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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 10, 12, 13, 18, and 26

[FAR Case 2017-009; Docket No. 2017-0009, Sequence No. 1]

RIN 9000-AN45

Federal Acquisition Regulation: Special Emergency Procurement Authority

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement sections of the National Defense Authorization Act for Fiscal Year 2017 to expand special emergency procurement authorities for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack, provide international disaster assistance under the Foreign Assistance Act of 1961, or support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert date 60 days**

after date of publication in the FEDERAL REGISTER to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2017-009 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FAR Case 2017-009" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Comment Now" that corresponds with "FAR Case 2017-009". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2017-009" on your attached document.
- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite "FAR Case 2017-009" in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Camara Francis, Procurement Analyst, at 202-550-0935 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2017-009".

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of this proposed rule is to implement sections 816 and 1641 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Sections 816 and 1641 modify 41 U.S.C. 1903, Special Emergency Procurement Authority. The revisions to 41 U.S.C. 1903 establish special emergency procurement authorities to allow for higher micro-purchase and simplified acquisition thresholds for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or support responses to an emergency or major disaster (42 U.S.C. 5122), except that

this new authority allows treatment of acquisitions, for property or a service, as a commercial item only for acquisitions to facilitate the defense against or recovery from a cyber attack against the United States.

II. Discussion and Analysis

This proposed rule provides for the following:

1. Definitions.

At FAR 2.101, definitions of "emergency" and "major" disaster" were added to explain two of the new circumstances that can trigger the new emergency procurement authorities. The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) did not add a definition of "cyber attack" because there was no statutory definition, and the Councils did not want to limit the authority of the head of the agency to determine what constituted a cyber attack that should trigger the new authorities. There was also no statutory definition of "international disaster assistance"; however, the reference to 22 U.S.C. 2292 et seq. provides additional guidance.

Under the micro-purchase threshold, paragraph (3), and simplified acquisition threshold, paragraph (1), new language was added to include the expanded special emergency procurement authorities.

2. The new circumstances that allow exercise of the special emergency procurement authorities were added to the relevant provisions that govern the micro-purchase threshold at FAR 13.201(g) (1) and the simplified acquisition procedures for certain commercial items at FAR 13.500(c). However, only the new circumstance of acquiring supplies or services to facilitate defense against or recovery from a cyber attack was added at FAR 12.102(f) (1), because acquisitions of supplies or services under the other new circumstances are not to be treated as an acquisition of commercial items.

3. FAR part 18 provides a summary of emergency acquisition flexibilities throughout the FAR, so the changes in parts 2, 12, and 13 are reflected in conforming changes to part 18.

4. Other conforming changes.

- Cyber attack was added to the policy on market research at FAR 10.001. This section already addresses market research in furtherance of disaster or emergency relief activities.
- At FAR subpart 26.2, Disaster or Emergency Assistance Activities, a new paragraph (b) was added at FAR 26.202 to clarify the link between the

Stafford Act and the increased micro-purchase and simplified acquisition thresholds.

III. Expected Impact of the Proposed Rule and Proposed Cost Savings

Prior to enactment of the NDAA for FY 2017, for acquisitions of supplies or services that are to be used to support a contingency operation, or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, agencies had the authority, as provided in FAR part 13, to utilize the higher micro-purchase threshold (MPT) of \$20,000 in lieu of \$3,500 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States (except for acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate requirements (Construction)). Additionally, prior to the enactment of the NDAA for FY 2017, agencies had the authority, as provided in FAR part 13, to utilize the higher simplified acquisition threshold (SAT) of \$750,000 in lieu of \$150,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and \$1.5 million for any contract to be awarded and performed, or purchase to be made, outside the

United States; and utilize the higher threshold of \$13 million in lieu of \$7 million for use of simplified acquisition procedures (SAP) for the acquisition of commercial items (including acquisitions treated as acquisitions of commercial items to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack).

This proposed rule expands the use of the special emergency procurement authorities to apply to acquisitions of supplies or services that facilitate defense against or recovery from a cyber attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or support a response to an emergency or major disaster (42 U.S.C. 5122).

DoD, GSA, and NASA have performed a regulatory cost analysis on this proposed rule. The following is a summary of the estimated public and Government cost savings, which are calculated in 2016 dollars at a 7 percent discount rate.

Public Cost Savings

This rule will impact all businesses that submit offers in response to Federal solicitations issued for

acquisitions below the MPT and SAT, if the solicitation is for an estimated value that falls within the range between the basic MPT or SAT and the higher threshold now authorized, thereby reducing the requirements imposed on the offerors when responding to the solicitation.

The estimated annualized public savings, using a discount rate of 7 percent is \$1,327,836 (approximately \$677,506 to other than small businesses and \$650,330 to small business), with a present value savings of \$18,969,086.

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at www.regulations.gov, search for "FAR Case 2017-009," click "Open Docket," and view "Supporting Documents."

DoD, GSA, and NASA welcome comments on both the methodology and the analysis during the public comment period for this rule.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new solicitation provisions or clauses, or impact any existing provisions or clauses.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is considered to be an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in Section III of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act codified at 5 U.S.C. 601 et seq. because the rule reduces compliance burdens on small entities.

However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and it is summarized as follows:

This rule implements sections 816 and 1641 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), which amend 41 U.S.C. 1903.

This rule expands special emergency procurement authorities for acquisitions of supplies or services that—

- Facilitate defense against or recovery from a cyber attack;
- Provide international disaster assistance under the Foreign Assistance Act of 1961; or
- Support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

The legal authority for this rule is sections 816 and 1641 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), which amend 41 U.S.C. 1903.

Based on an average of contract actions reported in the Federal Procurement Data System for fiscal years 2014 - 2016, this rule applies to less than 100 small entities that submit offers in response to solicitations for the acquisition of supplies or services—

- Between \$3,500 and \$20,000 or between \$150,000 and \$750,000, to support response to emergencies or major disasters in the U.S.;
- Between \$3,500 and \$30,000 or between \$150,000 and \$1.5 million, to provide international disaster assistance under the Foreign Assistance Act of 1961; and
- Between \$150,000 and \$750,000 to facilitate defense against or recovery from cyber attacks.

This rule reduces compliance requirements on small entities, resulting in estimated savings to affected small entities of approximately \$650,330 in the first year. The professional skill-sets previously required before these threshold increases were mid-level journeyman.

This rule reduces burdens on small entities, based on statutorily increased special emergency procurement authority. There are no alternatives consistent with the statute that would further reduce burdens on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017-009) in correspondence.

VIII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that would require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 10, 12, 13, 18, and 26

Government Procurement.

Dated: June 21, 2018.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 2, 10, 12, 13, 18, and 26 as set forth below:

1. The authority citation for 48 CFR parts 2, 10, 12, 13, 18, and 26 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b) (2) by—

a. Adding in alphabetical order the definitions "Emergency" and "Major disaster";

b. Revising paragraph (3) of the definition "Micro-purchase threshold"; and

c. Revising paragraph (1) of the definition "Simplified acquisition threshold".

The additions and revisions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Emergency, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect

property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. 5122).

* * * * *

Major disaster, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. 5122).

* * * * *

Micro-purchase threshold * * *

* * * * *

(3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense

against or recovery from cyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an emergency or major disaster (42 U.S.C. 5122), as described in 13.201(g) (1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903)–

(i) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

Simplified acquisition threshold means \$150,000 (41 U.S.C. 134), except for–

(1) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from

the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an emergency or major disaster (42 U.S.C. 5122), (41 U.S.C. 1903), the term means—

(i) \$750,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) \$1.5 million for any contract to be awarded and performed, or purchase to be made, outside the United States; and

* * * * *

PART 10—MARKET RESEARCH

10.001 [Amended]

3. Amend section 10.001 by removing from paragraph (a) (2) (vi) (A) "recovery from" and adding "recovery from cyber," in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

4. Amend section 12.102 by removing from paragraph (f) (1) "recovery from" and adding "recovery from cyber," in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

5. Amend section 13.201 by revising paragraph (g) to read as follows:

13.201 General.

* * * * *

(g) (1) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an emergency or major disaster (42 U.S.C. 5122), the micro-purchase threshold is—

(i) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

(2) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation; or the defense against or recovery

from cyber, nuclear, biological, chemical, or radiological attack; international disaster assistance; or an emergency or major disaster.

* * * * *

6. Amend section 13.500 by revising paragraph (c) (1) to read as follows:

13.500 General.

* * * * *

(c) * * *

(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation; to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster; or

* * * * *

PART 18—EMERGENCY ACQUISITIONS

7. Amend section 18.001 by—
a. Revising paragraph (b);

b. Redesignating paragraph (c) as paragraph (d);
and

c. Adding a new paragraph (c).

The revision and addition read as follows:

18.001 Definition.

* * * * *

(b) To facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack against the United States;

(c) In support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance; or

* * * * *

8. Revise section 18.202 to read as follows:

18.202 Defense or recovery from certain events.

(a) Micro-purchase threshold. The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 2.101.)

(b) Simplified acquisition threshold. The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 2.101.)

(c) Treating certain items as commercial. Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial items if the head of the agency determines the acquisition is to be used to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(c)(2).)

(d) Simplified procedures for certain commercial items. The threshold limits authorized for use of this authority may be increased when it is determined the acquisition is to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 13.500(c).)

PART 26—OTHER SOCIOECONOMIC PROGRAMS

9. Revise the heading for subpart 26.2 to read as follows:

**Subpart 26.2—Major Disaster or Emergency Assistance
Activities**

* * * * *

10. Amend section 26.202 by designating the undesignated paragraph as paragraph (a) and adding paragraph (b) to read as follows:

26.202 Local area preference.

* * * * *

(b) When using the authority under the Stafford Act, see the definitions of “micro-purchase threshold” and “simplified acquisition threshold” in 2.101 for the authority to use an increased micro-purchase threshold and simplified acquisition threshold.

Billing Code: 6820-EP

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