did not support the rule believed the Executive order in which the rule was based is unlawful; that the interim rule is based both on misapprehensions about the nature of Project Labor Agreements and on economic assumptions that lack any factual basis; and that the interim rule is so vague as to mislead affected parties about their ability to exercise their statutory rights. Since the rule mirrors the directives contained in the Executive orders, the Councils agreed that no change to the rule was necessary.

This same respondent, along with other plaintiffs, commenced a lawsuit to enjoin the enforcement of the E.O. issued by the President. A permanent injunction against enforcement of Executive Order 13202 was issued November 7, 2001, by the U.S. District Court for the District of Columbia (*see* Building and Construction Trades Department, AFL-CIO v. Allbaugh, D.D.C., 172 F.Supp.2d 138, D.D.C. 2001). The Government submitted its appeal (No. 01-5436 (D.C. Cir.)). In order to comply with the court order, a stay of the heart of the interim rule with a request for comments was published in the **Federal Register** at 67 FR 10527, March 7, 2002, pending resolution of the litigation.

In response to the interim rule stay, one respondent (The Associated General Contractors of America (AGC)) submitted comments. AGC believed that the unresolved legal challenge to the Executive Order 13202 does not require a stay of the interim rule, and it is inappropriate for the Councils to impede the enforcement of the E.O. The Councils determined that the stay would remain pending resolution of the litigation.

A decision by the United States Court of Appeals for the District of Columbia Circuit on July 12, 2002, reversed the judgment of the District Court and vacated the injunction (295 F.3d 28, D.C. Cir. 2002). Accordingly, the Councils are terminating the stay and adopting the May 16, 2001, interim rule as final without change.

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), and it is summarized as follows:

This rule amends FAR parts 17, 22, and 36 to implement Executive Order 13202 as amended on April 6, 2001 (E.O. 13208). The Executive orders require that any construction contract awarded after February 17, 2001, or any obligation of funds pursuant to such contract, must not require or prohibit offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction project(s); or otherwise discriminate against offerors, contractors, or subcontractors for becoming or refusing to become or remaining signatories or otherwise adhere to agreements with one or more organizations, on the same or other related construction projects. The rule primarily affects the internal operating procedures of Government agencies. The rule will apply to all large and small entities that seek award of construction contracts that are Federal and federally funded. During fiscal year 2001, there were over forty-seven thousand contract actions awarded to small businesses according to the Federal Procurement Data System. These actions were worth a total of over \$6 billion. It is expected that the awarding offices neutrality toward Government contractors' and subcontractors labor relations regarding project labor agreements will expand job opportunities to small entities, specifically nonunion small businesses. This gives small businesses the ability to negotiate and establish business relationships to deliver efficient and cost effective high quality construction projects.

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 does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 17, 22, and 36

Government procurement.

Dated: November 12, 2002.

Al Matera,

Director, Acquisition Policy Division.

Stay Terminated; Interim Rule Adopted as Final Without Change

Accordingly, DoD, GSA, and NASA terminate the interim rule stay published in the **Federal Register** at 67

FR 10527 on March 7, 2002, and further adopt as a final rule without change the interim rule amending 48 CFR parts 17, 22, and 36, which was published in the **Federal Register** at 66 FR 27414 on May 16, 2001.

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

[FR Doc. 02-29090 Filed 11-21-02; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2001-10; FAR Case 2000-306; Item III]

RIN 9000-AJ27

Federal Acquisition Regulation; Caribbean Basin Country End Products

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 convert this FAR case from an interim rule to a final rule with changes. This interim rule amended the FAR to implement the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. It also implemented section 211 of the United States-Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under that Act. However, on July 12, 2002, the USTR published a notice in the **Federal Register** to reinstate the treatment on Government procurement of products from Honduras. The determination to reinstate Honduras as published by the USTR has been incorporated in this final rule.

DATES: *Effective Date:* November 22, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-10, FAR case 2000-306.

SUPPLEMENTARY INFORMATION:

A. Background

This rule amended the Federal Acquisition Regulation (FAR) to implement the determination of the United States Trade Representative (USTR) to extend the treatment of certain end products, from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act, as eligible products under the Trade Agreements Act, with the exception of end products from the Dominican Republic, Honduras, and Panama. This rule also implemented section 211 of the United States-Caribbean Basin Trade Partnership Act and the determination of the USTR as to which countries qualify for the enhanced trade benefits under the Act.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 67 FR 6116, February 8, 2002, and no comments were received. However, on July 12, 2002 (67 FR 46239), the USTR published a notice in the **Federal Register** to reinstate the treatment on Government procurement of products from Honduras. The notice stated that products of Honduras shall be treated as eligible products for purposes of section 1-101 of Executive Order 12260. Such treatment shall not apply to products originating in Honduras that are excluded from duty-free treatment under 19 U.S.C. 2703(b). The determination to reinstate Honduras as published by the USTR has been incorporated in this case. The Councils have agreed to convert this FAR case from an interim rule to a final rule with changes.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final