basis when these designated industry groups are added to the Small Business Competitiveness Demonstration Programs given the history of their success in recent unrestricted competitive Government acquisitions falling under NAICS codes 561730 and 561710. Additional data retrieved from FPDS show that the number of small business set-asides for NAICS code 561730 in fiscal years 2002 and 2003 combined was approximately 952 and the number of small business set-asides for NAICS code 561710 in fiscal years 2002 and 2003 combined was approximately 96. The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because previously set-aside acquisitions for services falling within NAICS codes 561730 and 561710 will now be included in the designated industry groups of the Small Business Competitiveness Demonstration Program. FAR 19.1007(b) states that ''Solicitations for acquisitions in any of the designated industry groups that have an anticipated dollar value greater than the emerging small business reserve amount must not be considered for small business set-asides under FAR 19.5. However, agencies may reinstate the use of small business set-asides as necessary to meet their assigned goals, but only within organizational units that failed to meet the small business participation goal. Acquisitions in the designated industry groups must continue to be considered for placement under the 8(a) Program (see Subpart 19.8), the HUBZone Program (see Subpart 19.13), and the Service-Disabled Veteran-Owned Small Business Procurement Program (see Subpart 19.14).'' Given the large number of awards made under these NAICS codes, it is anticipated that the addition of the two NAICS codes to the Small Business Competitiveness Demonstration Program will promote an increased number of opportunities for small business concerns to develop teaming arrangements and joint ventures.

The purpose of the Competitiveness Demonstration Program is to assess the ability of small businesses to compete successfully in certain industry categories without competition being restricted by the use of small business set-asides. This portion of the program is limited to the four designated industry groups listed in FAR 19.1005 and will include the addition of landscaping and pest control services to the designated industry groups. The final rule imposes no reporting, recordkeeping, or other compliance requirements.

The final rule does not duplicate, overlap, or conflict with any other Federal rules. There are no practical alternatives that will accomplish the objectives of this final 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 19 and 52

Government procurement.

Dated: September 22, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 19 and 52, which was published at 70 FR 11740, March 9, 2005, is adopted as a final rule without change.

[FR Doc. 05–19473 Filed 9–29–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 28

[FAC 2005–06; FAR Case 2003–029; Item VII]

RIN 9000–AK01

Federal Acquisition Regulation; Powers of Attorney for Bid Bonds

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 establish that a copy of an original power of attorney, including a photocopy or facsimile copy, when submitted in support of a bid bond, is sufficient evidence of the authority to bind the surety. The authenticity and enforceability of the power of attorney at the time of the bid opening will be treated as a matter of responsibility.

DATES: *Effective Date:* September 30, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2005–06, FAR case 2003–029.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation to revise the policy relating to acceptance of copies of powers of attorney accompanying bid bonds. There has been a significant level of controversy surrounding contracting officers' decisions regarding the evaluation of bid bonds and accompanying powers of attorney.

Since 1999, a series of GAO decisions has rejected telefaxed as well as photocopied powers of attorney. The latest decision from GAO (*All Seasons Construction, Inc.*, B–291166.2, Dec. 6, 2002) has been interpreted by industry and procuring agencies to require a contracting officer to inspect the power of attorney at bid opening to ascertain that the signatures are original and applied after generation of the documents. This case law has created a costly and unworkable requirement for the surety industry and left contracting officers with an almost impossible standard to enforce. More recently, on January 9, 2004, the U.S. Court of Federal Claims, in *Hawaiian Dredging Construction, Co. v. U.S.*, 59 Fed. Cl.205 (2004), issued a ruling highlighting that the FAR does not require an original signature on the document serving as evidence of authority to bind the surety. The court was critical of GAO's reasoning in the *All Seasons* case. In response to the split between the two bid protest fora and the quandary shared by industry and government in implementing a workable standard to be applied at bid opening, the Councils agreed to a revision to FAR part 28 that would remove the matter of authenticity and enforceability of powers of attorney from a contracting officer's responsiveness determination, which is based solely on documents available at the time of bid opening. Instead, the rule instructs contracting officers to address these issues after bid opening as a matter of responsibility.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 51936, August 23, 2004, and 46 public comments were received. A resolution of the public comments follows:

Summary of the Public Comments/ Disposition

Some commenters agree with the proposed rule and expressed appreciation for the clarification the proposed rule would bring to a presently unworkable situation.

Comment: By making authenticity of the power of attorney a matter of responsibility, where small businesses are concerned, a contracting officer's decision becomes subject to referral to the Small Business Administration (SBA) for a certificate of competency. To resolve this issue, the commenter suggested the following language for the FAR: ''Subpart 19.6 does not apply to determinations of responsibility of sureties or on the acceptability of powers of attorney.'' This language is based on GAO case law holding that acceptability of individual bid bond sureties need not be referred to the SBA because such determinations are based solely on the qualifications of the surety and not the small business offeror.

Response: The Councils concur with the interpretation of GAO case law cited. Referral to SBA of a contracting officer's non-responsibility finding, pursuant to FAR subpart 19.6, is a matter arising entirely out of the small business' qualifications, not that of the surety. However, in the interest of being entirely clear on this issue, the Councils adopted language in paragraph 28.101–3(f), that a non-responsibility determination is not subject to the Certificate of Competency process if the surety has disavowed the validity of the power of attorney.

Comment: One commenter requests clarification regarding the extent to which the review of a power of attorney is a matter of responsiveness. As written, the issue is only one of responsiveness if a signed and dated power of attorney is not submitted. The commenter requests a revision to state a power of attorney should be rejected if it is obvious that the document is invalid. The commenter has received powers of attorney that indicate on their face that they have expired or do not name the individual who signed the bid bond.

Response: The Councils disagree and feel the proposed rule makes clear the responsiveness determination is very narrow. To insert language requiring the contracting officer to determine whether a document is facially valid is not helpful unless we define facial validity.

The proposed language intends to establish a simple dichotomy—

• Where an attorney-in-fact has signed the bid bond, the bidder must provide a signed and dated power of attorney to evidence the attorney-in-fact's authority to bind the surety; failure to provide a power of attorney renders the bid non-responsive;

• Any and all questions regarding the authenticity and enforceability of the power of attorney are not matters of responsiveness and, as such, shall be handled by the contracting officer after bid opening when he/she can seek clarification from the surety.

Finally, the bidder cannot be said to have an unfair opportunity to improve its bid when it is only the surety, not the bidder, that can vouch for the authenticity of a power of attorney. Paragraph (e) has been added to FAR 28.101–3 clarifying that in those circumstances where a surety rejects a power of attorney as invalid, the bidder may not substitute a new surety.

Comment: Several comments asked for clarification that modern forms of signatures and dates (*i.e.* digital, mechanically applied, or printed), in addition to facsimiles, be accepted as valid.

Response: The Councils have determined it appropriate to adopt language listing, with greater specificity than was provided in the original proposal, ''electronic, mechanically-applied and printed signatures, seals, and dates'' as acceptable evidence of authority to bind the surety. The Councils believe these terms are broad enough to encompass present practices within the surety industry, particularly because a broad consortium of surety associations suggested the language. As such, we find it would be redundant to include ''digital'' within the list.

Comment: There should be a revision to require powers of attorney to include notarized signatures and the contact information for the signers and the notary in order to authenticate the power of attorney.

Response: The Councils do not agree. First, it detracts from the two-part rule established by the proposed language to identify specific requirements for powers of attorney. Second, while the comment is well taken and a requirement for contact information would prove helpful to the contracting officer, such detailed directions are not appropriate for a FAR provision.

Comment: Representatives from the surety industry submitted a three-part comment as follows:

1. The sureties recommend certain additions and deletions of commas in paragraph (b), which would clarify that ''original'' modifies ''power of attorney'' and that original powers of attorney, photocopied original powers of attorney, and facsimile copied original powers of attorney are all acceptable means of establishing an attorney in fact's authority.

2. The sureties recommend removing the signature and date of the power of attorney as matters of responsiveness in paragraph (c)(1), alleging that this would undercut the goal of avoiding situations where a low bid must be rejected simply based on formatting errors. The sureties note that FAR 28.101–4(c)(7) and (8) require an agency to waive the fact that a bid bond itself was not signed, dated, or erroneously dated.

3. The sureties recommend a new paragraph (d) to clarify that a ''printed'' power of attorney is an ''original'' and that a photocopied or facsimile copied copy of a ''printed'' power of attorney is also acceptable. The sureties suggest this clarification is necessary because FAR part 2 does not define ''original'' and the *All Seasons* decision called into question the reliability of a printed power of attorney because the contracting officer could not be certain whether the signature had been applied before or after printing. FAR part 2 should be revised to include a broader definition of ''facsimile'' and a definition of ''original.'' Because the proposed revision is intended to remove the confusion created by the *All Seasons* reasoning, the sureties suggest further clarifying that printed or mechanically-applied signatures, dates, and seals are acceptable without regard to the order in which they are affixed. The sureties also note that printed documents with printed signatures and seals are widely accepted as originals in commercial practice.

Response: 1. The Councils agree that the suggested comma placement clarifies that original powers of attorney, as well as photocopies of originals and facsimiles of originals, are all acceptable as evidence of authority to bind the surety. It also clarifies that a photocopy of a non-original is *not* acceptable.

2. The Councils are concerned that removing the text ''signed and dated'' would harm the integrity of the procurement process. Making the lack of a signature and date an issue of responsibility would mean they could be added after bid opening and a document that was not otherwise legally sufficient could be made so. The Councils feel a signature and date are so fundamental to the document that they must be present at bid opening. However, the rule does state that any questions regarding the authenticity of signature(s) and date(s) on the power of

attorney are treated as matters of responsibility and, therefore, can be addressed after bid opening.

The Councils note the sureties cite FAR 28.101–4(c)(7) and (8) in support of their position; however, we distinguish that the FAR also makes clear that in order for the contracting officer to waive the lack of an offeror's signature and date on the bid bond, the bond must otherwise be acceptable. It is our reading that this would mean the bond must bear the signature of the surety or its representative and that all related documents, including any power of attorney, must be acceptable. It is not incongruous to require a signature and date on the power of attorney and we, therefore, retain the stated language in the proposed rule.

3. The Councils concur with the suggestion to add a paragraph detailing those means of applying signatures and dates that are commonly acceptable as ''original'' in commercial practice. We accept the clarification in the interest of partnering with the surety industry to achieve a rule that works well for both sureties and contracting officers. It is the intent of the proposed rule to come to a resolution that is consistent with sureties' commercial practices and protections, while ensuring the Government can accept the lowest bid, confident that the bid bond binds the surety. The revision clarifies the undoing of the GAO-made rule requiring signatures and dates to be applied *after* the power of attorney is printed. This ''wet signature'' requirement is the most onerous and unworkable aspect of the *All Seasons* holding. As revised, a power of attorney with signatures and dates applied electronically and printed at the time the hard copy document is generated is clearly acceptable, as was intended by the original proposal.

The Councils considered all comments before agreeing to convert this FAR case from a proposed rule to a final rule with changes.

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 reads as follows:

Final Regulatory Flexibility Analysis

FAR Case 2003–029

Powers of Attorney for Bid Bonds

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

1. Reasons for the action.

This FAR case was initiated at the request of the Office of Federal Procurement Policy to resolve controversy relating to the standards for powers of attorney accompanying bid bonds.

2. Objectives of, and legal basis for, the action.

The objective of this final rule is to establish clear and uniform standards for powers of attorney accompanying bid bonds which will allow the contracting officer to make more informed decisions that are in the best interest of the Government.

3. Summary of significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA), 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 comment.

There were no specific public comments that addressed the IRFA.

4. Description of, and, where feasible, estimate of the number of small entities to which the final rule will apply.

This final rule applies to all small entity bidders involved in Federal acquisitions that require bid bonds. It also applies to small entities who are sureties and attorneys-in-fact.

5. Description of projected reporting, recordkeeping, and other compliance requirements of the final rule.

This rule will have a beneficial impact on small entities, including small businesses within the surety industry, because the rule will amend the Federal Acquisition Regulation to change from the current structured process to a process that is used by the surety industry. These commercial practices are used by the surety industry when doing non-Government work and small businesses are familiar with these practices. By allowing commercial practices, the current costly and unworkable requirements are eliminated, which removes the burden from small businesses when doing business with the Government.

The intent of this rule is to establish clear and uniform standards for powers of attorney accompanying bid bonds that are in the best interest of both the Government and industry. This rule removes the matter of authenticity and enforceability of powers of attorney from a contracting officer's responsiveness determination, which is based solely on documents available at the time of bid opening. Instead, the rule instructs contracting officers to address these issues after bid opening. From the public comments received, this rule is deemed valuable because the changes being made to the process will guarantee that bidders will no longer be thrown out of the acquisition process prematurely when there is a question of validity. The rule changes are beneficial for all involved in the acquisition process.

The final rule does not impose any new reporting, recordkeeping, or other information collection requirements. It will reduce the information collection requirement by simplifying the standards for an acceptable evidence of power of attorney in support of a bid bond.

6. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

This final rule does not duplicate, overlap, or conflict with other relevant Federal rules.

7. Significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

There were no significant alternatives to the proposed rule, which accomplish the stated objectives. This rule will have a beneficial impact on small entities, which are bidders in Federal acquisitions that require bid bonds, as well as the associated sureties and attorneys-in-fact.

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 19 and 28

Government procurement.

Dated: September 22, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 19 and 28 as set forth below:

■ 1. The authority citation for 48 CFR parts 19 and 28 continues to read as follows:

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

PART 19—SMALL BUSINESS PROGRAMS

19.602–1 [Amended]

■ 2. Amend section 19.602–1 in the parenthetical in the introductory text of paragraph (a) by adding '', but for sureties see 28.101–3(f) and 28.203(c)'' after the word ''subcontracting''.

PART 28—BONDS AND INSURANCE

■ 3. Revise section 28.101–3 to read as follows:

28.101–3 Authority of an attorney-in-fact for a bid bond.

(a) Any person signing a bid bond as an attorney-in-fact shall include with the bid bond evidence of authority to bind the surety.

(b) An original, or a photocopy or facsimile of an original, power of attorney is sufficient evidence of such authority.

(c) For purposes of this section, electronic, mechanically-applied and printed signatures, seals and dates on the power of attorney shall be considered original signatures, seals and dates, without regard to the order in which they were affixed.

(d) The contracting officer shall—

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening.

(e)(1) If the contracting officer contacts the surety to validate the power of attorney, the contracting officer shall document the file providing, at a minimum, the following information:

(i) Name of person contacted.

(ii) Date and time of contact.

(iii) Response of the surety.

(2) If, upon investigation, the surety declares the power of attorney to have been valid at the time of bid opening, the contracting officer may require correction of any technical error.

(3) If the surety declares the power of attorney to have been invalid, the contracting officer shall not allow the bidder to substitute a replacement power of attorney or a replacement surety.

(f) Determinations of non-responsibility based on the unacceptability of a power of attorney are not subject to the Certificate of Competency process of subpart 19.6 if the surety has disavowed the validity of the power of attorney.

[FR Doc. 05–19474 Filed 9–29–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2005–06; FAR Case 2005–002; Item VIII]

RIN 9000–AK28

Federal Acquisition Regulation; Expiration of the Price Evaluation Adjustment

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 cancel for civilian agencies (except National Aeronautics and Space Administration (NASA) and Coast Guard) the Small Disadvantaged Business (SDB) price evaluation adjustment which was originally authorized under the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355, Sec. 7102). Civilian agencies (except NASA and Coast Guard) are not authorized to apply the price evaluation adjustment to their acquisitions.

DATES: *Effective Date:* September 30, 2005.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before November 29, 2005, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–06, FAR case 2005–002, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2005–002@gsa.gov*. Include FAC 2005–06, FAR case 2005–002 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 2005–06, FAR case 2005–002, in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2005–06, FAR case 2005–002.

SUPPLEMENTARY INFORMATION:

A. Background

The small disadvantaged business price evaluation adjustment for civilian agencies, originally authorized under the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355, Sec. 7102) expired. This provision, as implemented in FAR subpart 19.11, authorized agencies to apply the price evaluation adjustment to benefit certain small disadvantaged business concerns in competitive acquisitions. As a result of its expiration for civilian agencies (except NASA and Coast Guard), civilian agencies (except NASA and Coast Guard) have no statutory authority to apply the small disadvantaged business price evaluation adjustment to their acquisitions.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because certain small disadvantaged business concerns for specific North American Industry Classification System (NAICS) codes will no longer benefit from the price evaluation adjustment in competitive acquisitions. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This interim rule amends Federal Acquisition Regulation (FAR) Subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns. The small disadvantaged business price evaluation adjustment for civilian agencies other than National Aeronautics and Space Administration (NASA) and Coast Guard,