

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR—2006—0023]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005—11; Introduction**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of final and interim 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—11. 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.acquisition.gov/far>.

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

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2005—11 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.acquisition.gov/far>. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501—4755.

Item	Subject	FAR case	Analyst
.....	Earned Value Management System (EVMS) .....	2004—019	Parnell.
II .....	Emergency Acquisitions .....	2005—038	Sochon.

**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—11 amends the FAR as specified below:

**Item I—Earned Value Management System (EVMS) (FAR Case 2004—019)**

This final rule amends the Federal Acquisition Regulation to implement Earned Value Management System (EVMS) policy in accordance with OMB Circular A—11, Part 7 and the supplement to Part 7, the Capital Planning Guide. The FAR will require the use of an EVM System that complies with the guidelines of ANSI/EIA Standard - 748, in major acquisitions for development, and in other acquisitions in accordance with agency procedures. An agency shall conduct an Integrated Baseline Review (IBR) when EVMS is required. Offerors shall not be eliminated from consideration for contract award because they do not have an EVMS that is compliant with the ANSI/EIA standards, provided they submit an EVMS implementation plan with their proposal.

**Item II—Emergency Acquisitions (FAR Case 2005—038)**

This interim rule revises FAR Part 18 to provide a single reference to acquisition flexibilities that may be used during emergency situations. This change is expected to improve the Government's ability to expedite acquisition of supplies and services during emergency situations. The FAR

Part 18 makes no change to existing contracting policy.

Dated: June 28, 2006.

**Ralph De Stefano,**  
*Director, Contract Policy Division.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005-11 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 2005-11 is effective July 5, 2006.

Dated: June 26, 2006.

**Shay D. Assad,**  
*Director, Defense Procurement and Acquisition Policy.*

Dated: June 27, 2006.

**Roger D. Waldron,**  
*Acting Senior Procurement Executive, General Services Administration.*

Dated: June 27, 2006.

**Tom Luedtke,**  
*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 2, 7, 34, and 52**

[FAC 2005—11; FAR Case 2004—019; Item I; Docket 2006—0020, Sequence 13]

RIN 9000—AK16

**Federal Acquisition Regulation; FAR Case 2004—019, Earned Value Management System (EVMS)**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement earned value management system (EVMS) policy. FAR coverage is necessary to help standardize the use of EVMS across the Government. The final rule specifically impacts contracting officers, program managers, and offerors/contractors required to manage contracts by utilizing earned value management systems for major acquisitions.

**DATES:** *Effective Date:* July 5, 2006.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501—4082. Please cite FAC 2005—11, FAR case 2004—019. For information

pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the Federal Acquisition Regulation to implement Earned Value Management System (EVMS) policy in accordance with OMB Circular A-11, Part 7 and the supplement to Part 7, the Capital Planning Guide. The Circular sets forth policy, budget justification, and reporting requirements that apply to all agencies of the Executive Branch of the Government that are subject to Executive Branch review for major capital acquisitions. Performance based acquisition management requires the use of EVMS on those parts of the acquisition where developmental effort is required. This includes prototypes and tests to select the most cost effective alternative during the planning phase, acquisition phase, and any developmental, modification or upgrade effort(s) performed during the operational/steady state phase. Currently, the FAR does not include standard EVMS policy, provisions, or clauses available for Governmentwide use.

The Office of Federal Procurement Policy (OFPP) formally submitted proposed FAR changes to the General Services Administration in June 2004. DoD, GSA, and NASA published a proposed rule, implementing standard EVMS policy for Governmentwide use, in the **Federal Register** at 70 FR 17945, April 8, 2005 and the public comment period closed on June 7, 2005.

Twenty-five respondents submitted 109 comments. The 109 comments received were grouped into ten categories. A discussion of these public comments by category is provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with changes to the proposed rule. Differences between the proposed rule and final rule are identified in the summary of changes below following the discussion in the responses to the public comments below.

**Public comments.** A summary of the ten categories is as follows:

- Allowability.
- EVMS Applicability, Thresholds and Exclusions.
- Pre-award Integrated Baseline Reviews (IBRs).
- Post-award IBRs.
- Modified IBRs.
- Reporting.
- EVMS Compliance, System Surveillance and Approval of Changes.

- Training.
- Miscellaneous Comments.
- Unrelated to Proposed Rule.

##### Allowability

*Comment:* A number of commenters requested a change to the FAR cost principles (FAR Part 31) to make EVMS explicitly allowable. One commenter further stated that the "EVMS rule should explicitly state that contracts must permit recovery of EVMS Costs Allocable to the contract."

*Response:* The Councils do not believe FAR Part 31 should be revised. Cost allocability is only one of several requirements for allowability specified at FAR 31.201-2(a). The costs must also be reasonable, in accordance with the terms of the contract, and compliant with the provisions set forth in Part 31. Agencies have the flexibility of paying for pre-award IBRs.

##### EVMS Applicability, Thresholds and Exclusions

*Comment:* A number of commenters expressed concern over the contract dollar thresholds for which EVMS would apply. Some commenters recommended specific dollar thresholds for EVMS applicability and approval.

*Response:* The Councils believe EVMS application should be based on the particular agency facts and circumstances rather than specifying a threshold in the FAR. In accordance with OMB Circular A-11, Part 7, agencies have the authority to establish dollar thresholds and EVMS applicability criteria.

*Comment:* A number of commenters recommended that certain contract types be excluded from the requirements of EVMS, *i.e.*, firm fixed price, time and materials, level of effort, and commercial item contracts under FAR Part 12.

*Response:* The Councils believe it is not appropriate to exclude certain contract types from EVMS requirements in the FAR. In accordance with OMB Circular A-11, Part 7, EVMS is required for major acquisitions for development regardless of contract type.

*Comment:* A commenter stated that any decision to use EVMS should be part of a formal documented acquisition strategy.

*Response:* The Councils agree that the use of EVMS should be part of a formal documented acquisition strategy. This requirement is addressed at 7.105(b)(10) of the final rule.

*Comment:* A number of commenters stated that the requirement for EVMS for contractors will impact the overall cost to the government of acquisitions.

*Response:* EVMS is required for major acquisitions for development, in accordance with OMB Circular A-11. The Councils further note that agencies have significant discretion in determining the size and complexity of projects that meet the criteria for a major acquisition set by the agency.

*Comment:* The commenter stated that the methodology the Government will employ to analyze and use the EVM data to assess and monitor performance should be included in Acquisition Plans. This oversight shall not extend beyond the intent or requirements of the ANSI/EIA - 748 standard or a contract's terms and conditions and statement of work (SOW).

*Response:* The Councils agree that acquisition plans must discuss the methodology the Government will employ to analyze and use EVM data to assess and monitor contract performance (See FAR 7.105(b)(10)). The FAR addresses the assessment and monitoring of performance; the ANSI standard does not address oversight and specific reporting.

*Comment:* The commenter stated that adding levels of IBRs and Agency Head review will lengthen front-end planning and approval process timeliness.

*Response:* The Councils acknowledge that pre-award IBR's, which are optional, could possibly lengthen the pre-award process. However, any such delays are expected to be offset by anticipated savings gained through improved management of the program. The coverage does not add any Agency Head reviews.

*Comment:* A number of commenters state that the rule should clarify that EVMS applies to developmental efforts, not steady state or operational acquisitions, or for the procurement of commercial items.

*Response:* The Councils agree that the application of EVMS should be clarified. The final rule has been revised in FAR 34.201(a) to require EVM for major acquisitions for development in accordance with OMB Circular A-11, Part 7. The Circular does not require the use of EVM for steady-state or operational acquisitions, or for the procurement of commercial items. However, an Agency or requiring activity may elect to require EVMS for other than development efforts based on the costs/benefits involved.

*Comment:* The commenter states that a \$50 million threshold should be established for the application of EVMS for prime contracts. In addition, any small business awarded a prime contract that exceeds this threshold should be subject to the same EVMS requirements.

*Response:* The Councils believe that the FAR should not establish EVMS thresholds. The final rule provides individual agencies the authority to establish appropriate thresholds for major acquisitions and EVMS applicability criteria in accordance with OMB Circular A-11, based on their particular facts and circumstances.

*Comment:* The commenter states that EVMS requirements should not flow-down to subcontractors, regardless of dollar value. There is no privity of contract between the government and any subcontractor.

*Response:* The Councils believe that EVMS requirements should apply to subcontracts when the cost/benefits support such application. However, the Councils also recognize that clarification of this requirement is necessary. As such, the rule has been revised to clarify language at FAR 52.234-4(g) and 34.201(d) to require application of EVMS to subcontractors using the same rules as applied to the prime contractor. The Councils note that the Government often requires contractors to flow certain clauses down to subcontractors. Such flow-downs do not require privity of contract between the Government and the subcontractor, *i.e.*, the flow-down requirement in the clause is between the Government and the contractor.

*Comment:* The commenter recommends that EVMS thresholds should be indexed to inflation.

*Response:* The Councils believe that it is preferable to provide individual agencies with the authority to establish appropriate thresholds for major acquisitions and EVMS applicability criteria in accordance with OMB Circular A-11 based on their particular facts and circumstances, rather than indexing the thresholds to inflation.

*Comment:* The commenter stated that EVMS is not simple to implement. Small businesses may find it difficult and costly to implement EVMS. Flowing down EVMS requirements to several tiers of subcontractors compounds these difficulties.

*Response:* The Councils believe that application of EVMS should be done only when the cost/benefits of such application is warranted. The Councils also recognize that some businesses may not have an operational EVMS when they submit their offer. As such, the language in FAR 34.201(b) has been revised to make it clear that offerors who do not have an operational EVMS shall not be disqualified from contract award if they submit an EVMS implementation plan with their proposals.

*Comment:* The commenter submitted the following recommendations to mitigate the impact that EVMS requirements will have on small business:

- No validation on contracts less than \$50M.
- No EVM on contracts less than \$20M without authorization by agency's senior acquisition executive.
- Costs of complying with EVMS requirements should be directly chargeable to that contract.

*Response:* The Councils believe it is preferable to provide individual agencies with the authority to establish appropriate thresholds for major acquisitions and EVMS applicability criteria in accordance with OMB Circular A-11, based on their particular facts and circumstances rather than specifying a threshold in the FAR. It is also not appropriate for the EVMS clause to specify whether the costs of complying with EVMS requirements should be a direct or indirect cost. The charging of costs as direct or indirect costs (including the cost of complying with EVMS requirements) is determined by the Cost Accounting Standards and/or the requirements of FAR Part 31. Furthermore, EVMS costs, like other costs, must meet the allowability criteria in FAR 31.201-2(a).

*Comment:* The commenter stated that the flow-down requirements of EVMS to small business could have a negative effect. This commenter asserted that the statistical value in assessing the impact to small business is understated.

*Response:* The Councils note that an Initial Regulatory Flexibility Analysis was performed and comments were solicited as to the effect of this rule on small business. Some comments were received that indicated that small businesses may be affected. Therefore, to alleviate the possible burden on small businesses that do not have an EVM system, the rule is revised to make it clear that offerors shall not be eliminated from consideration for contract award because they do not have an operational EVM system, provided they submit an EVMS implementation plan with their proposal. Likewise, agencies have the flexibility of paying for initial baseline reviews in accordance with agency procedures.

*Comment:* The commenter recommended that the rule provide for an exception to allow the Government to manage the EVMS while the contractor is responsible for reporting status.

*Response:* The Councils believe that management of the EVMS is the contractor's responsibility. The contractor is responsible for managing

contract work. EVMS is one method used to manage that work.

#### **Pre-award IBRs**

*Comment:* A number of commenters state that the pre-award IBR process may cause undue cost and manpower burdens on offerors and the Government, and could result in delay of award, excessive B&P costs, decreased competition, risks of technical leveling, increased protest potential and the necessity for a follow-up IBR after award.

*Response:* Pre-award IBRs are not mandatory; however, if agencies determine that establishing a firm baseline prior to award is beneficial, the rule allows this flexibility. The Councils acknowledge that pre-award IBRs may increase B&P costs and source selection resources; however, EVM is designed to save money in the long run. Agencies have the flexibility of paying for pre-award IBRs within the source selection process. As with any source selection process, the Government must take all necessary steps to protect against disclosure of proprietary information or technical leveling during the proposal evaluation. The Government has flexibility for source-selection procedures as currently prescribed in FAR Subpart 15.3.

*Comment:* A number of commenters expressed concern that a pre-award budget baseline may not add value to the source selection process since there is insufficient information to establish a technical or cost baseline and it is too difficult to properly assess risk prior to award.

*Response:* The Councils believe that pre-award IBRs are designed to verify and establish the technical and cost baseline. If an Agency determines that a pre-award IBR is appropriate for that procurement, then the proposal should serve as a sufficient baseline to conduct an IBR prior to contract award.

*Comment:* A number of commenters stated that the only reason to conduct a pre-award IBR for sole source acquisitions is to establish a performance measurement baseline (PMB). However, this PMB will not be valid because pre-award IBR budget values will change from the PMB after award, and the contractor will be reluctant to disclose management reserve before negotiations are concluded.

*Response:* The Councils agree that the purpose of a pre-award IBR is to verify the technical content and the realism of the related performance budgets, resources and schedules. However, the Councils do not agree that such technical and cost baselines will

substantially change after award. A pre-award IBR will help to verify the realism of the proposal and therefore facilitate negotiations. Additionally, disclosure of cost information is subject to and available under the Truth in Negotiations Act (41 U.S.C. 254b and 10 U.S.C. 2306a).

*Comment:* The commenter states that performance of a pre-award IBR would fall under FAR Subpart 15.3 Source Selection. Specifically, pre-award IBRs would fall under FAR 15.306(d), exchanges with offerors after establishment of the competitive range. The proposed rule does not refer to Part 15.

*Response:* The Councils do not believe that it is necessary to address pre-award IBRs in FAR Part 15. However, FAR 7.105(b)(3) is revised to include source selection procedures when a pre-award IBR is contemplated. While a pre-award IBR is not mandated, when one will be performed, the acquisition plan should address how the IBR results will be considered in source selection.

*Comment:* The commenter states that any company with an approved EVM System should not be subjected to a pre-award IBR. For those companies without an existing or approved EVMS, this should be considered as part of management risk of the source selection evaluation based on their proposed system implementation described in their proposal. It would be resource and schedule prohibitive to perform an IBR or sequential IBRs prior to award.

*Response:* The Councils disagree. The determination that an offeror's EVM System is compliant with the ANSI/EAI - 748 standard is an independent assessment and is not related to the timing of an IBR. Pre-award IBRs are designed to verify and establish the technical and cost baseline. If an agency determines it is beneficial to establish the IBR prior to award, they have the flexibility to conduct an IBR. The language in FAR 34.201(b) has been revised to make it clear that offerors who do not have an operational EVMS shall not be disqualified from contract award if they submit an EVMS implementation plan with their proposals. In such case, a pre-award IBR would utilize data from the offeror's current cost/schedule control system.

*Comment:* The commenter states that if the requirement for a pre-award IBR is retained in the final rule, the requirement for a post-award IBR should be deleted.

*Response:* The Councils believe that the rule allows the flexibility for the timing and conduct of the IBR. Pre-award IBRs are not mandatory. An

agency may choose to perform a post-award IBR.

*Comment:* The commenter does not agree that "IBRs will normally be scheduled before award" as stated in 52.234-X3(c). In certain agency acquisitions, M&O contractors are responsible for design and planning activities necessary to establish the PMB, which must be in place prior to IBR. The commenter suggests a tiered approach for the performance of IBRs.

*Response:* The Councils believe that the rule allows the flexibility for the timing and conduct of the IBR. Pre-award IBRs are not mandatory. An agency may choose to perform a post-award IBR. If an Agency determines that a pre-award IBR is appropriate for that procurement, then the proposal should serve as a sufficient baseline to conduct an IBR prior to contract award. The Councils do not believe a tiered approach is necessary or beneficial.

*Comment:* The Commenter stated that the only way an independent baseline could exist prior to award would be if it were developed either privately or under a prior contract. Therefore, there is no need for provision 52.234-X2.

*Response:* The Councils believe that the pre-award IBR provision is necessary. If an agency determines that establishing a firm baseline prior to award is beneficial, the rule allows the flexibility of requiring a pre-award IBR. The IBR is meant to verify the technical content and the realism of the related performance budgets, resources and schedules. FAR 52.234-X2 does not address an independent baseline, but rather an integrated baseline conducted as a joint effort between the offeror and the Government.

*Comment:* A number of commenters stated that it often takes a number of weeks, after award, for the contractor to develop and refine their understanding of the project and their work plans so as to have the detailed information available necessary for a comprehensive IBR. If the "first IBR" is conducted prior to award "there is little likelihood that the level of information available to the contractor will be sufficient to allow a meaningful IBR..."

*Response:* The Councils believe that the technical proposal should reflect the offerors' understanding of the requirements at time of proposal submission. Thus the proposal should serve as a sufficient baseline to conduct an IBR prior to contract award.

*Comment:* The commenter cautions that a pre-award IBR may undermine the normal source selection process of technical evaluation. The IBR should be considered as one aspect of the evaluation process. The IBR should be

structured to guard against undermining an offeror's commitment or a contractor's obligation to perform—especially under a fixed-price, performance-based type arrangement.

*Response:* The Councils believe that pre-award IBRs do not undermine the source selection process. Pre-award IBRs are not required; however, if performed, the pre-award IBR would be considered in the evaluation process. FAR 7.105(b)(3) has been added to address how the results of the pre-award IBR will be considered in the source selection.

*Comment:* A number of commenters requested a revision to 52.234-X2(d) to define the procedures for determining the competitive range and/or determining the number of offerors that remain in a competitive range prior to conducting a pre-award IBR.

*Response:* The Councils do not believe that language is necessary to specify what constitutes the competitive range for the conducting of pre-award IBRs. Pre-award IBRs will be conducted in accordance with the source selection plan set forth for that acquisition.

*Comment:* A number of commenters stated that the regulations should not encourage the imposition of pre-award IBRs on smaller acquisitions or those contractors with minimal EVMS experience.

*Response:* Agencies have the authority to establish thresholds and EVMS applicability criteria. The Councils have agreed to revise the language in FAR 34.201(a) to make it clear that offerors who do not have an operational EVMS shall not be disqualified from contract award if they submit an EVMS implementation plan with their proposals.

### Post-award IBRs

*Comment:* The commenter noted that when a post-award IBR may be required, 34.X03 prescribes a solicitation provision (52.234-X1) that does not mention IBR.

*Response:* The Councils agree that the proposed rule should be clarified to address the responder's concern. As a result, FAR 34.202 in the final rule specifically states that when an EVMS is required, the Government will conduct an Integrated Baseline Review (IBR). No change to the provision at FAR 52.234-3 is therefore necessary since IBRs shall always be required when the post-award IBR language is in the contract in accordance with the clause at 52.234-4.

*Comment:* The commenter recommended revising 52.234-X3(c) to state "If a pre-award IBR has not been conducted, such a review shall be scheduled [and initiated] as early as

practicable after contract award..." since it is important to indicate that the IBR should commence during the allotted timeframe.

*Response:* The Councils do not agree that the timing of post award IBRs should be specified in the FAR. The clause at FAR 52.234-4(c) has been revised to state that a post award IBR shall be conducted as early as practicable after contract award. Agencies have the flexibility to establish the timing and conduct of the post award IBRs.

*Comment:* The commenter recommended that Post-award IBRs for options or major modifications should have a numerical threshold - 50% of prior contract value.

*Response:* The Councils believe it is preferable to provide flexibility in regard to whether there is a change to the contract in terms of exercise of significant option(s) or incorporation of major modification(s), rather than applying a predetermined dollar or percentage threshold.

*Comment:* The Commenter recommended changing the language in FAR 52.234-X3 from "not later than 180 days after award" to "in accordance with agency procedures."

*Response:* The Councils agree that the timing of post award IBRs should not be specified in the FAR. The clause at FAR 52.234-4(c) has been revised to state that a post award IBR shall be conducted as early as practicable after contract award. Agencies have the flexibility to establish the timing and conduct of the post award IBRs.

*Comment:* A number of commenters requested clarification of 34.X03(a) as to whether post-award IBRs are optional, "may require", while Paragraph (b) pre-award is less optional, "will require".

*Response:* The Councils have revised the language at FAR 34.202 to explicitly state that an IBR is required regardless of whether it is performed pre-award or post-award. The requirement for the timing of an IBR will be determined by the agency.

*Comment:* A number of commenters suggested the language at 52.234-X3(c) be revised to change Agencies "may conduct IBRs" to "shall conduct IBRs."

*Response:* The Councils agree that agencies are required to conduct the IBR's. As such, the Councils have revised the language at FAR 52.234-4(c) to state that the Government "will conduct an IBR."

#### Modified IBRs

*Comment:* A number of commenters recommend utilizing a tiered or modified IBR approach based on the size of the program, with smaller

programs requiring only scaled back IBRs. Task order contracts and other contract types where scope is not well defined should be excluded from IBRs.

*Response:* The Councils have provided that agencies have the flexibility to determine the application and extent of IBRs.

#### Reporting

*Comment:* The commenter is concerned that FAR 42.1106, Reporting Requirements, will result in EVM reports without the EVM System requirement.

*Response:* The Councils agree that the language should be revised to clarify the applicability of EVMS reporting. The language is moved to FAR 34.201(c), and revised to specifically state that contractors shall "submit EVMS reports monthly for those contracts for which an EVMS applies."

*Comment:* The commenter believes that EIA - 748 should govern reporting requirements, and any additional reporting requirements should require specific approval by the head of the contracting activity.

*Response:* The Councils do not agree that reporting requirements outside of ANSI/EIA - 748, which does not mandate specific reports, formats, or timing, should be subject to mandatory head of contracting activity approval, but instead should be subject to Agency procedures.

*Comment:* The commenter suggested that agencies should be required to submit written comments within 10 days of monthly reports or waive the right to require corrective action or to take adverse action. In addition, the commenter stated that variances of less than 10% should not be grounds for corrective action.

*Response:* The Councils believe that time allotted for review will be determined on a case-by-case basis. Failure to respond does not equate to acceptance. The Councils further believe that variances should be subject to review based on the particular facts and circumstances rather than a specified minimum percentage.

#### EVMS Compliance, System Surveillance and Approval of Changes

*Comment:* The commenter believes that third-party system certification or self assessment, as the basis for acceptance of an EVMS system, does not provide sufficient Government oversight.

*Response:* The Councils note that regardless of who conducts the review, the Cognizant Federal Agency (CFA) is responsible for determining if a

contractor's EVM system is compliant with the contractual requirements.

*Comment:* The commenter believes that allowing contractors an unlimited amount of time to demonstrate compliance to the EVMS requirements is counterproductive. Demonstration of compliance should precede award fee determination or should happen within 90 days after award.

*Response:* The Councils believe that EVMS compliance is related to the overall EVMS review and is not necessarily related to a contract award fee determination. The contractor should take the necessary actions to meet the negotiated milestones in their EVMS plan. Whether these milestones are tied to an award fee determination will be a subject for negotiation on an individual contract basis.

*Comment:* The commenter suggested that in addition to specifying EIA Standard 748, the Government should require that the evaluation process be based on either the EMIR or the NADIA EVM Intent Guide.

*Response:* The Councils believe that the FAR coverage is appropriate. Agencies have the flexibility to develop implementation procedures to meet their requirements.

*Comment:* A number of commenters stated that EVMS oversight should be clarified. In general, EVMS oversight should be performed for the contractor's entire company or facility, surveillance should be performed jointly by the contractor and a single cognizant Federal Agent for all contracts, and that certification resources and procedures should be established.

*Response:* The Councils agree that EVMS surveillance should be performed on a business segment basis rather than on a contract-by-contract basis. Therefore, the Councils have provided in the final rule that the Cognizant Federal Agent (CFA) will determine if a contractor's EVMS is compliant with the guidelines in ANSI/EIA Standard - 748.

*Comment:* A number of commenters questioned the effective date of the EVMS rule. One commenter questioned whether modification of existing contracts will be required to comply with the new FAR EVMS requirements. Another commenter suggested that the rule should provide a suitable phase-in for the EVMS requirements.

*Response:* The Councils have determined that the rule will be implemented within the standard procedures and timing of the effective date after issuance of the final rule, and will apply the new coverage prospectively to new solicitations and future awards. Agencies may modify

existing contracts by mutual agreement on a case-by-case basis.

*Comment:* The commenter states that the proposed rule uses the term "responsible Federal department or agency" but does not provide a definition. The commenter requests that the rule be clarified to clearly delineate roles and responsibilities for approval and oversight of Contractor's EVMS.

*Response:* The Councils have revised the language in the provisions at FAR 52.234-2 and 52.234-3, and clause at 52.234-4 to clarify that the Cognizant Federal Agency (CFA) (definition in FAR 2.101 and 42.003) is responsible for determining if a contractor's EVMS is compliant with the contractual requirements, *i.e.*, the guidelines in ANSI/EIA Standard - 748.

*Comment:* A number of commenters stated that the rule needed to be clarified regarding the use of the term "recognized," *i.e.*, which agency has cognizance, who within an agency is qualified, what constitutes a "recognized" system, what documentation is required to "recognize", and is "recognition" by one agency binding on another agency?

*Response:* The Councils have clarified the rule by changing the term "recognize" to "determined to be in compliance with the ANSI/EIA Standard - 748." The Cognizant Federal Agency (CFA) will determine if a contractor's EVMS is compliant with the guidelines in ANSI/EIA Standard - 748 on a contractor business segment basis, not an individual contract basis.

*Comment:* A number of commenters suggested that FAR 34.005-2(b)(6) be revised to change the terminology "meets" to "complies with."

*Response:* The Councils agree with the recommendation and have revised the language in FAR 34.005-2(b)(6) to require the use of an EVM System that "complies with" the guidelines of ANSI/EIA Standard - 748.

*Comment:* The commenter suggested substituting the term "EVMS criteria" for "EVMS guidelines".

*Response:* The Councils believe the use of the term "EVMS Guidelines" is more appropriate because that term is used in ANSI/EIA - 748.

*Comment:* The commenter recommends that the proposed clause be revised to remove the requirements that the contractor obtain approval of proposed changes to their EVMS from the Government prior to implementation of the proposed change. The commenter recommends that surveillance be performed only every six months, after seven calendar days notice, and that changes to their EVMS

be reviewed during those periodic reviews.

*Response:* The Councils believe that the rule provides the necessary Government oversight of a contractor's EVMS, and that approval of changes, done on a case-by-case basis, should be obtained prior to their implementation in a contractor's EVMS, not as a retroactive action.

*Comment:* A number of commenters have stated that the Government's access to records, including audit rights, are too broad. 52.234-X3 requires the Contractor to provide access to: "...all pertinent records and data... to permit Government surveillance to ensure that the EVMS conforms... with the performance criteria..." The commenters request that this language be removed from the clause.

*Response:* The Councils believe that governmental oversight for EVMS compliance is provided at FAR 52.234-4(f) and is necessary. Audit rights are provided via FAR 52.215-2, Audit and Records-Negotiation. FAR 52.234-4 does not expand upon these audit rights. If third party proprietary rights are marked with proper legends, the Government is prohibited from disclosure.

#### **Training**

*Comment:* A number of commenters stated that sufficient training must be received by program managers and contracting officers. In addition, the numbers of program managers and contracting officers sufficiently trained will be significant.

*Response:* The Councils recognize that the use of EVM will require resources and training. As such the Councils are working with Federal Acquisition Institute and Defense Acquisition University to provide EVMS training.

#### **Miscellaneous Comments**

*Comment:* For construction of buildings and facilities, the commenter suggests revising FAR Part 7 to require that a notice to proceed should be contingent on approved EVMS WBS, approved S Curve Baseline, and schedule.

*Response:* The Councils believe that the proposed revision is not appropriate for FAR Part 7 Acquisition Planning. If a contractor does not have an EVM system that complies with ANSI/EIA standard - 748, FAR 52.234-4 requires the contractor to take necessary actions to meet the negotiated milestones in their EVMS plan. Whether these milestones are tied to the notice to proceed will be a subject for negotiation on an individual contract basis.

*Comment:* The commenter refers to a sentence in the Background Section of the **Federal Register** notice of this proposed rule, noting that the intent of the Clinger-Cohen Act of 1996 was to include Construction of Building and Facilities, not just information systems.

*Response:* The Councils believe that no change to the text is necessary because the proposed language addresses all types of capital investments, including construction of buildings.

*Comment:* Some commenters suggest removing references to OMB Circular A-109 in FAR Part 34.000. No reason was provided.

*Response:* The Councils believe that OMB Circular A-109 continues to apply. OMB Circular A-11, Part 7 supplements OMB Circular A-109, which has not been rescinded by OMB, and is still available. Therefore, a reference to OMB Circular A-11 has been added to FAR 34.000.

*Comment:* The commenter suggested that the definition in Paragraph 2.101 which states "Earned value management system means a project management tool..." implies that EVMS is a single tool and not a methodology that can successfully be accomplished with a variety of existing tools.

*Response:* The Councils believe that the proposed language in the definition is consistent with the Capital Planning Guide and therefore should remain as stated.

*Comment:* The commenter suggested including additional references to sites where authoritative guidance and policy on EVMS may be found.

*Response:* The Councils do not believe that a change to the proposed language is appropriate. The Councils believe that implementing guidance and instructions provided by the agencies will be sufficient.

*Comment:* A number of commenters recommended a public meeting prior to publication of a final rule, and/or a second proposed rule.

*Response:* The Councils believe that based on comments received, no substantial changes were necessary in formation of the final rule. Therefore no public meeting is necessary, and it is appropriate to issue this final rule.

*Comment:* For a joint venture, the commenter suggests that the joint venture should use a single, mutually agreed on EVMS. The commenter also suggests that for teaming arrangements, the prime contractor should be responsible for meeting the EVMS requirements.

*Response:* The Councils believe that use of a single EVMS system is not, and should not be, required for prime

contractors and their subcontractors. Likewise, it is not appropriate to require a single EVMS for joint ventures or team members in a teaming agreement. While EVMS systems may differ, the reporting elements remain constant, and that is what's needed for management and oversight purposes.

#### Unrelated to the Proposed Rule

*Comment:* The responder submitted a comment concerning an application for a Federal job.

*Response:* The Councils believe the comment is not applicable to this rule.

**Summary of Changes.** As a result of the comments, changes to the proposed rule include the following:

1. FAR 7.105(b)(3) is revised to clarify source-selection procedures, related to the Acquisition Plan, when an agency decides to perform a pre-award Integrated Baseline Review (IBR).

2. FAR 34.X01(a) is designated as 34.201(a) and is revised to require EVMS in major acquisitions for development and in other acquisitions in accordance with agency procedures.

3. FAR 34.X02(a) is designated as 34.202(a) and is revised to clarify that an agency shall conduct an IBR when EVMS is required.

4. FAR 34.X03 is designated as 34.203 and is revised to provide prescriptive language to clearly state pre-award and post-award EVMS IBR requirements.

5. FAR 52.234–X1, 52.234–X2 and 52.234–X3 are designated as 52.234–3, 52.234–2, and 52.234–4 respectively. The clause and provisions are clarified to provide that the Cognizant Federal Agency (CFA) is responsible for the approval and oversight of contractor's EVMS.

6. FAR 34.X01(b) is designated as 34.201(b) and is revised to clearly state that offerors shall not be eliminated from consideration for contract award because they do not have an EVMS that is compliant with the ANSI/EIA standards, provided they submit an EVMS implementation plan with their proposal.

7. The provisions at FAR 52.234–2(b)(4) and 52.234–3(b)(4) are revised to provide for negotiated milestones in offerors' EVMS plans that indicate when an offeror anticipates its EVMS system will be compliant.

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 Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

##### Final Regulatory Flexibility Analysis: Earned Value Management Systems, (EVMS)

This Final Regulatory Flexibility Analysis has been prepared consistent with 5 U.S.C. 604.

##### 1. Succinct statement of the need for, and the objectives of, the rule.

Title V of the Federal Acquisition Streamlining Act of 1994 (FASA) requires agency heads to approve or define the cost, performance, and schedule goals for major acquisitions and achieve, on average, 90% of the cost, performance and schedule goals established. The Clinger-Cohen Act of 1996 requires the Director of OMB to develop, as part of the budget process, a process for analyzing, tracking, and evaluating the risks and results of all major capital investments for information systems for the life of the system. OMB Circular A–11, Part 7, Planning, Budgeting, Acquisition, and Management of Capital Assets and its supplement, Capital Programming Guide, were written to meet the requirements of FASA and the Clinger-Cohen Act. OMB Circular A–11, Part 7, sets forth the policy, budget justification, and reporting requirements that apply to all agencies of the Executive Branch of the government that are subject to Executive Branch review, for major capital acquisitions. The proposed FAR changes are necessary to implement Earned Value Management Systems (EVMS) requirements in OMB Circular A–11, Part 7, Planning, Budgeting, Acquisition, and Management of Capital Assets, and the supplement to Part 7, the Capital Programming Guide.

##### 2. Summary of the significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

Some comments were received that indicated that small businesses were affected. The comments received covered the following issues: Many small businesses do not have compliant EVMS systems. It will cost them money to set up an EVMS, and if the small business is a subcontractor, it may cost the prime money to coordinate the EVMS systems. If the small business delays setting up an EVMS system until a desirable business opportunity occurs, the time delay may discourage contracting officers from selecting them as prime contractors, or discourage prime contractors from selecting them as subcontractors. It will cost money for a small business to perform a pre-award IBR; these would be part of the business's bid and proposal costs. It is harder on small businesses than large businesses to absorb bid and proposal costs on contracts they do not win.

The assessment of these issues is as follows:

- The Councils anticipate that EVMS will be required mainly for development contracts

above \$20 million. The qualification of "development" was added to the final rule at 34.201. The FAR could have made fewer contracts subject to EVMS by setting a Governmentwide threshold, and by setting it high. But this would be contrary to OMB's purpose in initiating the EVMS rule, which is to allow OMB flexibility to require EVMS when OMB feels the stricter budgetary discipline is necessary for a particular acquisition.

- Small businesses may avoid all EVMS costs by choosing not to participate in EVMS solicitations, or may offset such costs to implement a compliant EVM System through cost reimbursement on resulting Government contracts.

- *EVMS system.* The cost for a small business setting up an EVMS compliant system should be a one-time cost. No public commenter gave specifics about the actual costs. In adopting the industry standard, contractors are already moving to set up EVMS systems. The construction industry is familiar with the concept of EVMS. The IT industry is rapidly adapting this industry standard.

- The FAR rule provides that agencies should not eliminate a contractor's proposal because that business does not have a compliant EVMS. This was added to the final rule at 34.201. In such a case, agencies can offset costs for a small business to implement a compliant EVM System through the resulting contract. Agencies can also help by restricting flow-down of the EVMS clause only to certain named subcontractors.

- *Pre-award IBR's.* We anticipate un-reimbursed pre-award IBR's will be unusual. OMB wants the flexibility of having the pre-award IBR tool available to agencies, and would be responsible for giving extra money to the agencies to pay for pre-award IBR's. Although the FAR is not forcing agencies to reimburse pre-award IBR costs either for large or small businesses; we anticipate agencies that want pre-award IBR's will pay for them, for example as separately funded cost reimbursement contracts. This was added to the final rule at 34.202. We also expect the agencies to reduce the number of proposals in the competitive range to avoid unnecessarily imposing costs on more than a few offerors. Small businesses may avoid these IBR costs entirely by choosing not to bid on solicitations with non-reimbursed pre-award IBR costs. Small businesses can partially recover un-reimbursed pre-award IBR costs by bidding only on cost-reimbursement contracts, which would allow the recovery as overhead on this and later contracts if the business wins these contracts.

##### 3. Description of and an estimate of the number of small entities to which the rule will apply.

An analysis of data in the Federal Procurement Data System (FPDS) on actions and dollars on contracts above \$20 million for supplies and equipments, IT services and construction, areas where EVMS is likely to be applied, indicated that small business only received 3.8 percent of the \$36.8 billion and 5.8 percent of the 345 actions. Because FPDS does not collect data on EVMS use, the data above is only an approximation of the effect on small business. These numbers

include more than just IT development contracts.

**4. Description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.**

The net effect of the rule is unknown at this time. The rule is expected to have some effect on small business concerns that do not have EVM systems. The final rule only affects those small businesses that receive a contract designated as a major acquisition. To alleviate burden on those small businesses that do not have an EVM system, the rule was revised to make it clear that offerors shall not be eliminated from consideration for contract award because they do not have an operational EVMS, provided they submit an EVMS implementation plan with their proposal. Other compliance requirements of the rule are covered in paragraph 2.

**5. Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.**

The FAR rule provides that agencies should not eliminate a contractor's proposal because of that business not having a compliant EVMS. This was added to the final rule at 34.201. Agencies can also help by restricting flow-down of the EVMS clause only to certain named subcontractors. Agencies can reimburse pre-award IBR costs if OMB requires them and furnishes the money for them. Other alternatives suggested by public commenters were discussed in the preamble, such as having a Governmentwide threshold of \$50,000,000. This alternative is not feasible as the purpose of the EVMS rule is to give OMB the tool to require stricter budgetary discipline where it sees fit, even in a lower dollar contract. Alternatives of excluding small businesses entirely from EVMS, or to give them a lower threshold Governmentwide, will not meet the purpose of the rule.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

**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, 7, 34, and 52**

Government procurement.

Dated: June 28, 2006

**Ralph De Stefano,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 34, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 34, and 52 are revised 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) by adding, in alphabetical order, the definition "Earned value management system" to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

(b) \* \* \*

*Earned value management system* means a project management tool that effectively integrates the project scope of work with cost, schedule and performance elements for optimum project planning and control. The qualities and operating characteristics of an earned value management system are described in American National Standards Institute/Electronics Industries Alliance (ANSI/EIA) Standard-748, Earned Value Management Systems. (See OMB Circular A-11, Part 7.)

\* \* \* \* \*

**PART 7—ACQUISITION PLANS**

■ 3. Amend section 7.105 by revising paragraph (b)(3) and amending paragraph (b)(10) by adding two sentences to read as follows:

**7.105 Contents of written acquisition plans.**

\* \* \* \* \*

(b) \* \* \*

(3) *Source-selection procedures.*

Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives (see Subpart 15.3). When an EVMS is required (see FAR 34.202(a)) and a pre-award IBR is contemplated, the acquisition plan must discuss—

(i) How the pre-award IBR will be considered in the source selection decision;

(ii) How it will be conducted in the source selection process (see FAR 15.306); and

(iii) Whether offerors will be directly compensated for the costs of participating in a pre-award IBR.

\* \* \* \* \*

(10) \* \* \* If an Earned Value Management System is to be used, discuss the methodology the Government will employ to analyze and use the earned value data to assess and monitor contract performance. In addition, discuss how the offeror's/contractor's EVMS will be verified for compliance with the American National Standards Institute/Electronics Industries Alliance (ANSI/EIA) Standard-748, Earned Value Management Systems, and the timing and conduct of integrated baseline reviews (whether prior to or post award). (See 34.202.)

\* \* \* \* \*

**PART 34—MAJOR SYSTEM ACQUISITION**

■ 4. Revise section 34.000 to read as follows:

**34.000 Scope of part.**

This part describes acquisition policies and procedures for use in acquiring major systems consistent with OMB Circular No. A-109; and the use of an Earned Value Management System in acquisitions designated as major acquisitions consistent with OMB Circular A-11, Part 7.

■ 5. Amend section 34.005-2 by adding paragraph (b)(6) to read as follows:

**34.005-2 Mission-oriented solicitation.**

\* \* \* \* \*

(b) \* \* \*

(6) Require the use of an Earned Value Management System that complies with the guidelines of ANSI/EIA Standard-748 (current version at time of solicitation). See 34.201 for earned value management systems and reporting requirements.

\* \* \* \* \*

■ 6. Add subpart 34.2 to read as follows:

**Subpart 34.2—Earned Value Management System**

*Sec.*

34.201 Policy.

34.202 Integrated Baseline Reviews.

34.203 Solicitation provisions and contract clause.

**34.201 Policy.**

(a) An Earned Value Management System (EVMS) is required for major acquisitions for development, in accordance with OMB Circular A-11. The Government may also require an EVMS for other acquisitions, in accordance with agency procedures.

(b) If the offeror proposes to use a system that has not been determined to be in compliance with the American National Standards Institute/Electronics Industries Alliance (ANSI/EIA) Standard-748, Earned Value Management Systems, the offeror shall submit a comprehensive plan for compliance with these EVMS standards. Offerors shall not be eliminated from consideration for contract award because they do not have an EVMS that complies with these standards.

(c) As a minimum, contracting officers shall require contractors to submit EVMS monthly reports for those contracts for which an EVMS applies.

(d) EVMS requirements will be applied to subcontractors using the same rules as applied to the prime contractor.

(e) When an offeror is required to provide an EVMS plan as part of its proposal, the contracting officer will determine the adequacy of the proposed EVMS plan prior to contract award.

#### **34.202 Integrated Baseline Reviews.**

(a) When an EVMS is required, the Government will conduct an Integrated Baseline Review (IBR).

(b) The purpose of the IBR is to verify the technical content and the realism of the related performance budgets, resources, and schedules. It should provide a mutual understanding of the inherent risks in offerors'/contractors' performance plans and the underlying management control systems, and it should formulate a plan to handle these risks.

(c) The IBR is a joint assessment by the offeror or contractor, and the Government, of the—

(1) Ability of the project's technical plan to achieve the objectives of the scope of work;

(2) Adequacy of the time allocated for performing the defined tasks to successfully achieve the project schedule objectives;

(3) Ability of the Performance Measurement Baseline (PMB) to successfully execute the project and attain cost objectives, recognizing the relationship between budget resources, funding, schedule, and scope of work;

(4) Availability of personnel, facilities, and equipment when required, to perform the defined tasks needed to execute the program successfully; and

(5) The degree to which the management process provides effective and integrated technical/schedule/cost planning and baseline control.

(d) The timing and conduct of the IBR shall be in accordance with agency procedures. If a pre-award IBR will be

conducted, the solicitation must include the procedures for conducting the IBR and address whether offerors will be reimbursed for the associated costs. If permitted, reimbursement of offerors' pre-award IBR costs is governed by the provisions of FAR Part 31.

#### **34.203 Solicitation provisions and contract clause.**

(a) The contracting officer shall insert a provision that is substantially the same as the provision at FAR 52.234-2, Notice of Earned Value Management System – Pre-Award IBR, in solicitations for contracts that require the contractor to use an Earned Value Management System (EVMS) and for which the Government requires an Integrated Baseline Review (IBR) prior to award.

(b) The contracting officer shall insert a provision that is substantially the same as the provision at 52.234-3, Notice of Earned Value Management System – Post Award IBR, in solicitations for contracts that require the contractor to use an Earned Value Management System (EVMS) and for which the Government requires an Integrated Baseline Review (IBR) after contract award.

(c) The contracting officer shall insert a clause that is substantially the same as the clause at FAR 52.234-4, Earned Value Management System, in solicitations and contracts that require a contractor to use an EVMS.

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

■ 7. Add sections 52.234-2, 52.234-3, and 52.234-4 to read as follows:

#### **52.234-2 Notice of Earned Value Management System –Pre-Award IBR.**

As prescribed in 34.203(a) use the following provision:

NOTICE OF EARNED VALUE MANAGEMENT SYSTEM – PRE-AWARD IBR (JUL 2006)

(a) The offeror shall provide documentation that the Cognizant Federal Agency has determined that the proposed earned value management system (EVMS) complies with the EVMS guidelines in ANSI/EIA Standard – 748 (current version at time of solicitation).

(b) If the offeror proposes to use a system that has not been determined to be in compliance with the requirements of paragraph (a) of this provision, the offeror shall submit a comprehensive plan for compliance with the EVMS guidelines.

(1) The plan shall—

(i) Describe the EVMS the offeror intends to use in performance of the contracts;

(ii) Distinguish between the offeror's existing management system and modifications proposed to meet the guidelines;

(iii) Describe the management system and its application in terms of the EVMS guidelines;

(iv) Describe the proposed procedure for administration of the guidelines, as applied to subcontractors; and

(v) Provide documentation describing the process and results of any third-party or self-evaluation of the system's compliance with the EVMS guidelines.

(2) The offeror shall provide information and assistance as required by the Contracting Officer to support review of the plan.

(3) The Government will review and approve the offeror's plan for an EVMS before contract award.

(4) The offeror's EVMS plan must provide milestones that indicate when the offeror anticipates that the EVM system will be compliant with the ANSI/EIA Standard - 748 guidelines.

(c) Offerors shall identify the major subcontractors, or major subcontracted effort if major subcontractors have not been selected subject to the guidelines. The prime Contractor and the Government shall agree to subcontractors selected for application of the EVMS guidelines.

(d) The Government will conduct an Integrated Baseline Review (IBR), as designated by the agency, prior to contract award. The objective of the IBR is for the Government and the Contractor to jointly assess technical areas, such as the Contractor's planning, to ensure complete coverage of the contract requirements, logical scheduling of the work activities, adequate resources, methodologies for earned value (budgeted cost for work performed (BCWP)), and identification of inherent risks.

(End of provision)

#### **52.234-3 Notice of Earned Value Management System – Post Award IBR.**

As prescribed in 34.203(b) use the following provision:

NOTICE OF EARNED VALUE MANAGEMENT SYSTEM –POST AWARD IBR (JUL 2006)

(a) The offeror shall provide documentation that the Cognizant Federal Agency has determined that the proposed earned value management system (EVMS) complies with the EVMS guidelines in ANSI/EIA Standard –748 (current version at time of solicitation).

(b) If the offeror proposes to use a system that has not been determined to be in compliance with the requirements of paragraph (a) of this provision, the

offeror shall submit a comprehensive plan for compliance with the EVMS guidelines.

(1) The plan shall—

(i) Describe the EVMS the offeror intends to use in performance of the contracts;

(ii) Distinguish between the offeror's existing management system and modifications proposed to meet the guidelines;

(iii) Describe the management system and its application in terms of the EVMS guidelines;

(iv) Describe the proposed procedure for administration of the guidelines, as applied to subcontractors; and

(v) Provide documentation describing the process and results of any third-party or self-evaluation of the system's compliance with the EVMS guidelines.

(2) The offeror shall provide information and assistance as required by the Contracting Officer to support review of the plan.

(3) The Government will review and approve the offeror's plan for an EVMS before contract award.

(4) The offeror's EVMS plan must provide milestones that indicate when the offeror anticipates that the EVM system will be compliant with the ANSI/EIA Standard -748 guidelines.

(c) Offerors shall identify the major subcontractors, or major subcontracted effort if major subcontractors have not been selected, planned for application of the guidelines. The prime Contractor and the Government shall agree to subcontractors selected for application of the EVMS guidelines.

(End of provision)

#### 52.234-4 Earned Value Management System.

As prescribed in 34.203(c), insert the following clause:

##### EARNED VALUE MANAGEMENT SYSTEM (JUL 2006)

(a) The Contractor shall use an earned value management system (EVMS) that has been determined by the Cognizant Federal Agency (CFA) to be compliant with the guidelines in ANSI/EIA Standard - 748 (current version at the time of award) to manage this contract. If the Contractor's current EVMS has not been determined compliant at the time of award, see paragraph (b) of this clause. The Contractor shall submit reports in accordance with the requirements of this contract.

(b) If, at the time of award, the Contractor's EVM System has not been determined by the CFA as complying with EVMS guidelines or the Contractor does not have an existing cost/schedule control system that is compliant with the guidelines in ANSI/EIA Standard -

748 (current version at time of award), the Contractor shall—

(1) Apply the current system to the contract; and

(2) Take necessary actions to meet the milestones in the Contractor's EVMS plan approved by the Contracting Officer.

(c) The Government will conduct an Integrated Baseline Review (IBR). If a pre-award IBR has not been conducted, a post award IBR shall be conducted as early as practicable after contract award.

(d) The Contracting Officer may require an IBR at—

(1) Exercise of significant options; or

(2) Incorporation of major modifications.

(e) Unless a waiver is granted by the CFA, Contractor proposed EVMS changes require approval of the CFA prior to implementation. The CFA will advise the Contractor of the acceptability of such changes within 30 calendar days after receipt of the notice of proposed changes from the Contractor. If the advance approval requirements are waived by the CFA, the Contractor shall disclose EVMS changes to the CFA at least 14 calendar days prior to the effective date of implementation.

(f) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or a duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS conforms, and continues to conform, with the performance criteria referenced in paragraph (a) of this clause.

(g) The Contractor shall require the subcontractors specified below to comply with the requirements of this clause: *[Insert list of applicable subcontractors.]*

(End of clause)

[FR Doc. 06-5966 Filed 7-3-06; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 18

[FAC 2005-11; FAR Case 2005-038; Item II; Docket 2006-0020, Sequence 5]

RIN 9000-AK50

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

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

**ACTION:** 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 provide a single reference to acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations.

**DATES:** *Effective Date:* July 5, 2006.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before September 5, 2006 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-11, FAR case 2005-038, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov/far>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.acquisition.gov/comp/far/ProposedRules/comments.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2005-038@gsa.gov](mailto:farcase.2005-038@gsa.gov). Include FAC 2005-11, FAR case 2005-038 in the subject line of the message.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-11, FAR case 2005-038, in all correspondence related to this case. All comments received will be posted without change to <http://www.acquisition.gov/comp/far/ProposedRules/comments.htm>,

including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Gloria Sochon, Procurement Analyst, at (202) 219-0311. Please cite FAC 2005-11, FAR case 2005-038. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The 2005 Atlantic hurricane season was a record one in terms of the number of hurricanes and their strength. The size and strength of Hurricane Katrina resulted in one of the largest natural disasters to strike the United States. As a result of last year's hurricane season, Federal agencies are looking for methods to expedite their responses during an emergency. Emergency situations, however, go beyond natural disasters and include contingency operations as defined in FAR 2.101 and actions to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States.

This rule revises FAR Part 18 to provide a single reference to the acquisition flexibilities already available in the FAR to facilitate and expedite acquisitions of supplies and services during all types of emergencies. For clarity and ease of use, the flexibilities are divided into two main groups. The first group titled "Available Acquisition Flexibilities" identifies the flexibilities that may be used anytime and do not require an emergency declaration. The second group titled "Emergency acquisition flexibilities" identifies the flexibilities that may be used only after an emergency declaration or designation has been made by the appropriate official. The second group is further divided into three subgroups: contingency operation; defense or recovery from certain attacks; and incidents of national significance, emergency declaration, or major disaster declarations.

In May 2003, the Office of Federal Procurement Policy (OFPP) published guidance on the use of emergency procurement flexibilities to help ensure agencies were well positioned to effectively meet the demands associated with fighting terrorism. The OFPP is currently updating its guidance to also address flexibilities that can be used in other emergency situations such as national emergencies. The final rule will include a reference to the updated OFPP guidance. The Councils would like to

hear the views of interested parties on the sufficiency of these provisions.

In particular, the Councils are interested in input on whether the provisions sufficiently clarify the existing FAR flexibilities that can be used in emergency situations or whether more detailed, comprehensive coverage is needed.

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 the rule makes no change to contracting policy. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Part 18 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 2005-11, FAR case 2005-038), in 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. 3501, *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 to improve the Government's ability to expedite acquisitions of supplies and services during emergency situations. However, pursuant to Public Law 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 Part 18**

Government procurement.

Dated: June 28, 2006.

**Ralph De Stefano,**

*Director, Contract Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 18 as set forth below:

■ 1. The authority citation for 48 CFR part 18 is revised to read as follows:

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

■ 2. Add Part 18 to read as follows:

**PART 18—EMERGENCY ACQUISITIONS**

*Sec.*

18.000 Scope of part.

18.001 Definition.

**Subpart 18.1—Available Acquisition Flexibilities**

18.101 General.

18.102 Central contractor registration.

18.103 Synopses of proposed contract actions.

18.104 Unusual and compelling urgency.

18.105 Federal Supply Schedules (FSSs), multi-agency blanket purchase agreements (BPAs), and multi-agency indefinite delivery contracts.

18.106 Javits-Wagner O' Day (JWOD) specification changes.

18.107 Qualifications requirements.

18.108 Priorities and allocations.

18.109 Soliciting from a single source.

18.110 Oral requests for proposals.

18.111 Letter contracts.

18.112 Interagency acquisitions under the Economy Act.

18.113 Contracting with the Small Business Administration (The 8(a) Program).

18.114 HUBZone sole source awards.

18.115 Service-disabled Veteran-owned Small Business (SDVOSB) sole source awards.

18.116 Overtime approvals.

18.117 Use of patented technology under the North American Free Trade Agreement.

18.118 Bid guarantees.

18.119 Advance payments.

18.120 Assignment of claims.

18.121 Electronic funds transfer.

18.122 Protest to GAO.

18.123 Contractor rent-free use of Government property.

18.124 Extraordinary contractual actions.

**Subpart 18.2—Emergency Acquisition Flexibilities**

18.201 Contingency operation.

18.202 Defense or recovery from certain attacks.

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

18.204 Resources.

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

**18.000 Scope of part.**

(a) This part identifies acquisition flexibilities that are available for emergency acquisitions. These

flexibilities are specific techniques or procedures that may be used to streamline the standard acquisition process. This part includes—

- (1) Generally available flexibilities; and
- (2) Emergency acquisition flexibilities that are available only under prescribed circumstances.

(b) The acquisition flexibilities in this part are not exempt from the requirements and limitations set forth in FAR Part 3, Improper Business Practices and Personal Conflicts of Interest.

#### **18.001 Definition.**

*Emergency acquisition flexibilities*, as used in this part, means flexibilities provided with respect to any acquisition of supplies or services by or for an executive agency that, as determined by the head of an executive agency, may be used—

- (a) In support of a contingency operation as defined in 2.101;
- (b) To facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States; or
- (c) When the President declares an incident of national significance, emergency declaration, or a major disaster declaration.

### **Subpart 18.1— Available Acquisition Flexibilities**

#### **18.101 General.**

The FAR includes many acquisition flexibilities that are available to the contracting officer when certain conditions are met. These acquisition flexibilities do not require an emergency declaration or designation of contingency operation.

#### **18.102 Central contractor registration.**

Contracts awarded to support unusual and compelling needs or emergency acquisitions are exempt from the requirements pertaining to Central Contractor Registration. (See 4.1102.)

#### **18.103 Synopses of proposed contract actions.**

Contracting officers need not submit a synopsis notice when there is an unusual and compelling urgency and the Government would be seriously injured if the agency complied with the notice time periods. (See 5.202(a)(2).)

#### **18.104 Unusual and compelling urgency.**

Agencies may limit the number of sources and full and open competition need not be provided for contracting actions involving urgent requirements. (See 6.302–2.)

#### **18.105 Federal Supply Schedules (FSSs), multi-agency blanket purchase agreements (BPAs), and multi-agency indefinite delivery contracts.**

Streamlined procedures and a broad range of goods and services may be available under Federal Supply Schedule contracts (see Subpart 8.4), multi-agency BPAs (See 8.405–3(a)(4)), or multi-agency, indefinite-delivery contracts (see 16.505(a)(7)). These contracting methods may offer agency advance planning, pre-negotiated line items, and special terms and conditions that permit rapid response.

#### **18.106 Javits-Wagner-O'Day (JWOD) specification changes.**

Contracting officers are not held to the notification required when changes in JWOD specifications or descriptions are required to meet emergency needs. (See 8.712(d).)

#### **18.107 Qualifications requirements.**

Agencies may determine not to enforce qualification requirements when an emergency exists. (See 9.206–1.)

#### **18.108 Priorities and allocations.**

The Defense Priorities and Allocations System (DPAS) supports authorized national defense programs and was established to facilitate rapid industrial mobilization in case of a national emergency. (See 11.6.)

#### **18.109 Soliciting from a single source.**

For purchases not exceeding the simplified acquisition threshold, contracting officers may solicit from one source under certain circumstances. (See 13.106–1(b).)

#### **18.110 Oral requests for proposals.**

Oral requests for proposals are authorized under certain conditions. (See 15.203(f).)

#### **18.111 Letter contracts.**

Letter contracts may be used when contract performance must begin immediately. (See 16.603.)

#### **18.112 Interagency acquisitions under the Economy Act.**

Interagency acquisitions are authorized under certain conditions. (See Subpart 17.5.)

#### **18.113 Contracting with the Small Business Administration (The 8(a) Program).**

Contracts may be awarded to the Small Business Administration (SBA) for performance by eligible 8(a) firms on either a sole source or competitive basis. (See Subpart 19.8.)

#### **18.114 HUBZone sole source awards.**

Contracts may be awarded to Historically Underutilized Business

Zone (HUBZone) small business concerns on a sole source basis. (See 19.1306.)

#### **18.115 Service-disabled Veteran-owned Small Business (SDVOSB) sole source awards.**

Contracts may be awarded to Service-disabled Veteran-owned Small Business (SDVOSB) concerns on a sole source basis. (See 19.1406.)

#### **18.116 Overtime approvals.**

Overtime approvals may be retroactive if justified by emergency circumstances. (See 22.103–4(i).)

#### **18.117 Use of patented technology under the North American Free Trade Agreement.**

Requirement to obtain authorization prior to use of patented technology may be waived in circumstances of extreme urgency or national emergency. (See 27.208.)

#### **18.118 Bid guarantees.**

The chief of the contracting office may waive the requirement to obtain a bid guarantee for emergency acquisitions when a performance bond or a performance bond and payment bond is required. (See 28.101–1(c).)

#### **18.119 Advance payments.**

Agencies may authorize advance payments to facilitate the national defense for actions taken under Public Law 85–804 (see Part 50, Extraordinary Contractual Actions). These advance payments may be made at or after award of sealed bid contracts, as well as negotiated contracts. (See 32.405.)

#### **18.120 Assignment of claims.**

The use of the no-setoff provision may be appropriate to facilitate the national defense in the event of a national emergency or natural disaster. (See 32.803(d).)

#### **18.121 Electronic funds transfer.**

Electronic funds transfer payments may be waived for acquisitions to support unusual and compelling needs or emergency acquisitions. (See 32.1103(e).)

#### **18.122 Protest to GAO.**

When urgent and compelling circumstances exist, agency protest override procedures allow the head of the contracting activity to determine that the contracting process may continue after GAO has received a protest. (See 33.104(b) and (c).)

#### **18.123 Contractor rent-free use of Government property.**

Rental requirements do not apply to items of Government production and research property that are part of a

general program approved by the Federal Emergency Management Agency and meet certain criteria. (See 45.404(a)(3) and (4).)

#### 18.124 Extraordinary contractual actions.

Part 50 prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85-804 (50 U.S.C. 1431-1434). This includes—

- (a) Amending contracts without consideration (see 50.302-1);
- (b) Correcting or mitigating mistakes in a contract (see 50.302-2); and
- (c) Formalizing informal commitments (See 50.302-3).

### Subpart 18.2—Emergency Acquisition Flexibilities

#### 18.201 Contingency operation.

(a) *Contingency operation* is defined in 2.101.

(b) *Micro-purchase threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to support a contingency operation. (See 2.101 and 13.201(g).)

(c) *Simplified acquisition threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to support a contingency operation. (See 2.101.)

(d) *SF 44, Purchase Order-Invoice-Voucher*. The normal threshold for the use of the SF 44 is at or below the micro-purchase threshold. Agencies may, however, establish higher dollar limitations for purchases made to support a contingency operation. (See 13.306.)

(e) *Test program for certain commercial items*. The threshold limits authorized for use of the test program may be increased for acquisitions to support a contingency operation. (See 13.500(e).)

#### 18.202 Defense or recovery from certain attacks.

(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 nuclear, biological, chemical, or radiological attack. (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 nuclear, biological, chemical, or radiological attack. (See 2.101.)

(c) *Commercial items to facilitate defense and recovery*. 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 nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(e).)

(d) *Test program for certain commercial items*. The threshold limits authorized for use of the test program may be increased when it is determined the acquisition is to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 13.500(e).)

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

(a) *Authorized or required by statute*. Agencies may limit the use of full and open competition when statutes authorize or require that the acquisition be made through another agency or from a specified source. This includes the Robert T. Stafford Disaster Relief and Emergency Assistance Act. (See 6.302-5 and Subpart 26.2.)

(b) *Disaster or emergency assistance activities*. Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. (See Subpart 26.2 and 6.302-5(b)(5).)

(c) *Ocean transportation by U.S. flag vessels*. The provisions of the Cargo Preference Act of 1954 may be waived in emergency situations. (See 47.502(c).)

#### 18.204 Resources.

(a) *National Response Plan*. The National Response Plan (NRP) provides a single, comprehensive framework for the management of domestic incidents where Federal involvement is necessary as required by the Homeland Security Act of 2002 (Public Law 107-296). The NRP only applies to incidents of national significance, defined as an actual or potential high-impact event that requires a coordinated and effective response by an appropriate combination of Federal, State, local, tribal,

nongovernmental, and/or private-sector entities in order to save lives, minimize damage, and provide for long-term community recovery and mitigation activities. The Department of Homeland Security is responsible for the NRP. The NRP is available at [http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0566.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0566.xml).

(b) [Reserved]

[FR Doc. 06-5964 Filed 7-3-06; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Chapter 1

[Docket FAR—2006—0023]

#### Federal Acquisition Regulation; Federal Acquisition Circular 2005-11; Small Entity Compliance Guide

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This Small Entity Compliance Guide has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-11 which amend the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2005-11 which precedes this document. These documents are also available via the Internet at <http://www.acquisition.gov/far>.

**FOR FURTHER INFORMATION CONTACT:** Laurieann Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact the analyst whose name appears in the table below.

## LIST OF RULES IN FAC 2005-11

Item	Subject	FAR case	Analyst
*I .....	Earned Value Management System (EVMS) .....	2004-019	Parnell.
II .....	Emergency Acquisitions .....	2005-038	Sochon.

FAC 2005-11 amends the FAR as specified below:

**Item I—Earned Value Management System (EVMS) (FAR Case 2004-019)**

This final rule amends the Federal Acquisition Regulation to implement Earned Value Management System (EVMS) policy in accordance with OMB Circular A-11, Part 7 and the supplement to Part 7, the Capital Planning Guide. The FAR will require the use of an EVM System that complies with the guidelines of ANSI/EIA Standard - 748, in major acquisitions for development, and in other acquisitions

in accordance with agency procedures. An agency shall conduct an Integrated Baseline Review (IBR) when EVMS is required. Offerors shall not be eliminated from consideration for contract award because they do not have an EVMS that is compliant with the ANSI/EIA standards, provided they submit an EVMS implementation plan with their proposal.

**Item II—Emergency Acquisitions (FAR Case 2005-038)**

This interim rule revises FAR Part 18 to provide a single reference to acquisition flexibilities that may be used

during emergency situations. This change is expected to improve the Government's ability to expedite acquisition of supplies and services during emergency situations. The FAR Part 18 makes no change to existing contracting policy.

Dated: June 28, 2006.

**Ralph De Stefano,**

*Director, Contract Policy Division.*

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