



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 7

[FAC 2021-06; FAR Case 2019-001; Item I; Docket No. FAR-2019-0020, Sequence No. 1]

RIN 9000-AN84

Federal Acquisition Regulation: Analysis for Equipment Acquisitions

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the FAA Reauthorization Act of 2018, which requires, when acquiring equipment, a case-by-case analysis of cost and other factors associated with certain methods of acquisition, including purchase, short-term rental or lease, long-term rental or lease, interagency acquisition, and, if applicable, acquisition agreements with a State or local government.

DATES: *Effective:* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 or *Michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2021-06 and FAR Case 2019-001.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 52081, on August 24, 2020, to implement section 555 of the FAA Reauthorization Act of 2018 (Pub. L. 115-254) (FAA stands for Federal Aviation Administration), which:

- Requires an agency to acquire equipment using the method of acquisition that is most advantageous to the Government based on a case-by-case analysis of comparative costs and other factors (to include the factors in FAR section 7.401);
- Identifies methods of acquisition that must be considered, at a minimum, in the analysis; and
- Requires the FAR to implement the requirements of the section and identify the factors agencies should or shall consider to perform the case-by-case analysis.

Five respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. No changes were made to the final rule as a result of public comments. To maintain consistency throughout the rule text, a minor change was made to the final rule at FAR 7.403(a) to ensure the terms "rent" and "lease" are used in the same order throughout the rule. A minor edit was also made to FAR 7.403(b) (2) to replace the obsolete weblink for the Schedule 51 V Hardware Superstore with an updated one.

Several respondents expressed support for the rule and the Councils acknowledge this support for the rule. The remaining respondents provided comments that were outside the scope of this rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This final rule does not create any new provisions or clauses, nor does it change the applicability or burden of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT or for commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available

regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory

Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

This rule is necessary to implement section 555 of the FAA Reauthorization Act of 2018 (Pub. L. 115-254). The objective of the rule is to ensure agencies acquire equipment using the method of acquisition that is most advantageous to the Government based on a case-by-case analysis of comparative costs and other factors.

There were no significant issues raised in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities; most of the impact will be on the Government. The rule primarily affects internal Government requirements determination decisions, acquisition strategy decisions, and contract file documentation requirements. The Government does not collect data on the total number of solicitations issued on an annual basis that are subject to the analysis of FAR subpart 7.4. However, the Federal Procurement Data System (FPDS) collects information on the product service code (PSC) assigned to a contract based on the predominant supply or service being acquired. FPDS data for fiscal years 2016 - 2018, on PSCs for approximately 100 types of equipment and 80 types of equipment rental or lease services, indicates that the Federal Government awards an average of 125,940 new contracts and orders annually, of which approximately 54,845 (44 percent) were awarded to approximately 6,940 unique small businesses.

This rule does not impose any reporting, recordkeeping, or other compliance requirements.

There are no alternatives that are consistent with the objectives of the statute.

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

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

List of Subjects in 48 CFR Part 7

Government procurement.

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

Therefore, DoD, GSA, and NASA amend 48 CFR part 7 as set forth below:

PART 7—ACQUISITION PLANNING

1. The authority citation for 48 CFR part 7 continues to read as follows:

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

Subpart 7.4—Equipment Acquisition

2. Revise the heading of subpart 7.4 to read as set forth above.

3. Revise section 7.400 to read as follows:

7.400 Scope of subpart.

This subpart—

(a) Implements section 555 of the FAA (Federal Aviation Administration) Reauthorization Act of 2018 (Pub. L. 115-254);

(b) Provides guidance when acquiring equipment and more than one method of acquisition is available for use; and

(c) Applies to both the initial acquisition of equipment and the renewal or extension of existing equipment leases or rental agreements.

4. Revise section 7.401 to read as follows:

7.401 Acquisition considerations.

(a)(1) Agencies shall acquire equipment using the method of acquisition most advantageous to the Government based on a case-by-case analysis of comparative costs and other factors in accordance with this subpart and agency procedures.

(2) The methods of acquisition to be compared in the analysis shall include, at a minimum—

- (i) Purchase;
- (ii) Short-term rental or lease;
- (iii) Long-term rental or lease;
- (iv) Interagency acquisition (see 2.101); and
- (v) Agency acquisition agreements, if applicable, with a State or local government.

(b)(1) The factors to be compared in the analysis shall include, at a minimum:

- (i) Estimated length of the period the equipment is to be used and the extent of use within that period;
- (ii) Financial and operating advantages of alternative types and makes of equipment;

(iii) Cumulative rent, lease, or other periodic payments, however described, for the estimated period of use;

(iv) Net purchase price;

(v) Transportation, installation, and storage costs;

(vi) Maintenance, repair, and other service costs;

and

(vii) Potential obsolescence of the equipment because of imminent technological improvements.

(2) The following additional factors should be considered, as appropriate, depending on the type, cost, complexity, and estimated period of use of the equipment:

(i) Availability of purchase options.

(ii) Cancellation, extension, and early return conditions and fees.

(iii) Ability to swap out or exchange equipment.

(iv) Available warranties.

(v) Insurance, environmental, or licensing requirements.

(vi) Potential for use of the equipment by other agencies after its use by the acquiring agency is ended.

(vii) Trade-in or salvage value.

(viii) Imputed interest.

(ix) Availability of a servicing capability, especially for highly complex equipment; e.g., can the

equipment be serviced by the Government or other sources if it is purchased?

(c) The analysis in paragraph (a) is not required—

(1) When the President has issued an emergency declaration or a major disaster declaration pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*);

(2) In other emergency situations if the agency head makes a determination that obtaining such equipment is necessary in order to protect human life or property; or

(3) When otherwise authorized by law.

5. Amend section 7.402 by—

a. Removing from paragraph (a)(1) “cumulative leasing” and adding “cumulative rental or leasing” in its place;

b. Removing from paragraph (a)(2) “favor of leasing” and adding “favor of renting or leasing” in its place;

c. Revising the paragraph (b) subject heading, paragraph (b)(1) introductory text, and paragraph (b)(2);

d. Removing from paragraph (b)(3) “long term lease” and adding “long term rental or lease agreement” in its place; and

e. Removing from paragraph (b)(4) “If a lease with option” and adding “If a rental or lease agreement with option” in its place.

The revisions read as follows:

7.402 Acquisition methods.

* * * * *

(b) *Rent or lease method.* (1) The rent or lease method is appropriate if it is to the Government's advantage under the circumstances. The rent or lease method may also serve as a short-term measure when the circumstances—

* * * * *

(2) If a rent or lease method is justified, a rental or lease agreement with option to purchase is preferable.

* * * * *

6. Amend section 7.403 by—

- a. Revising the section heading;
- b. Removing from paragraph (a) introductory text "in lease or" and adding "in rent, lease, or" in its place;
- c. Revising paragraph (b); and
- d. Adding paragraph (c).

The revisions and addition read as follows:

7.403 General Services Administration assistance and OMB guidance.

* * * * *

(b) For additional GSA assistance and guidance, agencies may—

(1) Request information from the GSA FAS National Customer Service Center by phone at 1-800-488-3111 or by email at *ncscustomer.service@gsa.gov*; and

(2) See GSA website, Schedule 51 V Hardware Superstore-Equipment Rental, (*<https://www.gsa.gov/buying-selling/products-services/industrial-products-services/rental-of-industrial-equipment>*).

(c) For additional OMB guidance, see—

(1) Section 13, Special Guidance for Lease-Purchase Analysis, and paragraph 8.c.(2), Lease-Purchase Analysis, of OMB Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, (*<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf>*); and

(2) Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, of OMB Circular A-11, Preparation, Submission, and Execution of the Budget, (*https://www.whitehouse.gov/wp-content/uploads/2018/06/app_b.pdf*).

7.404 [Amended]

7. Amend section 7.404 by removing “a lease with” and adding “a rental or lease agreement with” in its place.

[FR Doc. 2021-11866 Filed: 6/9/2021 8:45 am; Publication Date: 6/10/2021]