

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3, 9, 12, and 52

[FAR Case 2007-006; Docket 2007-0001;  
Sequence 11]

RIN 9000-AK80

#### Federal Acquisition Regulation; FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting (2nd Proposed Rule)

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

**ACTION:** Proposed rule; additional changes proposed.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are seeking comments on changes to the proposed rule, FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, published in the **Federal Register** at 72 FR 64019, November 14, 2007, for which the initial comment period has closed, that may be included in the final rule. The Councils do not contemplate publishing a final or interim rule until public comments are received and considered on the specific changes discussed further in this document.

**DATES:** Interested parties should submit written comments to the FAR Secretariat on or before July 15, 2008 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR case 2007-006 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2007-006" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2007-006. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if

any), and "FAR Case 2007-006" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAR case 2007-006 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:

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 FAR case 2007-006.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Councils published FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, as a proposed rule in the **Federal Register** at 72 FR 64019, November 14, 2007. The proposed rule was published, at the request of the Department of Justice (DOJ), in order to—

- Require contractors to have a code of ethics and business conduct;
- Establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of Government contracts or subcontracts; and
- Notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to such contracts or subcontracts.

The proposed rule was a follow-on case to FAR Case 2006-007, published as a final rule in the **Federal Register** on November 23, 2007 (72 FR 65873).

Thirty three respondents commented on the proposed rule. The Councils currently are reviewing the comments and are considering changes to the proposed rule.

- The public and other interested parties have expressed concerns about—
  - The proposed exemption for contracts to be performed entirely outside the United States; and
  - The proposed exemption for contracts for the acquisition of commercial items.
- In addition, the Department of Justice (DOJ) proposes to add a requirement for contractors to report violations of the civil False Claims Act, and add knowing failure to timely report such violations as an additional

cause for debarment or suspension to FAR Subpart 9.4.

Therefore, the Councils are seeking comments and recommendations regarding the changes to the proposed rule FAR text listed later in this notice. This notice includes only the sections of the proposed rule affected by these changes, summarized as follows:

(1) *Require inclusion of the clause FAR 52.203-13 in contracts and subcontracts that will be performed outside the United States (see FAR 3.1004 and 52.203-13(d) in the initial proposed rule).* This change would result in making the clause requirements for a contractor code of business ethics and conduct, business ethics awareness and compliance program, and internal control system applicable to contracts performed outside the United States.

The exemption from the requirement to include the clause 52.203-13 in contracts and subcontracts to be performed entirely outside the United States was a carry-over from the proposed and final rules under FAR Case 2006-007, which addressed both contractor code of business ethics and conduct and the use of fraud hotline posters. The final rule under FAR case 2006-007 relied heavily on the Defense Acquisition Regulations System (DFARS) coverage of contractor business ethics and hotline posters (see 48 CFR 203.70 and 48 CFR 252.203-7002). The DFARS clause on hotline posters does not apply to overseas contracts or to commercial items. There is no DFARS clause on contractor code of business ethics and conduct, just recommended guidelines. When the Councils added the clause at FAR 52.203-13 to contractually require a contractor code of business ethics and conduct, the same exemptions as applied to the hotline posters were perpetuated. The proposed rule under 2007-006, which was issued on an extremely expedited basis, did not propose change to the exemption for overseas contracts that was initiated under FAR case 2006-007. After publication of the proposed rule under 2007-006, DOJ and other respondents expressed concern about the overseas exemption.

The Councils note that the proposed rule did not exempt contracts that will be performed entirely outside the United States from all the requirements of the proposed rule. The proposed rule—

- Applied the proposed debarment/suspension for knowing failure to timely disclose an overpayment on a Government contract or violations of Federal criminal law in connection with the award or performance of any

Government contract or subcontract, to all contracts, whether domestic or overseas.

- Applied the policy demanding integrity and honesty (see FAR 3.1002) to all contractors.

- Only exempted contracts to be performed entirely outside the United States from inclusion of the clause.
- Had a clause requirement for an internal control system which mandated an internal reporting mechanism by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports on any of the contractor's contracts or subcontracts, whether overseas or domestic.

(2) *Require inclusion of the clause at FAR 52.203-13 in contracts (and subcontracts) for all acquisitions of a commercial item.* However, just like small businesses, a formal business ethics awareness and compliance program and internal control system are not required in contracts and subcontracts for the acquisition of commercial items. This would have the effect of applying to contracts for the acquisition of commercial items the requirements for—

- A written code of business ethics;
- Preventing and detecting criminal conduct; and
- Notifying, in writing, when the contractor has reasonable grounds to believe that violations of the civil False Claims Act or Federal criminal law have occurred in connection with the award or performance of this contract or any subcontract thereunder.

This is in some ways more fair to contractors providing commercial items, because even though the clause was not included in contracts for the acquisition of commercial items, the contractors were still subject under the initial proposed rule to debarment or suspension for knowing failure to notify the Government of violations of Federal criminal law in connection with the award or performance of the contract (or subcontract). Now the requirement to report violations is explicitly stated in the contract.

(3) *Add a new cause for suspension or debarment to the current lists at FAR 9.407-2 and 9.406-2, respectively.* For suspension, the new cause would be adequate evidence of a knowing failure to timely disclose the violation of the civil False Claims Act in connection with the award or performance of any Government contract, or subcontract thereunder. For debarment, the new cause would be a preponderance of the evidence of a knowing failure to timely disclose violation of the civil False Claims Act (31 U.S.C. 3729-3733) in

connection with the award or performance of any Government contract, or subcontract thereunder. This would also be added as a required disclosure in the contract clause.

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 changes may 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 small businesses will be required to notify, in writing, the agency Office of the Inspector General, with a copy to the contracting officer, whenever the contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of the civil False Claims Act or a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder.

An Initial Regulatory Flexibility Analysis (IRFA) was prepared in connection with the initial proposed rule. The analysis is summarized as follows:

The IRFA reported that “the clause requirements for a formal awareness/training program and internal control system will not apply to small business concerns.” (See 72 FR 64021.) That is still true. Only the requirements of paragraph (b) of the clause will apply (to have a written code of business ethics and to notify the agency Office of the Inspector General in writing, with a copy to the contracting officer whenever the Contractor has reasonable grounds to believe that a principal, employee, agency, or subcontractor of the contractor has committed a violation of the False Claims Act or a violation of Federal criminal law).

The proposed changes that affect the IRFA are as follows:

- Applies to contracts to be performed outside the United States.
- Applies to contracts for the acquisition of commercial items (except 52.203-13(c)).
- Requires reporting of violations of civil False Claims Act.

The requirement in the proposed rule “to notify the agency inspector general and the contracting officer in writing whenever the contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract” (72 FR 64020) was applicable to small, as well as large, businesses. The IRFA estimated that approximately 1,400 prime and subcontracts with small businesses

would include the contract clause. We estimate that by including small businesses that offer commercial items or that perform contracts outside the United States, the number of small businesses impacted by the clause may increase by 50%. We estimate that the requirement to report violations of the civil False Claims Act may double the number of reports. The number of small businesses that would actually be required by the clause to submit a report would then be calculated as 84 (28 × 1.5 × 2). The number of small entities that are not impacted by the clause requirement but would report alleged violations of the civil False Claims Act was estimated to be 17. This estimate has doubled, because of the addition of mandatory reporting of violations of the civil False Claims Act. Therefore, the total number of small businesses submitting a report has increased from 45 to 118 (84+34).

The FAR Secretariat has submitted a copy of the amended IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 3, 9, 12, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, et seq. (FAR case 2007-006), in correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. Accordingly, the FAR Secretariat will submit a request for approval of a revised information collection requirement concerning Contractor Compliance Program and Integrity Reporting to the Office of Management and Budget under 44 U.S.C. 3501, et seq. The estimated reporting burden for a violation remains 3 hours. Based on the revised number of impacted contractors and retaining the other figures used in the initial estimate, the annual reporting burden is revised as follows:

*Respondents:* 284.

*Responses per respondent:* 1.

*Total annual responses:* 284.

*Preparation hours per response:* 3.

*Total response burden hours:* 852.

### Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

**D. Request for Comments Regarding Paperwork Burden**

Submit comments, including suggestions for reducing this burden, not later than June 16, 2008 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control Number 9000-00XX, Contractor Compliance Program and Integrity Reporting, in all correspondence.

*Public comments are particularly invited on:* Whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-00XX, Contractor Compliance Program and Integrity Reporting, in all correspondence.

**List of Subjects in 48 CFR Parts 3, 9, 12, and 52**

Government procurement.

Dated: May 14, 2008.

**Al Matera,**

*Director, Office of Acquisition Policy.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 3, 9, 12, and 52 as set forth below:

1. The authority citation for 48 CFR parts 3, 9, 12, 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. Amend section 3.1002 by adding paragraph (c) to read as follows:

**3.1002 Policy.**

\* \* \* \* \*

(c) A contractor may be suspended and/or debarred for knowing failure to timely disclose a violation of the civil

False Claims Act or Federal criminal law in connection with the award or performance of any Government contract performed by the contractor or a subcontract awarded thereunder (see 9.406-2(b)(1)(v) and 9.407-2(a)(7)).

3. Revise paragraph (a) of section 3.1004 to read as follows:

**3.1004 Contract clauses.**

\* \* \* \* \*

(a) Insert the clause at FAR 52.203-13, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed \$5,000,000 and the performance period is 120 days or more.

\* \* \* \* \*

**PART 9—CONTRACTOR QUALIFICATIONS**

4. Amend section 9.406-2 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(1)(v) to read as follows:

**9.406-2 Causes for debarment.**

\* \* \* \* \*

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

\* \* \* \* \*

(v) Knowing failure to timely disclose—

(A) An overpayment on a Government contract;

(B) Violation of the civil False Claims Act (31 U.S.C 3729-3733) in connection with the award or performance of any Government contract or subcontract; or

(C) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.

\* \* \* \* \*

5. Amend section 9.407-2 by adding paragraph (a)(7) to read as follows:

**9.407-2 Causes for suspension.**

(a) \* \* \*

(7) Knowing failure to timely disclose—

(i) An overpayment on a Government contract;

(ii) Violation of the civil False Claims Act (31 U.S.C 3729-3733) in connection with the award or performance of any Government contract or subcontract; or

(iii) Violation of Federal criminal law in connection with the award or performance of any Government contract or subcontract.

\* \* \* \* \*

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

6. Amend section 12.301 by redesignating paragraph (d)(2) as (d)(3)

and adding a new (d)(2) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(d) \* \* \*

(2) Insert the clause at 52.203-13, Contractor Code of Business Ethics and Conduct, as prescribed in 3.1004(a).

\* \* \* \* \*

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

7. Amend section 52.203-13 by—  
a. Revising the date of clause;  
b. Adding paragraph (b)(3);  
c. Revising the introductory text of paragraph (c) and (c)(2)(ii);  
d. Adding paragraph (c)(2)(ii)(F); and  
e. Revising paragraph (d).

**52.203-13 Contractor Code of Business Ethics and Conduct.**

\* \* \* \* \*

Contractor Code of Business Ethics and Conduct

[[Insert Abbreviated Month and Year of Publication in the Federal Register]]

\* \* \* \* \*

(b) \* \* \*

(3) The Contractor shall notify, in writing, the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act or a violation of Federal criminal law in connection with the award or performance of this contract or any subcontract thereunder.

(c) *Business ethics awareness and compliance program and internal control system.* This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if 52.212-4 appears in this contract.

\* \* \* \* \*

(2) \* \* \*

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

\* \* \* \* \*

(F) Timely reporting, in writing, to the agency Office of the Inspector General, with a copy to the Contracting Officer, whenever the Contractor has reasonable grounds to believe that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act (31 U.S.C 3729-3733) or a violation of Federal criminal law in connection with the award or performance of any Government contract performed by the Contractor or a subcontract thereunder.

\* \* \* \* \*

(d) *Subcontracts.* (1) The Contractor shall include the substance of this clause,

including this paragraph (d), in subcontracts that have a value in excess of \$5,000,000 and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all reports of violation of the civil False Claims Act or violation of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(End of clause)

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R6-ES-2008-0001; 92220-1113-0000-C6]

RIN 1018-AU67

#### Endangered and Threatened Wildlife and Plants; Proposed Removal of *Erigeron maguirei* From the Federal List of Endangered and Threatened Plants; Availability of Post-Delisting Monitoring Plan

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; notice of availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 et seq.), propose to remove the plant *Erigeron maguirei* (commonly referred to as Maguire daisy) from the List of Endangered and Threatened Plants. The best scientific and commercial data available indicate that this species has recovered and no longer meets the definition of threatened or endangered under the Act. Our review of the status of this species shows that populations are stable, threats have been addressed, and adequate regulatory mechanisms ensure the species is not currently and is not likely to again become an endangered species within the foreseeable future in all or a significant portion of its range. We seek information, data, and comments from the public regarding *E. maguirei*, this proposal to delist, and the Post-Delisting Monitoring Plan. This proposed rule completes the 5-year status review initiated on April 7, 2006 (71 FR 17900).

**DATES:** We will accept comments received or postmarked on or before July 15, 2008. Public hearing requests must be received by June 30, 2008.

**ADDRESSES:** You may submit comments by one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **U.S. mail or hand-delivery:** Public Comments Processing, Attn: RIN 1018-AU67; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

#### FOR FURTHER INFORMATION CONTACT:

Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Field Office, 2369 West Orton Circle, West Valley City, UT 84119, or telephone (801) 975-3330. Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at (800) 877-8337 for TTY assistance.

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we hereby request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) Biological information concerning this species;

(2) Relevant data concerning any current or likely future threats (or lack thereof) to this species, including the extent and adequacy of Federal and State protection and management that would be provided to the *Erigeron maguirei* as a delisted species;

(3) Additional information concerning the range, distribution, population size, and population trends of this species, including the locations of any additional populations of this species;

(4) Current or planned activities in the subject area and their possible impacts on this species; and

(5) Our draft Post-Delisting Monitoring Plan.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal

identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment during normal business hours at the Utah Field Office, 2369 West Orton Circle, West Valley City, UT 84119 (801/975-3330).

#### Public Hearing

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received by June 30, 2008. Such requests must be made in writing and addressed to the Field Supervisor (see **FOR FURTHER INFORMATION CONTACT** section).

#### Previous Federal Action

Section 12 of the Act directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27824) accepting the Smithsonian report as a petition to list taxa named therein under section 4(c)(2) (now 4(b)(3)) of the Act and announced our intention to review the status of those plants. *Erigeron maguirei* was included in that report (40 FR 27880, July 1, 1975). Maguire daisy is the common name for *Erigeron maguirei*, however we will use primarily the scientific name of this species throughout this proposed rule to clarify taxonomic issues or the legal status of the plant.

On June 16, 1976, we published a rule in the **Federal Register** (41 FR 24524) to designate approximately 1,700 vascular plant species, including *Erigeron maguirei*, as endangered pursuant to section 4 of the Act. The 1978 amendments to the Act required that all proposals over 2 years old be withdrawn. On December 10, 1979, we published a notice of withdrawal (44 FR 70796) of that portion of the June 16, 1976, proposal that had not been made final, which included *E. maguirei*.

On December 15, 1980, we published a revised notice of review for native plants in the **Federal Register** designating *Erigeron maguirei* as a candidate species (45 FR 82480). Section 4(b)(3)(B) of the 1982