

(1) Notify its employees of—
(i) The United States Government's zero tolerance policy described in paragraph (b) of this clause; and
(ii) The actions that will be taken against employees for violations of this policy. Such actions may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment; and
(2) Take appropriate action, up to and including termination, against employees or subcontractors that violate the policy in paragraph (b) of this clause.
(d) *Notification.* The Contractor shall inform the Contracting Officer immediately of—
(1) Any information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, or

subcontractor employee has engaged in conduct that violates this policy; and
(2) Any actions taken against Contractor employees, subcontractors, or subcontractor employees pursuant to this clause.
(e) *Remedies.* In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraphs (c), (d), or (f) of this clause may render the Contractor subject to—
(1) Required removal of a Contractor employee or employees from the performance of the contract;
(2) Required subcontractor termination;
(3) Suspension of contract payments;
(4) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;

(5) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or
(6) Suspension or debarment.
(f) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts.
(End of clause)
Alternate I (AUG 2007). As prescribed in 22.1705(b), substitute the following paragraph in place of paragraph (c)(1)(i) of the basic clause:
(i)(A) The United States Government's zero tolerance policy described in paragraph (b) of this clause; and
(B) The following directive(s) or notice(s) applicable to employees performing work at the contract place(s) of performance as indicated below:

Document Title	Document may be obtained from:	Applies Performance to in/at:

[Contracting Officer shall insert title of directive/notice; indicate the document is attached or provide source (such as website link) for obtaining document; and, indicate the contract performance location outside the U.S. to which the document applies.]
[FR Doc. 07-3796 Filed 8-16-07; 8:45 am]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATION

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Part 18

[FAC 2005-19; FAR Case 2005-038; Item VI; Docket 2006-0020; Sequence 5]

RIN 9000-AK50

Federal Acquisition Regulation; FAR
Case 2005-038, Emergency
Acquisitions

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 to adopt the

interim rule published in the **Federal Register** at 71 FR 38247 on July 5, 2006, as a final rule with changes. The final rule amends the Federal Acquisition Regulation (FAR) to provide a single reference to acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations.
DATES: Effective Date: September 17, 2007.

FOR FURTHER INFORMATION CONTACT Mr. William Clark, Procurement Analyst, at (202) 219-1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-19, FAR case 2005-038.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to provide a single reference to acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 71 FR 38247 on July 5, 2006, that created a new FAR Part 18 to provide a single reference to acquisition flexibilities available to facilitate contracting during emergencies. Five sources submitted comments on the interim rule. A discussion of those comments is provided below.

(1) *More detailed approach.* Two commenters were very supportive of the rule. However, one of those commenters recommended developing a more detailed, comprehensive approach. The commenter also said including the full text of every associated emergency authority could be unwieldy and might be counterproductive to the "ease of use" goal. Another commenter expressed support for the interim rule but recommended developing more detailed, comprehensive coverage, including guidance related to the proper administration and oversight of federal spending.

Response: Repeating the full text of every emergency acquisition flexibility in Part 18 would be redundant and difficult to maintain. More detailed, comprehensive procedures are better suited to guidebooks, not the acquisition regulations. The Councils note OFPP has updated its guidance on emergency acquisition flexibilities. That guidance includes more detailed, comprehensive procedures for emergency acquisitions.

(2) *Stress small business participation.* Two commenters recommended that the rule address the overall opportunities for small businesses in emergency acquisitions instead of just addressing the additional flexibilities unique to certain categories of small businesses (*i.e.*, ability to award on a sole source basis to 8(a) firms, Historically Underutilized Business Zone (HUBZone) small business

concerns, and service-disabled veteran-owned small business). The commenter stated that all small businesses should enjoy the same preferences under the rule to ensure the Government has access to the broadest base of qualified small businesses, and recommended revising the rule to encourage agencies to provide the maximum practicable opportunities to all small businesses as required by Part 19.

Response: The rule is not intended to give preference to any category of small businesses. However, it is intended to specify contracting tools available in emergencies and lists those applicable to certain small business categories. The Councils do not have the authority to extend these preferences to all small business categories.

(3) *Additional acquisition flexibilities.* Two commenters recommended referencing the additional flexibilities authorized by the Local Community Recovery Act of 2006 (Pub. L. 109–218) in FAR Part 18, noting that the Councils implemented the Local Community Recovery Act of 2006 at 70 FR 44546 on August 4, 2006. One of those commenters also recommended identifying the exceptions for mandatory sources of supplies and services for Federal Prison Industries, Inc. (FPI) at FAR 8.605 because FPI is not a mandatory source when public exigency requires immediate delivery or performance and certain other conditions are met. The commenter also recommended identifying the exceptions for Trade Agreements because the requirements of FAR 25.4, Trade Agreements, do not apply to acquisitions awarded using other than full and open competition (FAR Subparts 6.2 and 6.3) when the limitation of competition would preclude use of the Free Trade procedures or sole source acquisitions justified in accordance with FAR 13.501(a).

Response: The final rule addresses these additional acquisition flexibilities.

(4) *Reference Buy American Act.* One commenter recommended revising the rule to include a reference to the Buy American Act so contracting officers have a ready reference to the requirements even though emergency acquisitions are not exempt from the Buy American Act.

Response: The rule highlights additional acquisition flexibilities that can be used to facilitate and expedite emergency acquisitions. The rule is not intended to identify the acquisition policies and procedures that are not unique to emergency acquisitions.

(5) *Leasing motor vehicles.* One commenter recommended revising the

rule to identify the ability to lease motor vehicles for a period of less than 60 days without obtaining the certification required by FAR 8.1102(a) since this flexibility may be of interest in the immediate response to an emergency.

Response: The rule does not identify the exception to the certification because the exception is not affected by urgency. The referenced certification is required unless the lease is for types of motor vehicles that have been defined as fuel efficient or an agency has established procedures for advance approvals for leases of larger vehicles on a case-by-case basis.

(6) *Javits-Wagner-O'Day.* One commenter recommended revising FAR 18.106, Javits-Wagner-O'Day (JWOD) specification changes, to say “contracting officers need not comply with the notification requirements” instead of “contracting officers are not held to the notification required.”

Response: The commenter provided no rationale to justify the recommended change. The Councils believe the terminology used in the rule sufficiently conveys the intent of the requirement and therefore, did not revise the terminology.

(7) *Other acquisition flexibilities.* One commenter recommended revising the rule to also address the following in FAR Part 18—

(a) FAR 6.302–1, Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements,

(b) FAR Part 12, Acquisition of Commercial Items,

(c) FAR Part 13, Simplified Acquisition Procedures,

(d) FAR Part 14, Sealed Bidding,

(e) FAR 16.505(a)(3), Use of performance based acquisition methods to the maximum extent possible for orders under indefinite delivery contracts,

(f) Applicable provisions of the Homeland Security Act of 2002, and

(g) Modification of existing contracts.

Response: The commenter did not specify why these items should be addressed in FAR Part 18. The Councils are unaware of any additional flexibilities in the referenced parts and sections that should be addressed in Part 18. The authority under “Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements” is a valid exception to competition whether an emergency is declared or not. The use of FAR Part 12 procedures is not dependent on urgency. FAR Part 13 is addressed in 18.109. FAR Part 14 would not lend itself to Part 18, since sealed bidding procedures are extremely

inflexible. Performance based orders could be issued under indefinite delivery contracts whether an emergency was declared or not. The Homeland Security Act is addressed in FAR 18.204(a). Finally, modifying a contract is not dependent on an emergency or public exigency.

(8) *FAR supplements.* One commenter asked whether DoD and the military departments will need to develop supplemental coverage for their FAR supplements.

Response: DoD and civilian agencies that have additional acquisition flexibilities should address those in their FAR supplements in accordance with agency procedures.

(9) *DoD unique statutory acquisition limitations.* One commenter asked how DoD will ensure less experienced contracting officers are aware of, and will follow, the DoD unique statutory acquisition limitations such as the requirement imposed by Section 854 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 107–107) which requires DoD agencies to comply with certain review and approval requirements before using a non-DoD contract to procure supplies or services in amounts exceeding the simplified acquisition threshold. The commenter said contracting officers may rely on FAR Part 18 unaware that the Defense Federal Acquisition Regulation Supplement (DFARS) includes additional statutory limitations on the acquisition of supplies and services.

Response: FAR Part 18 is not a stand-alone document. Contracting officers must follow all the applicable requirements in the parts and sections cross referenced in Part 18.

(10) *Emergency acquisition flexibilities not covered in FAR.* One commenter recommended modifying Part 18 to also address the emergency acquisition flexibilities that are available to the United States Agency International Development (USAID) and other civilian agencies with foreign emergency responsibilities.

Response: As stated in the preamble to the interim rule, the rule provides a single reference to the acquisition flexibilities already available in the FAR. The international humanitarian and contingency operation flexibilities are not already available in the FAR. Any proposed FAR revisions to incorporate foreign emergency acquisition flexibilities should be prepared and forwarded to the Civilian Agency Acquisition Council in accordance with agency procedures.

(11) *Defense Production Act and the Defense Priorities and Allocations System.* One commenter supported the

reference to the Defense Production Act and the Defense Priorities and Allocations System (DPAS) in connection with emergency acquisitions because contracting officers are not aware of this flexibility. The commenter also recommended revising the rule to advise contracting officers that DPAS can also be used for protection and restoration of critical infrastructure pursuant to 50 U.S.C. App. 2152(14).

Response: The rule provides a single reference to the acquisition flexibilities already available in the FAR. The changes referenced above are not already available in the FAR and are therefore, beyond the scope of this rule. However, the Councils will consider whether additional changes are needed to implement the amended DPAS Regulations.

(12) *Miscellaneous.* (a) One commenter recommended revising the thresholds for the Davis Bacon Act and Service Contract Act to be consistent with other emergency threshold increases instead of waiving the requirements of these Acts during emergencies. The commenter said increasing the thresholds would not require further legislation. Two commenters recommended establishing pre-positioned contracts for registered small businesses. These commenters said the pre-positioned contracts should be open to all small businesses, and not just the ones with additional emergency acquisition flexibilities. Two commenters said the rule does not extend the same emergency acquisition flexibilities to prime contractors. One commenter said the FAR and the rule use multiple terms for urgent needs including "urgent and compelling needs," "urgent and compelling," and "unusual and compelling urgency" which is confusing. The commenter recommended selecting and using one term consistently in the rule and throughout the FAR. One commenter recommended supplementing FAR Part 18 with guidance regarding hiring adequate staff to meet increased acquisition demands, improving training for when and how to use emergency flexibilities, and providing comprehensive contract administration and oversight to reduce waste, fraud, and abuse during emergency acquisitions.

Response: The rule provides a single reference to the acquisition flexibilities already available in the FAR. The recommended policy changes are not included in the FAR and are therefore, beyond the scope of this rule. However, the Councils will consider the advisability of pursuing these recommendations to ensure all

appropriate flexibilities are available to respond to emergency acquisitions.

(b) Two commenters recommended providing regulatory authority for agencies to suspend small business contracting goals during the first 180 days following an emergency declaration or start of a contingency operation because being able to contract with a firm that can do the work should be the more urgent and compelling need in the immediate aftermath of a domestic disaster or contingency operation.

Response: The small business contracting goal is statutory and the Councils have no authority to suspend the program.

(13) *OFPP Guidebook.* One commenter said OFPP should promptly update their May 2003 "Guidance on the Use of Emergency Procurement Flexibilities."

Response: OFPP has updated the Guide.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule makes no change to contracting policy.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Part 18

Government procurement.

Dated: July 30, 2007.

Al Matera,

Acting Director, Contract Policy Division.

Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR part 18, which was published in the **Federal Register** at 71 FR 38247, July 5, 2006, is adopted as a final rule with changes.

PART 18—EMERGENCY ACQUISITIONS

■ 1. The authority citation for 48 CFR part 18 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).

■ 2. Amend section 18.000 by adding paragraph (c) to read as follows:

18.000 Scope of part.

* * * * *

(c) Additional flexibilities may be authorized in an executive agency supplement to the FAR.

18.117 through 18.124 [Redesignated as 18.119 through 18.126]

18.106 through 18.116 [Redesignated as 18.107 through 18.117]

■ 3. Redesignate sections 18.117 through 18.124 as 18.119 through 18.126, respectively, and 18.106 through 18.116 as 18.107 through 18.117, respectively.

18.106 and 18.118 [Added]

■ 4. Add new section 18.106 to read as follows:

18.106 Acquisitions from Federal Prison Industries, Inc. (FPI).

Purchase from FPI is not mandatory and a waiver is not required if public exigency requires immediate delivery or performance (see 8.605(b)).

■ 5. Add new section 18.118 to read as follows:

18.118 Trade agreements.

The policies and procedures of FAR 25.4 may not apply to acquisitions not awarded under full and open competition (see 25.401(a)(5)).

■ 6. Revise paragraph (b) of section 18.203 to read as follows:

18.203 Incidents of national significance, emergency declaration, or major disaster declaration.

* * * * *

(b) *Disaster or emergency assistance activities.* Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In addition, contracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete. (See Subparts 6.6 and 26.2.)

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■ 7. Amend section 18.204 by adding paragraph (b) to read as follows:

18.204 Resources.

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(b) *OFPP Guidelines*. The Office of Federal Procurement Policy (OFPP) "Emergency Acquisitions Guide" is available at http://www.whitehouse.gov/omb/procurement/guides/emergency_acquisitions_guide.pdf. [FR Doc. 07-3797 Filed 8-16-07; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 19, 52, and 53**

[FAC 2005-19; FAR Case 2004-017; Item VII; Docket 2007-001; Sequence 6]

RIN 9000-AK18

**Federal Acquisition Regulation; FAR
Case 2004-017, Small Business Credit
for Alaska Native Corporations and
Indian Tribes**

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 implement section 702 of the Emergency Supplemental Act, 2002, as amended by section 3003 of the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States. The law permits subcontracts awarded to Alaska Native Corporations (ANCs) and Indian tribes to be counted towards a contractor's goals for subcontracting with small business (SB) and small disadvantaged business (SDB) concerns.

DATES: *Effective Date:* September 17, 2007.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-19, FAR case 2004-017.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 702 of the Emergency Supplemental Act, 2002 (Public Law 107-117), as amended by section 3003 of the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States (Public Law 107-206) (43 U.S.C. 1626), provides that subcontracts awarded to ANCs that are considered a minority and economically disadvantaged concern under the criteria at 43 U.S.C. 1626(e)(1), and any of their direct and indirect subsidiary corporations, joint ventures, and partnerships that meet the requirements of 43 U.S.C. 1626(e)(2), shall be counted towards the satisfaction of a contractor's goal for subcontracting with SB and SDB concerns. The law also provides that subcontracts awarded to Indian tribes that are recognized by the Bureau of Indian Affairs in accordance with 25 U.S.C. 1452(c), and Indian-owned economic enterprises that meet the requirements of 25 U.S.C. 1452(e), may be counted towards the satisfaction of a contractor's goal for subcontracting with SB and SDB concerns. Such credit is taken even where the ANC or Indian tribe may be "other than small" under the Small Business Administration (SBA) regulations.

In addition, section 3003 provides that where lower-tier subcontracts exist, the ANC or Indian tribe shall designate the appropriate contractor or contractors to receive credit towards their SB and SDB subcontracting goals. Accordingly, the rule requires that, where one or more subcontractors are in the subcontract tier between the prime contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate contractor(s) to count the subcontract towards its SB and SDB subcontracting goals. In most cases, the appropriate contractor is the contractor that awarded the subcontract to the ANC or Indian tribe. To help avoid possible double counting, the rule requires the ANC or Indian tribe to provide a copy of its written designation to the contracting officer, the prime contractor, and any subcontractors between the prime contractor and ANC or Indian tribe within 30 days of date of award to the ANC or Indian tribe. If the contracting officer does not receive a copy of the ANC or Indian tribe's written designation within 30 days of the subcontract award, the contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated contractor.

The law does not require the ANC or Indian tribe to be eligible for SDB or 8(a)

certification. Similarly, the law does not provide for contractors to count subcontracts awarded to such an entity toward the evaluation of the extent of the participation of SDB concerns in the performance of certain North American Industry Classification System (NAICS) Industry codes unless the entity is certified as an SDB by SBA (FAR Subpart 19.12).

The Councils initially interpreted section 702 of Public Law 107-117, as amended by section 3003 of Public Law 107-206, to allow Indian tribes to be counted towards a contractor's goal for subcontracting with SB concerns but not SDB concerns. Upon further consideration, the Councils believe their initial interpretation was incorrect. Nothing in the plain language of the statute or the legislative history indicates that Congress intended to treat Indian tribes differently than ANCs. In addition, the Councils believe interpreting the statute to treat Indian tribes differently contradicts the intent of other laws (e.g., Small Business Act and Technical Corrections Act of 1994 (Public Law 103-263)) and longstanding Government policy that attempts to eliminate distinctions between the various Indian tribes, including ANCs and Indian-owned economic enterprises. Therefore, the rule allows Indian tribes to also be counted as SDBs.

In addition, the Councils initially interpreted the statute to allow certain entities owned and controlled by ANCs to also be counted towards a contractor's goal for subcontracting with SB and SDB concerns but did not believe the statute authorized entities owned and controlled by Indian tribes to be counted towards a contractor's goal for subcontracting with SB and SDB concerns. Upon further consideration, the Councils believe their initial interpretation was also incorrect. Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. 476), as amended, prohibits departments or agencies from promulgating any regulation or making any decision or determination that classifies, enhances, or diminishes the privileges and immunities available to an Indian tribe relative to other federally recognized tribes. Excluding entities owned and controlled by Indian tribes from the treatment afforded by section 702 of Public Law 107-117, as amended by section 3003 of Public Law 107-206 (43 U.S.C. 1626) to other federally recognized tribes diminishes the privileges available to entities owned and controlled by Indian tribes and enhances the privileges available to entities owned and controlled by ANCs. Therefore, the rule provides the same