DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR–2007–0002, Sequence 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–22; Introduction

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

ACTION: Summary presentation of final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–22. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov*.

DATES: For effective dates and comment dates, see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–22 and the specific FAR case number(s). For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–22

Item	Subject	FAR case	Analyst
I	Implementation of Section 104 of the Energy Policy Act of 2005	2006–008	Clark.
II	Contractor Code of Business Ethics and Conduct	2006–007	Woodson.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–22 amends the FAR as specified below:

Item I—Implementation of Section 104 of the Energy Policy Act of 2005 (FAR Case 2006–008)

This final rule implements Section 104 of the Energy Policy Act of 2005. Section 104 requires that all acquisitions of energy consuming-products and all contracts that involve the furnishing of energy-consuming products require acquisition of ENERGY STAR® or Federal Energy Management Program (FEMP) designated products. The final rule provides a clause for the Contracting Officer to insert in solicitations and contracts to ensure that suppliers and service and construction contractors recognize when energy-consuming products must be ENERGY STAR® or FEMP-designated.

Item II—Contractor Code of Business Ethics and Conduct (FAR Case 2006–007)

This final rule amends Federal Acquisition Regulation (FAR) Parts 2, 3, and 52 to address the requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters. In response to public comments, this final rule reduces the burden on small entities by making the requirements for a formal training program and internal control system inapplicable to small businesses. If a small business subsequently finds itself in trouble ethically during the performance of a contract, the need for a training program and internal controls will likely be addressed by the Federal Government at that time, during a criminal or civil lawsuit or debarment or suspension.

Dated: November 16, 2007.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–22 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 2005–22 is effective December 24, 2007.

Dated: November 15, 2007.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: November 16, 2007.

Al Matera,

Acting Deputy Chief Acquisition Officer, Office of the Chief Acquisition Officer, General Services Administration.

Dated: November 14, 2007.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 07–5798 Filed 11–21–07; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, 23, 36, and 52

[FAC 2005–22; FAR Case 2006–008; Item I; Docket 2006–020; Sequence 12]

RIN 9000–AK63

Federal Acquisition Regulation; FAR Case 2006–008, Implementation of Section 104 of the Energy Policy Act of 2005

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 address implementation of Section 104 of the Energy Policy Act of 2005.

DATES: *Effective Date*: December 24, 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 2005–22, FAR case 2006–008.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 70937, December 7, 2006. The rule proposed to amend FAR Parts 23, 36, and 52 to ensure compliance with the Federal mandate to promote energy efficiency when specifying or acquiring energy-consuming products. This mandate stems from Section 104 of the Energy Policy Act of 2005. Section 104 requires that all acquisitions of energy consuming-products and all contracts that involve the furnishing of energy-consuming products require acquisition of ENERGY STAR® or Federal Energy Management Program (FEMP) designated products.

On February 5, 2007, the public comment period closed. Seven respondents submitted comments on the proposed rule (3 associations/coalitions, 3 Government agencies or offices, and 1 Government employee).

1. Voice positive support for the clause.

Comment: Three respondents all voice positive support for the proposed clause at FAR 52.223–15, Energy Efficiency in Energy-Consuming Products. One respondent states that adding the clause will make ENERGY STAR®/Federal Energy Management Program (FEMP)-designated products an enforceable part of contracts, which will make it easier to comply with the environmentally friendly purchasing regulations. Another respondent states that it supports the proposal as written. This respondent notes in particular that it is important to have a contract clause for ENERGY STAR® and FEMP-designated products. A third respondent supports the draft FAR clause implementing the Energy Act of 2005, because this will promote the overall goal to proactively develop programs to reduce the environmental impacts of industries' manufacturing processes and products throughout their entire life cycle.

Response: None required.

2. Recommend deletion of clause.

Comment: Although one respondent fully supports the policy of promoting the acquisition of energy-efficient products by both the Federal Government and commercial buyers, the respondent believes that the new mandatory FAR clause would place an unnecessary and unreasonable burden on contractors. According to this respondent, the Energy Policy Act suggests that the procuring agency should bear the burden of making sure that it buys an ENERGY STAR® or FEMP-designated product when such a product is available and cost-effective. This approach has been effective. The proposed rule does not explain why it is now necessary to change this approach, other than the statement that ''agencies often overlook including the pre-existing requirements in FAR 23.203 in contract specifications.'' The respondent states three reasons why shifting the burden of compliance to the contractor is a heavy risk.

- ENERGY STAR® compliance is not guaranteed for the life of the product model. If new standards come out, the product may lose its ENERGY STAR® compliance and must remove the label. The producer (or reseller) could no longer provide the product to the Government under any contract that included the proposed clause.
- Whether a product is compliant with the ENERGY STAR® qualifications can change after the Government takes possession. Procuring agencies often modify products delivered by contractors, transforming a product that was compliant into one that does not meet the qualifications. The potential impacts of the proposed rule would be amplified for Federal Supply Schedule (FSS) vendors who deliver products to the Government under delivery orders. Through enhancements of the buying agency, the product might be changed in such a way that it no longer meets the ENERGY STAR® standards.
- An agency generally will not be in a position to determine if an ENERGY STAR® or FEMP-designated product is available or life-cycle cost-effective until it makes its source selection decision. Putting the proposed clause in solicitations would discourage all potential offerors whose products are not ENERGY STAR® or FEMP-designated to forego the competition. Therefore, the respondent suggests that at least the clause should not be included in solicitations.

Response: The Councils do not agree that including a clause causes an unreasonable burden on contractors. It is no more burden than including the requirement in the specifications. The rationale provided in the **Federal Register** notice that agencies are neglecting to include the requirement in the specifications provides adequate rationale for the need for a clause. In response to the three reasons to delete the clause offered by the respondent—

- The Councils agree that some change in wording may help clarify that it is not the intent of the clause to require changes after contract award. If the product is ENERGY STAR® compliant or a FEMP-designated product at the time of contract award, then delivery or furnishing of that product will be acceptable for the life of the contract (see change at 52.223–15(b)).
- Any change to a product after the Government takes possession would have no impact on the contractor. The contractor has fulfilled its obligation upon delivery. Ordering activities should not be placing orders for products on the Federal Supply Schedules that are modified in such a way that the product no longer meets ENERGY STAR® Standards. In such circumstances, the agency should award a contract, without the clause at 52.223–15, rather than ordering off the schedule.
- The third reason appears to apply to delivery of compliant end products. It is necessary to include the clause in the solicitation, so that offerors know the expectations of the agency. The agency should do market research in advance of the solicitation, to determine whether ENERGY STAR® or FEMP-designated products are available that meet the agency needs and are cost-effective over the life of the product, so that the clause is not included if the agency can determine in advance that an exception applies. If the clause is included in the solicitation, it includes language that the requirement may be waived by the contracting officer. Therefore, there is no prohibition against an offer of noncompliant products, but the Government is not encouraging submission of such offers. If the contracting officer determines after receipt of offers that no compliant products are available that meet the agency needs and are cost-effective over the life of the product, then it may be appropriate to amend the solicitation, and the clause need not be included in the contract.

3. Approval level for exemptions.

Comment: One respondent thinks that ''agency head'' is too high an approval authority for the exemptions at 23.205

in the proposed rule. (Note: The Councils have renumbered section 23.205 as 23.204 in the final rule.) The respondent recommends changing to ''agency head or his/her designee'' or ''head of the contracting activity.''

Response: According to FAR drafting conventions, the phrase ''or designee'' should not be used in the FAR. FAR 1.108(b) states that each authority is delegable unless specifically stated otherwise (see 1.102–4(b)).

4. Exemptions at 23.205 do not match exemptions in paragraph (c) of the clause.

Comment: One respondent recommends that the exceptions as proposed in paragraph (c) of the clause should be the same as stated in the proposed text at 23.205.

Response: The proposed FAR 23.205 is entitled, ''Procurement Exemptions'' and goes on to describe two circumstances in which an agency is not required to procure ENERGY STAR® qualified or FEMP-designated products: namely, if the head of the agency determines in writing either that no qualified or designated product is reasonably available that meets the agency's functional requirements, or that no qualified or designated product is cost-effective over the life of the contract. If the agency head makes either of these written determinations, the proposed clause at FAR 52.223–15 never appears in the solicitation. As such, the solicitation would be consistent with the policies defined in the proposed FAR 23.205.

Even if the head of the agency does not make the written determinations before issuance of the solicitation, and the clause does appear in the solicitation, there is no apparent inconsistency. The key issue with regard to the difference between the statement of the exemptions at 23.205 and in the clause at paragraph (c) is that the proposed text at 23.205 is addressed to the agency and the clause is addressed to the contractor. FAR 23.205 provides criteria for the agency to determine that use of the clause is not required. However, if the clause is included in the solicitation/contract, the contractor can determine whether ENERGY STAR® or FEMP-designated products are listed, but only the contracting officer could provide the determination whether listed products meet the needs of the agency or whether such products would be cost effective over the life of the product. Therefore, the contractor must rely on written approval from the contracting officer for these exemptions.

5. Object to proposed statement that exemptions should be rare (FAR 23.205(b)).

Comment: Three respondents object to the statement at FAR 23.205(b) that it should be rare for a determination to be made that no ENERGY STAR® or FEMP-designated product is cost-effective over the life of the product taking energy cost savings into account. They recommend deletion of the language for the following reasons:

• The language is overly broad and a blanket declaration that a determination ''should be rare'' is not supported. Depending on the product, it could be common that extra costs for an ENERGY STAR® product are not justified by the energy cost savings. The qualifying specifications for a product to be considered as an ENERGY STAR® or FEMP-designated product are ever evolving. The periodic update of the specifications may mean that products considered to be energy-efficient today may not be eligible for the ENERGY STAR® label when the updated specification is introduced. Therefore, it doesn't make sense to limit the use of the life-cycle cost exception by claiming that the determination should be rare.

• The statement lacks statutory basis.

• The language is unnecessary and will discourage agencies from waiving the requirement to purchase an ENERGY STAR® product—even when procuring such a product would not be life-cycle cost-effective.

Response: The Councils agree that the statement ''Such determinations should be rare as such products are normally life cycle cost effective'' may be presumptuous in that the accuracy of the statement is dependent on the product in question and various governing label standards. The intent of the statement was to state a probability, not impose a condition on agency heads. Product life-cycle cost effectiveness is considered by the Department of Energy and the Environmental Protection Agency in the process of identifying ENERGY STAR® or FEMP-designated performance levels. ENERGY STAR®-qualified and FEMP-designated products are assumed to be life-cycle cost-effective under typical operating conditions and energy prices. The agency head may waive the requirements if the agency head determines that no ENERGY STAR® or FEMP-designated product is cost effective over the life of the product, regardless of the number of such waivers already granted. The Councils have deleted the language that was proposed at 23.205(b).

6. Impact on small business.

Comment: One respondent suggests that the statement at 23.205(b) that exemptions for life-cycle cost should be rare (see previous Section A.5.) has a particularly negative impact on small businesses, which do not have the resources comparable to large businesses to devote to developing new energy efficient technologies. According to this respondent, small businesses are at a competitive disadvantage and less likely to obtain the ENERGY STAR® label. The respondent concludes that such businesses will therefore be more reliant on the exceptions in the Energy Policy Act. The respondent recommends that the Councils revisit the conclusion that the proposed rule will not have a significant impact on small businesses and delete the unnecessary language proposed at FAR 23.205(b).

Response: As discussed in the previous section A.5., the Councils have agreed to delete the proposed language that exemptions for life-cycle cost should be rare.

Furthermore, the proposed rule does not change the requirements to obtain the ENERGY STAR® label. The criteria of obtaining the ENERGY STAR® label apply equally to small and large businesses. The respondent offers no evidence that small businesses are unable to obtain the ENERGY STAR® label. Comments on the ability of a small business to obtain the ENERGY STAR® label should be addressed to the EPA and the Department of Energy and are outside the parameters of this rule. Therefore, the Councils re-affirm the statement in the preamble to the proposed rule, that the rule is not expected to significantly impact small businesses because the rule only emphasizes existing requirements. See also Section B., Regulatory Flexibility Analysis.

7. Clarify that prescription applies even if Government does not take title.

Comment: One respondent suggests clarifying the proposed FAR 23.207(b) to indicate that products furnished by contractors while performing at a Federally-controlled facility must meet the ENERGY STAR®/FEMP requirements regardless of whether the Government receives title at the end of contract performance.

Response: The Councils did not agree to any change to the proposed rule in response to this comment. Since no exclusions are listed, all energy consuming products furnished by a contractor at a Government facility are covered by the rule, whether or not the Government takes title. FAR 23.207(b) (now 23.206(b)) already makes it clear that we are not just applying the rule to

end products delivered by the Contractor and accepted by the Government.

8. Consistency of language between clause prescription, 52.213–4(b), and paragraph (b) of the clause.

Comment: One respondent points out that the clause prescription does not match the paragraph (b) of the clause 52.223–15. The respondent recommends changes to the clause as follows:

• (b)(1)—Change ''Delivered'' to ''Delivered by the contractor''.

• (b)(3) and (4)—Combine into one paragraph to read ''Specified in the design construction, renovation or maintenance of a facility, including any article, material, or supply to be incorporated into the facility or work, regardless of whether the designs, plans, or specifications utilized have been prepared by an architect-engineer.''

Response: The Councils reviewed the proposed language at 23.207, 52.213–4(b)(1)(viii) (which duplicates 23.207), and 52.223–15(b), and agreed to make the language consistent in the prescription and clauses.

The Councils concluded that the statement ''delivered'' was sufficient and not ambiguous. When discussing contractual requirements, ''delivered'' always applies to the contractor (or its subcontractors). Although a requirement for the contractor to deliver a particular item legally would require the contractor to ensure that any item delivered by a subcontractor met the same requirements, the Councils have added in paragraph (c) of the clause that the requirements of paragraph (b) apply to the contractor (including any subcontractors).

The Councils did not agree to any change to the phrase ''furnished by the contractor.'' There was no substantive inconsistency here between text and clause, and the term ''furnished'' could imply ''furnished by the Government'' as Government-furnished property, so including the term ''by the contractor'' makes it unambiguous. The Councils added language to include products ''acquired by the contractor for use in performing services at a Federally-controlled facility'' and products ''furnished by the contractor for use by the Government.''

The Councils agreed to change prescription, 52.213–4, and paragraphs (b)(3) and (4) of the clause to clarify that ''specified'' applies to the design phase, and ''incorporation'' applies to the phase of construction, renovation, or maintenance. In addition, the word ''building or work'' is substituted for facility, because it is a defined term, used currently with regard to construction in Parts 22 and 25. The definition of this term has been moved from 22.4 to Part 2, because it is used in more than one FAR part.

9. Rule should cover other energy savings.

Comment: One respondent recommends that the rule should be expanded to cover water conserving products and low standby power. Although the respondent recognizes that these issues could be addressed in another FAR case at a later time, the respondent points out advantages of combining these new ideas in this case, because of similarity of purpose and urgency of achieving energy efficiency more quickly.

Response: The underlying rationale for the current FAR case is implementation of Section 104 of the Energy Policy Act. Section 104 of the Act makes no mention of low standby power or water efficiency and such coverage is outside the scope of this case.

However, in considering whether such coverage would be necessary or desirable, the Councils have determined that low standby power is one of the FEMP energy attributes and is already included at FAR 23.203. Low standby power is addressed separately at FAR 23.203 because there is a separate Executive order related to low standby power. However, separate mention in the clause is unnecessary. If acquiring a product that has standby power requirements, one would be expected to deliver, furnish, or specify a product meeting the FEMP designation.

Water efficient products are also covered to some extent by FEMP and ENERGY STAR®. For example, FEMP covers faucets, shower heads, and urinals. Although water efficiency is not the primary focus of ENERGY STAR®, it is also one of the factors that is considered in rating the energy efficiency of such appliances as washing machines or dishwashers. To the extent that FEMP or ENERGY STAR® standards cover water efficient products, they are covered by the proposed FAR clause. If there is a need to expand the focus on water efficiency, it needs to be achieved through expansion of the coverage of water efficient products by ENERGY STAR® or FEMP.

10. Other changes to the proposed rule.

• ''Energy-efficient product'' is already defined in FAR Part 2, and within that definition, are the descriptions of ENERGY STAR® and FEMP. Therefore, the proposed definition of ''FEMP-designated product'' at FAR 23.201 and in the clause have been deleted, and the restriction on the meaning of the term ''product'' has been added to the definition of ''energy-efficient product'' in FAR Part 2. This revised definition of ''energy-efficient product'' has been added to the clause.

• The website for FEMP has been updated, both in the text at FAR 23.204 (now 23.203) and paragraph (d) of the clause.

• The statutory cite has been added at 52.212–5(b)(26).

This is not a significant regulatory action and, therefore, is not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. The 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 it only emphasizes existing requirements. Whereas the Councils recognize that the rule may affect small entities performing contracts for those agencies that have not fully implemented the program in service and construction contracts, public comments did not indicate that the number of entities affected, or the extent to which they will be affected, will be significant. The rule may affect the types of products these businesses use during contract performance. Assistance (including product listings and recommendations) is available to all firms at the ENERGY STAR® and FEMP websites, *http://www.energystar.gov/products* and *http://www1.eere.energy.gov/femp/procurement/eep__requirements.html*, respectively. Options to comply with the requirements of the rule can be as simple as purchasing ENERGY STAR® or FEMP-designated products when performing service and construction contracts. The final rule has eliminated the one aspect of the proposed rule that was criticized in a public comment as having a potentially adverse impact on small businesses. No Initial or Final Regulatory Flexibility Analysis has, therefore, been performed.

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 2, 22, 23, 36, and 52

Government procurement.

Dated: November 16, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 22, 23, 36, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 22, 23, 36, 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order the definition ''Building or work''; and revising the definition ''Energy-efficient product'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Building or work means construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies, or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not ''building'' or ''work'' within the meaning of this definition unless conducted in connection with and at the site of such building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

* * * * *

Energy-efficient product— (1) Means a product that—

(i) Meets Department of Energy and Environmental Protection Agency criteria for use of the Energy Star trademark label; or

(ii) Is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program.

(2) As used in this definition, the term ''product'' does not include any energy-consuming product or system designed or procured for combat or combat-related missions (42 U.S.C. 8259b).

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.401 [Amended]

■ 3. Amend section 22.401 by removing the definition ''Building or work''.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 4. Amend section 23.201 by revising paragraph (b) to read as follows:

23.201 Authorities.

* * * * *

(b) National Energy Conservation Policy Act (42 U.S.C. 8253, 8259b, 8262g, and 8287).

* * * * *

■ 5. Revise section 23.203 to read as follows:

23.203 Energy-efficient products.

(a) Unless exempt as provided at 23.204—

(1) When acquiring energy-consuming products listed in the ENERGY STAR® Program or Federal Energy Management Program (FEMP)—

(i) Agencies shall purchase ENERGY STAR® or FEMP-designated products; and

(ii) For products that consume power in a standby mode and are listed on FEMP's Low Standby Power Devices product listing, agencies shall—

(A) Purchase items which meet FEMP's standby power wattage recommendation or document the reason for not purchasing such items; or

(B) If FEMP has listed a product without a corresponding wattage recommendation, purchase items which use no more than one watt in their standby power consuming mode. When it is impracticable to meet the one watt requirement, agencies shall purchase items with the lowest standby wattage practicable; and

(2) When contracting for services or construction that will include the provision of energy-consuming products, agencies shall specify products that comply with the applicable requirements in paragraph (a)(1) of this section.

(b) Information is available via the Internet about—

(1) ENERGY STAR® at *http://www.energystar.gov/products*; and

(2) FEMP at *http://www1.eere.energy.gov/femp/procurement/eep__requirements.html*.

23.204 [Redesignated as 23.205]

■ 6. Redesignate section 23.204 as new section 23.205.

■ 7. Add new section 23.204 to read as follows:

23.204 Procurement exemptions.

An agency is not required to procure an ENERGY STAR® or FEMP-designated product if the head of the agency determines in writing that—

(a) No ENERGY STAR® or FEMP-designated product is reasonably available that meets the functional requirements of the agency; or

(b) No ENERGY STAR® or FEMP-designated product is cost effective over the life of the product taking energy cost savings into account.

■ 8. Add new section 23.206 to read as follows:

23.206 Contract clause.

Unless exempt pursuant to 23.204, insert the clause at 52.223–15, Energy Efficiency in Energy-Consuming Products, in solicitations and contracts when energy-consuming products listed in the ENERGY STAR® Program or FEMP will be—

(a) Delivered;

(b) Acquired by the contractor for use in performing services at a Federally-controlled facility;

(c) Furnished by the contractor for use by the Government; or

(d) Specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 9. Amend section 36.601–3 by redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

36.601–3 Applicable contracting procedures.

(a)(1) * * *

(2) Facility design solicitations and contracts that include the specification of energy-consuming products must comply with the requirements at subpart 23.2.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.212–5 by revising the clause date to read ''(DEC 2007)''; redesignating paragraphs (b)(26) through (b)(38) as paragraphs (b)(27) through (b)(39); and adding a new paragraph (b)(26) to read as follows:

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

* * * * *

(b) * * *

(26) FAR 52.223–15, Energy Efficiency in Energy-Consuming Products (DEC 2007) (42 U.S.C. 8259b).

* * * * *

■ 11. Amend section 52.213–4 by revising the clause date to read ''(DEC 2007)''; redesignating paragraphs (b)(1)(viii) through (b)(1)(xi) as paragraphs (b)(1)(ix) through (b)(1)(xii); and adding a new paragraph (b)(1)(viii) to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(viii) 52.223–15, Energy Efficiency in Energy-Consuming Products (DEC 2007) (42 U.S.C. 8259b) (Unless exempt pursuant to 23.204, applies to contracts when energy-consuming products listed in the ENERGY STAR® Program or Federal Energy Management Program (FEMP) will be—

(A) Delivered;

(B) Acquired by the Contractor for use in performing services at a Federally-controlled facility;

(C) Furnished by the Contractor for use by the Government; or

(D) Specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance.)

* * * * *

■ 12. Section 52.223–15 is added to read as follows:

52.223–15 Energy Efficiency in Energy-Consuming Products.

As prescribed in 23.206, insert the following clause:

ENERGY EFFICIENCY IN ENERGY-CONSUMING PRODUCTS (DEC 2007)

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

Energy-efficient product— (1) Means a product that—

(i) Meets Department of Energy and Environmental Protection Agency criteria for use of the Energy Star trademark label; or

(ii) Is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program.

(2) The term ''product'' does not include any energy-consuming product or system designed or procured for combat or combat-related missions (42 U.S.C. 8259b).

(b) The Contractor shall ensure that energy-consuming products are energy efficient products (*i.e.*, ENERGY STAR® products or FEMP-designated products) at the time of contract award, for products that are—

(1) Delivered;

(2) Acquired by the Contractor for use in performing services at a Federally-controlled facility;

(3) Furnished by the Contractor for use by the Government; or

(4) Specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance.

(c) The requirements of paragraph (b) apply to the Contractor (including any subcontractor) unless—

(1) The energy-consuming product is not listed in the ENERGY STAR® Program or FEMP; or

(2) Otherwise approved in writing by the Contracting Officer.

(d) Information about these products is available for—

(1) ENERGY STAR® at *http://www.energystar.gov/products*; and

(2) FEMP at *http://www1.eere.energy.gov/femp/procurement/eep__requirements.html.*

(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, and 52

[FAC 2005–22; FAR Case 2006–007; Item II; Docket 2007–0001; Sequence 1]

RIN 9000–AK67

Federal Acquisition Regulation; FAR Case 2006–007, Contractor Code of Business Ethics and Conduct

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 address the requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters.

DATES: *Effective Date*: December 24, 2007

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–22, FAR case 2006–007.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 7588, February 16, 2007, to address the requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters. The original comment period closed on April 17, 2007, but on April 23, 2007, the comment period was reopened and extended to May 23, 2007. We received comments from 42 respondents plus an additional late comment from one of the initial respondents. However, 15 of the respondents were only requesting extension of the comment period. The remaining 27 public comments are addressed in the following analysis.

The most significant changes, which will be addressed, are—

- The clause requirement for a formal training program and internal control system has been made inapplicable to small businesses (see paragraph 5.c.v. and 11. of this section);
- The contracting officer has been given authority to increase the 30 day time period for preparation of a code of business ethics and conduct and the 90 day time period for establishment of an ethics awareness and compliance program and internal control system, upon request of the contractor (see paragraph 6.c. of this section);
- The requirements in the internal control system relating to ''disclosure'' and ''full cooperation'' have been deleted, and moved to FAR Case 2007–006 for further consideration (see paragraphs 2.e. and 6.d. of this section);
- The clause 52.203–XX with 3 alternates has been separated into 2 clauses, one to address the contractor code of business ethics and conduct, and one to address the requirements for hotline posters (see paragraphs 3.h. and 10.b. of this section); and
- A contractor does not need to display Government fraud hotline posters if it has established a mechanism by which employees may