

flexibility. The Office of Information and Regulatory Affairs (OIRA) has deemed that 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, and that this rule is not a major rule under 5 U.S.C. 804.

**IV. 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.* The Final Regulatory Flexibility Analysis (FRFA) is summarized as follows.

This rule implements section 825 of the NDAA for FY 2011 and section 813 of the NDAA for FY 2012, which extended the sunset date for protests of task and delivery orders valued in excess of \$10 million from May 27, 2011, to September 30, 2016.

The authority to file protests against the award of task or delivery orders is relatively new, and there is little data available, as such protests may be filed with the agency or Government Accountability Office (GAO). GAO has exclusive jurisdiction of a protest of an order valued in excess of \$10 million. Data on agency-level protests are not compiled outside the agency concerned; therefore estimates are based on the total number of protests filed at the GAO in FYs 2009, 2010, and 2011.

Assuming that one-half of all protests are filed with the GAO and the other half are filed with the agency, then the average number of protests filed per fiscal year would be 4,466 (see below):

Fiscal Year 2009 protests to GAO ....	2,000
Fiscal Year 2010 protests to GAO ....	2,300
Fiscal Year 2011 protests to GAO ....	2,400
	6,700
Divided by .....	3
Average annual GAO protests .....	2,233
Multiplied by .....	2
Per Fiscal Year; Estimated total number of protests .....	4,466

Protests may be filed against the award of contracts as well as certain task or delivery orders. There are few prohibitions on the grounds for protests against the award of a contract. However, protests against the award of a task or delivery order are limited to (a) a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or (b) a protest of an order valued in excess of \$10 million. Therefore, it is reasonable to assume that less than 50 percent of the total number of protests filed is against the award of a task or delivery order. A generous estimate is approximately one-fourth, or 1,117. Likewise, only a percentage of the protests against the award of a task or delivery order are made by small businesses. Even if we assume that percentage to be one-half, then the number of protests filed by small businesses against the award of a task or delivery order is estimated to be 559.

# protests of task/delivery orders by small businesses .....	559
% of protests sustained .....	× .03
# of task/delivery orders protests sustained .....	17

The number 17 represents the number of small business task or delivery order protests sustained in a fiscal year. This number is representative of protests against awards by all Government agencies.

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

**V. Paperwork Reduction Act**

The final 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. Chapter 35).

**List of Subjects in 48 CFR Part 16**

Government procurement.

Dated: January 23, 2013.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

**Interim Rule Adopted as Final Without Change**

■ Accordingly, the interim rule amending 48 CFR part 16, which was published in the **Federal Register** at 77 FR 44062 on July 26, 2012, (which incorporated an interim rule published in the **Federal Register** at 76 FR 39238 on July 5, 2011), is adopted as final without change.

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 25 and 52**

**[FAC 2005-65; FAR Case 2012-012; Item III; Docket 2012-0012, Sequence 1]**

**RIN 9000-AM24**

**Federal Acquisition Regulation; Free Trade Agreement—Colombia**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with change, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the United States-Colombia Trade Promotion Agreement. This Trade Promotion Agreement is a free trade agreement (FTA) that provides for mutually non-discriminatory treatment of eligible products and services from Colombia.

**DATES:** *Effective Date:* January 29, 2013.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-65, FAR Case 2012-012.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 77 FR 27548 on May 10, 2012, to implement the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112-42) (19 U.S.C. 3805 note). The comment period closed on July 9, 2012. No comments were received on the interim rule.

The interim rule added Colombia to the definition of “Free Trade Agreement country” in multiple locations in the FAR.

The Colombia FTA covers acquisition of supplies and services equal to or exceeding \$77,494. The threshold for the Colombia FTA is \$7,777,000 for construction. The excluded services for the Colombia FTA are the same as for the Bahrain FTA, Dominican Republic—Central American FTA, Chile FTA, NAFTA, Oman FTA, and Peru FTA.

Because the Colombia FTA construction threshold of \$7,777,000 is the same as the World Trade Organization (WTO) Government Procurement Agreement (GPA) threshold, no new clause alternates are required for the Buy American Act—Construction Materials under Trade Agreements provision and clause (FAR 52.225-11 and 52.225-12) or the Recovery Act FAR clauses at 52.225-23 and 52.225-24.

The final rule corrects the alphabetical order of the listing of the Colombia Free Trade Agreement in the heading of the fourth column of the table at FAR 25.401(b).

**II. Executive Order 12866**

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. The Office of Information and Regulatory Affairs (OIRA) has deemed that this is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, and that this rule is not a major rule under 5 U.S.C. 804.

### III. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule now opens up Government procurement to the goods and services of Colombia, DoD, GSA, and NASA do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at Defense Federal Acquisition Regulation Supplement 225.401-70, and acquisitions that are set aside or provide other form of preference for small businesses are exempt. FAR 19.502-2 states that acquisitions of supplies or services with an anticipated dollar value between \$3,000 and \$150,000 (with some exceptions) are automatically reserved for small business concerns.

### IV. Paperwork Reduction Act

The rule affects the certification and information collection requirements in the provisions at FAR 52.212-3, 52.225-4, 52.225-6, and 52.225-11 currently approved under the Office of Management and Budget Control Numbers 9000-0136, titled: Commercial Item Acquisition; 9000-0130, titled: Buy American Act-Free Trade Agreements-Israeli Trade Act Certificate; 9000-0025, titled: Trade Agreements certificate; and 9000-0141, titled: Buy American-Construction, respectively, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible because it is just a question of which

category offered goods from Colombia would be listed under.

### List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: January 23, 2013.

**Laura Auletta,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.*

### Interim Rule Adopted as Final with Change

■ Accordingly, the interim rule amending 48 CFR parts 25 and 52, which was published in the **Federal Register** at 77 FR 27548, May 10, 2012, is adopted as final with the following change:

#### PART 25—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

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

##### 25.401 [Amended]

■ 2. Amend section 25.401, in the table that follows paragraph (b), by removing from the table heading “Colombia FTA, Chile FTA,” and adding “Chile FTA, Colombia FTA,” in its place.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 31 and 52

[FAC 2005-65; FAR Case 2011-011; Item IV; Docket 2011-0011, Sequence 1]

RIN 9000-AM13

### Federal Acquisition Regulation; Unallowability of Costs Associated With Foreign Contractor Excise Tax

**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 certain requirements of section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, which imposes a 2 percent excise tax on

certain Federal procurement payments to foreign persons. The rule disallows the cost associated with the 2 percent excise tax on certain foreign procurements.

**DATES:** *Effective Date:* February 28, 2013.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-65, FAR Case 2011-011.

### SUPPLEMENTARY INFORMATION:

#### I. Background

The James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347) was signed into law and effective on January 2, 2011. Section 301 of the Act amends the Internal Revenue Code of 1986 by adding a new section 5000C, Imposition of tax on certain foreign procurements (26 U.S.C. 5000C). Section 5000C imposes a 2 percent excise tax on payments made to foreign persons pursuant to Government contracts for the provision of goods or services, if the goods are manufactured or produced in, or the services are performed in, a country that is not a party to an international procurement agreement with the United States. The statute applies to contracts entered into on or after January 2, 2011. The statute does not apply, however, if the imposition of the tax would be inconsistent with any international agreement. The tax is to be collected in a manner similar to other U.S. taxes withheld on payments to foreign persons. Additionally, section 301 stipulates that no funds are to be disbursed to any foreign contractor in order to reimburse the tax imposed (26 U.S.C. 5000C Note).

On February 22, 2012, DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 77 FR 10461 implementing the prohibition against reimbursement of the 2 percent excise tax, by revising the FAR rules so that the cost of the tax cannot be included as part of a payment, or as part of a cost-based negotiated price.

Regulations under section 5000C will be forthcoming from the Department of the Treasury that will provide specific guidance regarding the application of the tax and the procedures for withholding the tax. Once the Department of the Treasury implements procedures for withholding this 2 percent excise tax, the impact on