

Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

\* \* \* \* \*

■ 5. Amend section 52.225-11 by revising the date of the clause and in paragraph (a) in the definition “Designated country”, revising paragraph (3) to read as follows:

**52.225-11 Buy American Act—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

BUY AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (MAR 2009)

(a) \* \* \*

*Designated Country* \* \* \*

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

\* \* \* \* \*

[FR Doc. E9-5867 Filed 3-18-09; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 26, 31, and 52**

[FAC 2005-31; FAR Case 2008-017; Item V; Docket 2009-0007, Sequence 1]

RIN 9000-AL15

**Federal Acquisition Regulation; FAR Case 2008-017, Federal Food Donation Act of 2008**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the

Federal Food Donation Act of 2008 (Pub. L. 110-247) which encourages executive agencies and their contractors, in contracts for the provision, service, or sale of food, to the maximum extent practicable and safe, to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States.

**DATES:** *Effective Date:* March 19, 2009.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before May 18, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-31, FAR case 2008-017, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008-017” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-017. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2008-017” on your attached document.

- *Fax:* 202-501-4067.

- *Mail:* General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-31, FAR case 2008-017, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:**

Michael Jackson, Procurement Analyst, at (202) 208-4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAR case 2008-017.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Federal Food Donation Act of 2008 (Pub. L. 110-247) (Act) encourages Federal agencies and their contractors to donate excess food to nonprofit organizations serving the needy. The Act requires Federal contracts above \$25,000 for the provision, service, or sale of food in the United States, to include a clause that encourages, but does not require, the donation of excess food to nonprofit organizations. The Act

would also extend to the Government and the contractor, when donating food, the same civil or criminal liability protection provided to donors of food under the Bill Emerson Good Samaritan Food Donation Act of 1996.

The interim rule is applicable to contracts above \$25,000 (greater than \$25,000) for the provision, service, or sale of food in the United States (*i.e.*, food supply or food service). The type of solicitations and contract actions anticipated to be applicable to this law will mostly be for fixed-price commercial services; however, there may be circumstances when a noncommercial and/or cost reimbursement requirement may apply. For example, on an indefinite-delivery, indefinite-quantity (IDIQ) cost reimbursement contract for logistical support to be performed in the United States, there may be a task order needed to provide food service to feed personnel. This FAR change applies to solicitations issued on or after the effective date of this interim rule (see FAR 1.108(d)). Agencies will have to update their automated contract systems to include the clause if the contract calls for the provision, service, or sale of food in the United States. The statute instructed that the FAR be revised to cover the lease or rental of Federal property to a private entity for events at which food is provided in the United States. However, the FAR covers the acquisition of supplies and services (FAR 1.104), but does not cover the outlease of real property. The GSA has jurisdiction over changes to the Federal Management Regulation (FMR) and we anticipate a change in the FMR to address this requirement. The proposed revisions are to the FAR parts 26, 31, and 52. The detailed explanation of the interim rule follows:

1. *Part 26—Other Socioeconomic Programs:* Adds a new Subpart 26.4, Food Donations to Nonprofit Organizations.

a. The Councils anticipate that the majority of solicitation and contract actions that may be applicable to this Act are fixed-price commercial services; therefore, Subpart 26.4 is the most appropriate place to implement this Act. This subpart applies to all contracts greater than \$25,000 for the provision, service, or sale of food in the United States. Executive agencies and contractors are encouraged to donate excess, apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States. Instead of using “above \$25,000” as stated in the Act, the rule uses “greater than \$25,000” which is used throughout the FAR.

b. The definition section, FAR 26.401, adds four definitions from the Act. These definitions are “apparently wholesome food,” “excess food,” “food-insecure” and “nonprofit organization”. The definition for “apparently wholesome food” was expanded to incorporate the language from section (b)(2) of the Bill Emerson Good Samaritan Food Donation Act.

c. The policy section, FAR 26.402, states that the Government encourages executive agencies and their contractors, to the maximum extent practicable and safe, to donate excess apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States.

d. The procedures section, FAR 26.403, provides the details regarding encouraging donations by the contractor to nonprofit organizations, costs and liability. For costs, it is stated that the head of the executive agency shall not assume responsibility of the related costs for the donation by the contractor to the nonprofit organization, nor will the Government reimburse any costs incurred by the contractor for donations of Federal excess food and states that these costs are unallowable in accordance with the change to FAR 31.205–1(f)(8). Finally, for liability, the section states how the executive agency and the contractor making donations pursuant to the Act are exempt from the civil and criminal liability to the extent provided under subsection (c) of the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791).

e. Section FAR 26.404 prescribes that the contracting officer shall insert the clause in solicitations and contracts greater than \$25,000 for the provision, service, or sale of food in the United States (*i.e.*, food supply or food service).

2. *Subpart 31.2, Contracts with Commercial Organizations:* New language is added to Subpart 31.2 — Contracts with Commercial Organizations, section 31.205, Selected Costs, and section FAR 31.205–1, Public relations and advertising costs. FAR 31.205–1(e) lists allowable public relations costs in paragraph (3) which includes the costs of participating in community service activities. Since it is possible to have a cost type contract that may include food supplies and/or services and the Act specifically states that the head of the executive agency shall not assume responsibility for the costs and logistics of collecting, transporting, maintaining the safety of, or distributing excess, apparently wholesome food to food-insecure people in the United States under this Act, section 31.205–1(f), for unallowable

public relations and advertising costs adds paragraph (8) to state any costs associated with the donation of excess food to nonprofit organizations are unallowable.

3. *Part 52—Solicitation Provisions and Contract clauses:* Two clauses are revised and one new clause is added.

a. FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, is revised. This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items. Paragraph (c) allows the contracting officer to indicate which, if any, of the additional clauses are applicable to the specific acquisition. Paragraph (c)(7) adds the clause 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations, if applicable, and the remaining clause is renumbered. Also, in order to incorporate the subcontractor “Flowdown” provision of the clause, paragraph (e) requires the Contractor to flow down specific FAR clauses in a subcontract for commercial items. Paragraph (e)(1)(xii) is revised to add the 52.226–6 clause and the remaining clause is renumbered.

b. FAR 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items), is revised. The contracting officer may use the clause in simplified acquisitions exceeding the micro-purchase threshold that is for other than commercial items. Paragraph (b)(2) of the clause lists additional clauses that may apply. Paragraph (b)(2)(iii) adds the clause 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations, if applicable, and the remaining clause is renumbered.

c. FAR 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations, is a new clause.

Basic terms and conditions for 52.226–6: This clause fully addresses the terms and conditions as the following: when it is applicable, the contractor is encouraged to donate excess food to nonprofit organizations; the contractor, including subcontractors, shall assume all the related costs and support to donate the food and the contractor will not be reimbursed for any costs incurred or associated with the donation; that any costs incurred are unallowable; and the contractor including any subcontractors shall be exempt from civil and criminal liability to the extent provided under the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791).

Additional terms and conditions for 52.226–6: There are two additional terms and conditions included in the clause that go beyond the Act. In paragraph (d), Liability, the last sentence is added to state that nothing in this clause shall be construed to supersede State or local health regulations. This language was taken from the Bill Emerson Good Samaritan Act. It makes it clear to the contractor that they must comply with these regulations, too. In paragraph (e), “Flowdown” is added to encourage the subcontractors to participate in the Federal excess food donation program for actions greater than \$25,000.

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 interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule is not mandatory for contractors, including small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 26, 31, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–31, FAR case 2008–017), in all correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

## D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the provision of the Federal Food Donation Act of 2008 was enacted on June 20, 2008. The Act requires that the FAR be revised to implement this Act no later

than 180 days after the date of enactment. The Councils believe that the interim rule in the FAR will provide the Contracting Officer the relevant regulatory guidance needed when addressing requirements outlined in this rule. This interim rule is applicable to all solicitations and contracts greater than \$25,000 for the provision, service, or sale of food in the United States issued on or after the effective date of the rule. However, pursuant to Pub. L. 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 26, 31, and 52

Government procurement.

Dated: March 13, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 26, 31, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 26, 31, and 52 continues to read as follows:

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

#### PART 26—OTHER SOCIOECONOMIC PROGRAMS

■ 2. Add Subpart 26.4 to read as follows:

##### Subpart 26.4—Food Donations to Nonprofit Organizations

Sec.

26.400 Scope of subpart.

26.401 Definitions.

26.402 Policy.

26.403 Procedures.

26.404 Contract clause.

##### 26.400 Scope of subpart.

This section implements the Federal Food Donation Act of 2008 (Pub. L. 110–247).

##### 26.401 Definitions.

As used in this subpart—

*Apparently wholesome food* means food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions, in accordance with (b)(2) of the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791(b)).

*Excess food* means food that—

- (1) Is not required to meet the needs of the executive agencies; and
- (2) Would otherwise be discarded.

*Food-insecure* means inconsistent access to sufficient, safe, and nutritious food.

*Nonprofit organization* means any organization that is—

- (1) Described in section 501(c) of the Internal Revenue Code of 1986; and
- (2) Exempt from tax under section 501(a) of that Code.

##### 26.402 Policy.

The Government encourages executive agencies and their contractors, to the maximum extent practicable and safe, to donate excess apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States.

##### 26.403 Procedures.

(a) In accordance with the Federal Food Donation Act of 2008 (Pub. L. 110–247) an executive agency shall comply with the following:

(1) *Encourage donations.* In the applicable contracts stated at section 26.404, encourage contractors, to the maximum extent practicable and safe, to donate apparently wholesome excess food to nonprofit organizations that provide assistance to food-insecure people in the United States.

(2) *Costs.* (i) In any case in which a contractor enters into a contract with an executive agency under which apparently wholesome food is donated to food-insecure people in the United States, the head of the executive agency shall not assume responsibility for the costs and logistics of collecting, transporting, maintaining the safety of, or distributing excess, apparently wholesome food to food-insecure people in the United States under this Act.

(ii) The Government will not reimburse any costs incurred by the contractor against this contract or any other contract for the donation of Federal excess foods. Any costs incurred for Federal excess food donations are not considered allowable public relations costs in accordance with 31.205–1(f)(8).

(3) *Liability.* An executive agency (including an executive agency that enters into a contract with a contractor) and any contractor making donations pursuant to this Act shall be exempt from civil and criminal liability to the extent provided under the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791).

##### 26.404 Contract clause.

Insert the clause at 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations, in solicitations and contracts greater than \$25,000 for

the provision, service, or sale of food in the United States.

#### PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Amend section 31.205–1 by revising paragraph (e)(3); and adding paragraph (f)(8) to read as follows:

##### 31.205–1 Public Relations and advertising costs.

(e) \* \* \*

(3) Costs of participation in community service activities (e.g., blood bank drives, charity drives, savings bond drives, disaster assistance, etc.) (But see paragraph (f)(8) of this section.)

\* \* \* \* \*

(f) \* \* \*

(8) Costs associated with the donation of excess food to nonprofit organizations in accordance with the Federal Food Donation Act of 2008 (Pub. L. 110–247)(see FAR subpart 26.4).

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

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraph (c)(7) as paragraph (c)(8); and adding a new paragraph (c)(7); and

■ c. Redesignating paragraph (e)(1)(xii) as paragraph (e)(1)(xiii) and adding a new paragraph (e)(1)(xii).

The revised and added text reads as follows:

##### 52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (MAR 2009)

\* \* \* \* \*

(c) \* \* \*

(7) 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations. (MAR 2009) (Pub. L. 110–247).

\* \* \* \* \*

(e)(1) \* \* \*

(xii) 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations. (MAR 2009) (Pub. L. 110–247). Flow down required in accordance with paragraph (e) of FAR clause 52.226–6.

\* \* \* \* \*

■ 5. Amend section 52.213–4 by—

■ a. Revising the date of the clause; and

■ b. Redesignating paragraphs (b)(2)(iii) and (b)(2)(iv) as paragraphs (b)(2)(iv) and (b)(2)(v), respectively; and adding a new paragraph (b)(2)(iii).

The revised and added text reads as follows:

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

\* \* \* \* \*

#### TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (MAR 2009)

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iii) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations. (MAR 2009) (Pub. L. 110-247) (Applies to contracts greater than \$25,000 that provide for the provision, the service, or the sale of food in the United States.)

\* \* \* \* \*

■ 6. Add section 52.226-6 to read as follows:

#### 52.226-6 Promoting Excess Food Donation to Nonprofit Organizations.

As prescribed in 26.404, insert the following clause:

PROMOTING EXCESS FOOD DONATION TO NONPROFIT ORGANIZATIONS (MAR 2009)

(a) *Definitions.* As used in this clause—

*Apparently wholesome food* means food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.

*Excess food* means food that—

(1) Is not required to meet the needs of the executive agencies; and

(2) Would otherwise be discarded.

*Food-insecure* means inconsistent access to sufficient, safe, and nutritious food.

*Nonprofit organization* means any organization that is—

(1) Described in section 501(c) of the Internal Revenue Code of 1986; and

(2) Exempt from tax under section 501(a) of that Code.

(b) In accordance with the Federal Food Donation Act of 2008 (Pub. L. 110-247), the Contractor is encouraged, to the maximum extent practicable and safe, to donate excess, apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States.

(c) *Costs.* (1) The Contractor, including any subcontractors, shall assume the responsibility for all the costs and the logistical support to collect, transport, maintain the safety of, or distribute the excess, apparently wholesome food to the nonprofit organization(s) that provides assistance to food-insecure people.

(2) The Contractor will not be reimbursed for any costs incurred or associated with the donation of excess foods. Any costs incurred for excess food donations are unallowable.

(d) *Liability.* The Government and the Contractor, including any subcontractors, shall be exempt from civil and criminal

liability to the extent provided under the Bill Emerson Good Samaritan Food Donation Act (42 U.S.C. 1791). Nothing in this clause shall be construed to supersede State or local health regulations (subsection (f) of 42 U.S.C. 1791).

(e) *Flowdown.* The Contractor shall insert this clause in all contracts, task orders, delivery orders, purchase orders, and other similar instruments greater than \$25,000 with its subcontractors or suppliers, at any tier, who will perform, under this contract, the provision, service, or sale of food in the United States.

(End of clause)

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3, 47, and 52

[FAC 2005-31; Item VI; Docket FAR-2009-0003; Sequence 2]

#### Federal Acquisition Regulation; Technical Amendments

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

**ACTION:** Final rule.

**SUMMARY:** This document makes amendments to the Federal Acquisition Regulation in order to make editorial changes.

**DATES:** *Effective Date:* March 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** The Regulatory Secretariat, Room 4041, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-31, Technical Amendments.

#### List of Subjects in 48 CFR Parts 3, 47, and 52

Government procurement.

Dated: March 13, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amends 48 CFR parts 3, 47, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 3, 47, and 52 continues to read as follows:

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

## PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Revise section 3.503-2 to read as follows:

#### 3.503-2 Contract clause.

The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

## PART 47—TRANSPORTATION

#### 47.103-1 [Amended]

■ 3. Amend section 47.103-1 by removing from paragraph (c) “ATTN: FBA, 1800 F Street, NW., Washington, DC 20405” and adding “Transportation Audit Division (QMCA), Crystal Plaza 4, Room 300, 2200 Crystal Drive, Arlington, VA 22202.” in its place.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.225-11 by revising the date in Alternate I; and revising paragraph (b)(1) of Alternate I to read as follows:

#### 52.225-11 Buy American Act—Construction Materials under Trade Agreements.

\* \* \* \* \*

*Alternate I* (MAR 2009). \* \* \*

\* \* \* \* \*

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a - 10d) by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except NAFTA and the Bahrain FTA apply to this acquisition. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). Therefore, the Buy American Act restrictions are waived for designated country construction materials other than Bahrainian or Mexican construction materials.

\* \* \* \* \*

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