

DEPARTMENT OF STATE

48 CFR Parts 601, 602, 603, 604, 605, 606, 609, 611, 612, 613, 616, 617, 619, 622, 623, 625, 626, 628, 630, 632, 636, 637, 642, 651, 652, and 653

[Public Notice 4685]

RIN 1400-AB06

Department of State Acquisition Regulation (DOSAR)

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This rule makes final a proposed rule published for comment on November 13, 2003 amending the Department of State Acquisition Regulation (DOSAR). No public comments were received. The proposed rule is therefore adopted as final. This final rule also contains three miscellaneous amendments not published on November 13, 2003, as outlined below.

EFFECTIVE DATE: This rule is effective April 13, 2004.

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SUPPLEMENTARY INFORMATION: On November 13, 2003 (Public Notice 4525 at 68 FR 64297), the Department of State proposed numerous amendments to the DOSAR to reflect recent changes in the Federal Acquisition Regulation (FAR), as well as organizational and other policy changes within the Department. The rule was discussed in detail in Public Notice 4525, as were the Department's reasons for the changes to the regulation. The Department is now promulgating a final rule with the following minor changes from the proposed rule:

- DOSAR 601.603-70 is further revised to delete one more acquisition office (the Diplomatic Telecommunications Service—Program Office). The acquisition responsibilities of this office have been transferred to the Office of Acquisition Management.
- DOSAR 605.202-70 (a) is revised to delete the last sentence. This sentence established an end date (March 12, 2004) for the waiver for synopsisizing foreign acquisitions in the

Governmentwide Point of Entry (GPE). Since this waiver is extended periodically, it makes sense to not publish the actual date. This will ease administration of the regulation so that changes do not have to be published each time the date changes.

- DOSAR 605.202-70(d) is revised to state that the GPE waiver authority also does not apply to any contracts exceeding \$5 million. The proposed rule limited this to only construction contracts. A decision has been made that all contracts exceeding \$5 million must be synopsisized in the GPE.

These amendments do not affect the public, and therefore good cause exists to publish them without first soliciting public comment because prior public comment is unnecessary.

Regulatory Findings

Administrative Procedure Act

The Department is publishing this rule as a final rule after it was published as a proposed rule on November 13, 2003 (see **SUPPLEMENTARY INFORMATION**).

Regulatory Flexibility Act

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$1 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

Executive Order 12866

The Office of Management and Budget has reviewed this rule under Executive Order 12866.

Paperwork Reduction Act

Information collection requirements have been approved under the Paperwork Reduction Act of 1980 by OMB, and have been assigned OMB Control Number 1405-0050. The Department is currently seeking approval for the information collection requirements associated with Form DS-4053, Department of State Mentor-Protégé Program Application.

List of Subjects in 48 CFR Parts 601, 602, 603, 604, 605, 606, 609, 611, 612, 613, 616, 617, 619, 622, 623, 625, 626, 628, 630, 632, 636, 637, 642, 651, 652, and 653

Department of State Acquisition Regulation.

■ Accordingly, for the reasons set forth in the preamble, title 48, chapter 6 of the Code of Federal Regulations is amended as follows:

- 1. The authority citation for 48 CFR parts 601, 602, 603, 604, 605, 606, 609, 611, 612, 613, 616, 617, 619, 622, 623, 625, 626, 628, 630, 632, 636, 637, 642, 651, 652, and 653 continues to read as follows:

Authority: 40 U.S.C. 486(c); 22 U.S.C. 2658.

Subchapter A—General

PART 601—DEPARTMENT OF STATE ACQUISITION REGULATION

- 2. Section 601.105-3 is revised to read as follows:

601.105-3 Copies.

The DOSAR is available through the Department's Intranet system at <http://aope.a.state.gov>, or through the Internet from A/OPE's Acquisition Web site. The Internet address is: <http://www.statebuy.state.gov/>.

601.106 [Amended]

- 3. Section 601.106 is amended by removing from the last sentence "225,302 hours" and inserting "225,503 hours" in its place.
- 4. Section 601.603-1 is added to read as follows:

601.603-1 General.

Details of the Department's acquisition career management program are described in 6 FAH-6, the Acquisition Career Management Program Handbook, which is available on the Intranet from the A/OPE Web site (see 601.105-3 for address).

■ 5. Section 601.603–3 is amended by revising paragraph (d) to read as follows:

601.603–3 Appointment.

* * * * *

(d) *Personal services agreements.* Individuals who may sign personal services agreements (PSAs) are limited to the following:

- (1) The Human Resources Officer;
- (2) The Human Resources/Financial Management Officer; or,
- (3) The Management Officer or an American Foreign Service Officer designated to perform human resource functions.

■ 6. In section 601.603–70, paragraph (a) is revised and a sentence is added at the end of paragraph (b)(6) to read as follows:

601.603–70 Delegations of authority.

(a) *Delegations.* As stated in 601.603–3(a), there is no contracting officer authority conferred by virtue of position. Pursuant to 601.602–1(b), the Procurement Executive has designated the following as contracting activities as defined in FAR 2.101. These authorities are not redelegable. In addition, specific individuals are designated as heads of contracting activities (HCAs) (*see* FAR 2.101):

(1) *Overseas posts.* Each overseas post shall be regarded as a contracting activity to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies, equipment, publications, and services. The Principal Officer, the Management Officer, or the Supervisory General Services Officer are designated as HCAs; *provided*, that he/she has a contracting officer's warrant issued by the Procurement Executive. The Procurement Executive (or authorized A/OPE staff) may delegate to a contracting officer, on a case-by-case basis, the authority to award a contract or modification which exceeds the contracting officer's warrant level.

(i) No authority is delegated to enter into cost-reimbursement, fixed-price incentive, or fixed-price redeterminable contracts. Design/build solicitations and contracts may only be entered into with the written approval of A/OPE and OBO. Proposed construction contracts exceeding \$500,000 and any related architect-engineer contracts must have prior A/OPE approval.

(ii) When expressly authorized by a U.S. Government agency which does not have a contracting officer at the post, the officers named in paragraph (a)(1) introductory text of this section may enter into contracts for that agency. Use of this authority is subject to the

statutory authority of that agency and any special contract terms or other requirements necessary for compliance with any conditions or limitations applicable to the funds of that agency. The agency's authorization shall cite the statute(s) and state any special contract terms or other requirements with which the acquisition so authorized must comply. In view of the contracting officer's responsibility for the legal, technical, and administrative sufficiency of contracts, questions regarding the propriety of contracting actions that the post is required to take pursuant to this authority may be referred to the Department for resolution with the headquarters of the agency concerned.

(2) *Office of Logistics Management; Office of Acquisition Management (A/LM/AQM).* The authority to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies and services, including construction, is delegated to the Director or designee as the HCA.

(3) *Foreign Service Institute.* The authority to enter into and administer contracts pursuant to Chapter 7, Title I, of the Foreign Service Act of 1980, as amended (22 U.S.C. 4021 *et seq.*), is delegated to the Director of the Foreign Service Institute, the Executive Director, the Deputy Executive Director, and the Supervisory Contracting Officer as the HCA.

(4) *Office of Foreign Missions.* The authority to enter into and administer contracts pursuant to Title II of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 4301 *et seq.*), is delegated to the Director, Office of Foreign Missions, and the Administrative Officer as the HCA.

(5) *U.S. Mission to the United Nations.* The authority to enter into and administer contracts pursuant to the United Nations Participation Act of 1945, as amended (22 U.S.C. 287), is delegated to the Counselor for Administration as the HCA.

(6) *Regional Procurement Support Offices.* The authority to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies, equipment, publications, and services on behalf of overseas posts is delegated to each Director, Regional Procurement Support Office (RPSO) as the HCA at the following locations:

- (i) RPSO Frankfurt in conjunction with Consulate General Frankfurt; and
- (ii) RPSO Florida in conjunction with the Florida Regional Center.

(b) * * *

(6) * * * These authorities extend to any acquisition performed by any

Department of State contracting activity on behalf of INL.

* * * * *

PART 602—DEFINITIONS OF WORDS AND TERMS

■ 7. Section 602.101–70 is amended by adding, in alphabetical order, a definition of “Chief of Mission”; and, by revising the definition of “Despatch Agency”, as follows:

602.101–70 DOSAR definitions.

* * * * *

Chief of Mission means the principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) of the Foreign Service Act of 1980 (Public Law 96–465) to be temporarily in charge of such a mission or office.

* * * * *

Despatch Agency means the office responsible for the transportation of supplies between the U.S. and posts within its specific geographic area as assigned by the Office of Logistics Operations. There are six Despatch Agencies, one each in Iselin, New Jersey; Baltimore, Maryland; Miami, Florida; Seattle, Washington; Brownsville, Texas; and the European Logistical Support Office in Antwerp, Belgium.

* * * * *

PART 603—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 8. Section 603.104–5 is redesignated as section 603.104–4.

■ 9. Section 603.104–10 is redesignated as section 603.104–7. New section 603.104–7 is amended in paragraph (d)(2)(ii)(B) by correcting the citation at the end of the paragraph to read “FAR 3.104–7(d)(2)(ii)(B).”

■ 10. Section 603.204 is amended by revising paragraph (b) to read as set forth below, and by removing paragraph (c):

603.204 Treatment of violations.

* * * * *

(b) Upon completion of the investigation and/or prosecution or with the consent of the U.S. Department of Justice, the Assistant Inspector General for Investigations shall provide to the Procurement Executive a report, together with all pertinent documentation, concerning the suspected violation. The Office of the Procurement Executive shall provide to

the contractor a written notice by certified mail, return receipt requested, presenting the findings, and shall establish a schedule, including location, for an investigative hearing for the purposes described in FAR 3.204(b).

* * * * *

■ 11. Section 603.601 is amended by adding the following sentence to the end of paragraph (a):

603.601 Policy.

(a) * * * This policy also applies to individuals hired under personal services agreements and personal services contracts.

■ 12. A new Subpart 603.8, consisting of section 603.804, is added to read as follows:

Subpart 603.8—Limitations on the Payment of Funds To Influence Federal Transactions

603.804 Policy

(b) The contracting officer shall forward a copy of all contractor disclosures furnished pursuant to the clause at FAR 52.203-12 to the Office of the Legal Adviser, Employment Law, Senior Ethics Counsel (L/EMP/Ethics).

PART 604—ADMINISTRATIVE MATTERS

■ 13. Subpart 604.5 is revised to read as follows:

Subpart 604.5—Electronic Commerce in Contracting

604.502 Policy.

(b) The Assistant Secretary of State for Administration is the head of the agency for the purpose of FAR 4.502(b).

(1)(i) *Posting solicitations for domestic contracting activities.* Contracting officers at domestic contracting activities shall post all open market competitive, unclassified Requests for Proposals and Invitations for Bids exceeding the simplified acquisition threshold on the Internet, unless an exception has been approved by the head of the contracting activity. Contracting officers may post Requests for Quotations and noncompetitive acquisitions if desired. Solicitations shall be posted through the Statebuy Interactive Platform (SIP) at <https://state.monmouth.army.mil/>. If the SIP is temporarily unavailable (due either to problems with the SIP system or the Internet connections), the solicitation shall be posted on the Governmentwide point of entry (GPE), and immediately posted on the SIP when the SIP again becomes available.

(ii) *Materials not in automated format.* For solicitations containing

drawings or other materials that are not in an automated format, the contracting officer shall:

(A) Post as much of the solicitation as possible on the Internet; and,

(B) Make hard copies available for those parts of the solicitation that are not in an automated format.

(iii) *Posting solicitations for overseas contracting activities.* Contracting officers at overseas contracting activities shall post competitive local guard solicitations on the Internet using the Statebuy Interactive Platform if U.S. firms may be competing. Posting of other solicitations is optional.

Subchapter B—Competition and Acquisition Planning

PART 605—PUBLICIZING CONTRACT ACTIONS

■ 14. Section 605.202-70 is amended—

■ (a) By removing “CBD” in the first sentence of paragraph (a);

■ (b) By adding the words “in the Governmentwide point of entry (GPE)” after the word “notices” in the first sentence of paragraph (a);

■ (c) By removing “CBD” and inserting “GPE” in its place in the second sentence of paragraph (a);

■ (d) By removing the last sentence of paragraph (a);

■ (e) By removing “CBD” and inserting “GPE” in its place in paragraph (b); and,

■ (f) By revising paragraph (d) to read as follows:

605.202-70 Foreign acquisitions.

* * * * *

(d) *Policy exclusions.* GPE waiver authority does not apply to local guard service contracts exceeding \$250,000, or any contracts exceeding \$5 million. Local guard service contracts that exceed \$250,000 and other contracts that exceed \$5 million shall be published in the GPE. Option year prices shall be included when computing the applicability of this threshold.

■ 15. Section 605.207-70 is amended by removing the word “synopsis” and inserting the word “notice” in its place.

605.303 [Amended]

■ 16. Section 605.303 is amended by removing the word “Office” and inserting the word “Bureau” in its place in the first sentence of paragraph (a).

PART 606—COMPETITION REQUIREMENTS

606.302 [Amended]

■ 17. Section 606.302-6 is amended—

■ (a) By removing the words “*Commerce Business Daily*” and inserting “GPE” in their place in paragraph (c)(1)(i);

■ (b) By removing the words “CBD synopsis” and inserting “GPE notice” in their place in paragraph (c)(1)(ii); and,

■ (c) By removing the words “*Commerce Business Daily*” and inserting “GPE” in their place in paragraph (c)(2).

606.370 [Amended]

■ 18. Section 606.370 is amended by removing the word “Administrative” and inserting the word “Management” in its place in the third sentence of paragraph (b).

■ 19. Section 606.501 is amended by inserting the following sentence after the first sentence in paragraph (b):

606.501 Requirement.

* * * * *

(b) * * * A/LM/AQM’s competition advocate is also designated the contracting activity competition advocate for the Regional Procurement Support Offices. * * *

606.501-70 [Amended]

■ 20. Section 606.501-70 is amended by removing the word “Administrative” and inserting the word “Management” in its place.

PART 609—CONTRACTOR QUALIFICATIONS

■ 21. A new section 609.404-70 is added to read as follows:

609.404-70 Specially Designated Nationals List.

Contracting officers shall not award to any of the entities listed on the Specially Designated Nationals (SDN) List, available on the Department of Treasury’s Office of Foreign Assets Control Web site at <http://www.treas.gov/ofac/>. Contracting officers shall consult this list prior to award for any dollar amount. This list may also be accessed through the EPLS Web site at <http://epls.arnet.gov>.

■ 22. Section 609.405 is amended—

■ (a) By removing paragraphs (d) introductory text and (d)(1)(i);

■ (b) By adding a new paragraph (d)(3) to read as indicated below; and,

■ (c) By removing paragraphs (d)(4)(i) and (d)(4)(ii).

609.405 Effect of listing.

* * * * *

(d)(3) The Procurement Executive is the agency head’s designee for the purposes of FAR 9.405(d)(3).

■ 23. Section 609.406-3 is amended by revising the last two sentences of paragraph (a)(1) to read as follows:

609.406-3 Procedures.

(a)(1) * * * The Office of the Inspector General shall investigate the

matter, as appropriate, and provide a copy of its investigation report to the Procurement Executive for consideration of debarment action, if and when appropriate. The contracting officer shall provide to the Procurement Executive and the Office of the Inspector General a copy of his or her intended actions in response to the Office of the Inspector General report.

* * * * *

PART 611—DESCRIBING AGENCY NEEDS

■ 24. A new subpart 611.6 is added to read as follows:

Subpart 611.6—Priorities and Allocations

Sec.
611.600 Scope of subpart.
611.602 General.
611.603 Procedures.

Subpart 611.6—Priorities and Allocations

611.600 Scope of subpart.

On September 18, 2001, the Department of Commerce (DOC) authorized the Department of State to use the Defense Priorities and Allocations System (DPAS). This authority expires on October 1, 2006. The Department of Defense has approved the Department's Embassy Security Protection Program (DOSESPP) as a national defense program eligible for the priorities support under the DPAS.

611.602 General.

(c)(1) Authority to use the DPAS is limited to the following circumstances:

- (i) The contract or order must be placed with a U.S. firm; and,
- (ii) The contract or order must be in support of the DOSESPP, which consists of work involving the security of overseas posts. The DOSESPP includes a wide range of elements of both physical and technical security, such as:

(A) New Embassy/Consulate Compound (NEC/NCC) Program. This program involves the construction of new secure Embassies, Consulates, and related facilities, as well as renovations of newly acquired buildings when used as alternatives to the construction of new secure buildings.

(B) Physical security upgrade. This includes installation of forced entry/ballistic resistant (FE/BR) windows and doors, walls/fences, active anti-ram barriers, bollards (concrete and steel barriers), and related items.

(C) Forced entry/ballistic resistant (FE/BR) components. This includes

doors, windows, and related facilities and items that can provide the necessary time to protect Government personnel from attack.

(D) Armored vehicles. This includes passenger vehicles with appropriate armoring.

(E) Entry control and building surveillance equipment. This includes walk-through metal detectors, X-ray equipment, surveillance cameras, explosive detection equipment, and other features to enhance the protection of Government personnel and facilities.

(2) DOC has assigned the following priority rating to DOSESPP contracts or orders: DO–H8.

611.603 Procedures.

(f) Department of State contracting officers are authorized to sign DO–H8 rated contracts or orders. It is the responsibility of the requirements office to determine which contracts or orders should be rated. All contracts with U.S. firms under the DOSESPP will not necessarily need to be assigned a priority rating.

(g) The contracting officer should place a DO–H8 rating on any contract or order if there is any doubt as to whether a contractor doing work for Embassy security protection will be able to deliver on time. If an unrated contract or order is not completed on time, the contracting officer may modify the contract or order to add the rating; however, the rating shall only be effective for the newly established delivery date, not the original delivery date.

(1) DOC can provide special assistance to implement the DPAS program in specific cases. For example, the Department may request a higher priority rating, or request that DOC issue a written directive to a contractor that is not complying with the DPAS regulations. In addition, although the DPAS program normally applies only to U.S. firms, if the Department has a prime contract with a foreign firm that will be awarding subcontracts with U.S. firms, the Department may request from DOC authorization to place a rating on the prime contract.

(2) Contracting officers or requirements offices who wish to request special assistance from DOC must complete DOC Form BXA–999, *Request for Special Priorities Assistance*, and submit it to A/OPE, which will arrange for submission of the request to DOC.

PART 612—ACQUISITION OF COMMERCIAL ITEMS

■ 25. A new part 612, consisting of subpart 612.3 and section 612.302, is added to subchapter B as follows:

PART 612—ACQUISITION OF COMMERCIAL ITEMS

Subpart 612.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

612.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) The head of the contracting activity shall approve any request for a waiver to tailor a clause or otherwise include any additional terms or conditions in a solicitation or contract in a manner that is inconsistent with customary commercial practice.

Subchapter C—Contracting Methods and Contract Types

PART 613—SIMPLIFIED ACQUISITION PROCEDURES

■ 26. Section 613.303–5 is amended by adding a new paragraph (b) to read as follows:

613.303–5 Purchases under BPAs.

(b) Individual purchases under BPAs for commercial items may exceed the simplified acquisition threshold; however, the higher threshold must be consistent with the requirements of FAR 13.303–5(b)(1) and (2).

* * * * *

PART 616—TYPES OF CONTRACTS

616.505 [Amended]

■ 27. Section 616.505 is amended by correcting the paragraph designation of “(b)(4)” to read “(b)(5)”.

PART 617—SPECIAL CONTRACTING METHODS

■ 28. Section 617.204 is amended by adding the following sentence to the end of paragraph (e):

617.204 Contracts.

(e) * * * The Procurement Executive may delegate this approval authority to individuals within the Office of the Procurement Executive.

■ 29. Section 617.504–70 is amended by adding the words “and Bureau Executive Directors” after the words “deputy assistant secretaries” in paragraph (a) and by removing the parenthetical “(illustrated in part 653)” in the first sentence of paragraph (b).

Subchapter D—Socioeconomic Programs**PART 619—SMALL BUSINESS PROGRAMS**

■ 30. Section 619.201 is revised to read as follows:

619.201 General policy.

(a) The Operations Director, Office of Small and Disadvantaged Business Utilization (A/SDBU), is responsible for performing all functions and duties prescribed in FAR 19.201(c) and (d).

(b) In addition to the requirements of FAR 19.201(b), each head of the contracting activity, or designee, is responsible for establishing in coordination with the A/SDBU Operations Director annual goals for the DOS small business program.

(c) The Assistant Secretary of State for Administration is the agency head for the purposes of FAR 19.201(c).

(d) Pursuant to FAR 19.201(d), each Small and Disadvantaged Business Utilization Specialist (SDBUS) is responsible for—

(1) Maintaining a program to locate capable small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business sources to fulfill DOS acquisition requirements;

(2) Coordinating inquiries and requests for advice from small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns on DOS contracting and subcontracting opportunities and other acquisition matters;

(3) Advising contracting activities on new or revised small business policies, regulations, procedures, and other related information;

(4) Assuring that small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns are provided adequate specifications or drawings by initiating, in writing, with appropriate technical and contracting personnel to ensure that all necessary specifications or drawings for current and future acquisitions, as appropriate, are available;

(5) Reviewing all proposed acquisitions in excess of the simplified acquisition threshold, including commercial items using the simplified acquisition procedures of FAR Subpart 13.5, and task and delivery orders under

multiple award contracts exceeding \$2 million, to assure that small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns will be afforded an equitable opportunity to compete and, as appropriate, initiating recommendations for small business, 8(a), or HUBZone set-asides. This includes proposed contract modifications for new or additional requirements that do not fall within the original scope of the contract and which exceed the simplified acquisition limitation. This does not include the exercising of contract options;

(6) Assuring that contract financing available under existing regulations is offered when appropriate and that requests by small business concerns for such financing are not treated as a handicap in the award of contracts;

(7) Providing assistance to the contracting officer in making determinations concerning responsibility of prospective contractors whenever small business concerns are involved;

(8) Participating in the evaluation of a prime contractor's small, small disadvantaged, woman-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business subcontracting plans;

(9) Assuring that the participation of small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns is accurately reported;

(10) Attending, as appropriate, debriefings to unsuccessful small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns to assist those firms in understanding requirements for responsiveness and responsibility so that the firm may be able to qualify for future awards;

(11) Making available to SBA copies of solicitations when so requested;

(12) When a bid or offer from a small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business has been rejected for non-responsiveness or non-responsibility, upon request, aid, counsel, and assist that firm in understanding requirements for responsiveness and responsibility so

that the firm may be able to qualify for future awards;

(13) Participating in Government-industry conferences to assist small business concerns, including Business Opportunity/Federal Acquisition Conferences, Minority Business Enterprise Acquisition Seminars and Business Opportunity Committee meetings;

(14) Maintaining a list of supplies and services that have been placed as repetitive small business set-asides;

(15) Participating in the development, implementation, and review of automated source systems to assure that the interests of small business concerns are included;

(16) Advising potential sources how they can obtain information about competitive acquisitions;

(17) Providing small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns information regarding assistance available from Federal agencies such as the Small Business Administration, Minority Business Development Agency, Bureau of Indian Affairs, Economic Development Administration, National Science Foundation, Department of Labor and others, including State agencies and trade associations; and

(18) Participating in interagency programs relating to small business matters as authorized by the A/SDBU Operations Director.

(f)(1) The Procurement Executive is the agency designee for the purposes of FAR 19.201(f)(1). The written determination shall be forwarded to the Procurement Executive through the A/SDBU Operations Director.

■ 31. A new section 619.202, and subsection 619.202–70 are added to read as follows:

619.202 Specific policies.**619.202–70 The Department of State Mentor-Protégé Program.**

(a) *Purpose.* The Mentor-Protégé Program is designed to motivate and encourage firms to assist small businesses with business development, including small disadvantaged businesses, women-owned small businesses, HUBZone small businesses, veteran-owned small businesses and service-disabled veteran-owned small businesses. The program is also designed to improve the performance of DOS contracts and subcontracts, foster the establishment of long-term business relationships between small businesses and prime contractors, and increase the

overall number of small businesses that receive DOS contract and subcontract awards. The program is limited to non-commercial item acquisitions.

(b) *Definitions.* The definitions of small business (SB), HUBZone small business concern (HUBZone), small disadvantaged business (SDB), women-owned small business (WOSB), veteran-owned small business (VOSB), and service-disabled veteran-owned small business (SDVOSB) are the same as found in FAR 2.101.

Mentor means a prime contractor that elects to promote and develop small business subcontractors by providing developmental assistance designed to enhance the business success of the protégé.

Protégé means a small business, HUBZone small business, small disadvantaged business, women-owned small business, veteran-owned small business, or service-disabled veteran-owned small business that is the recipient of developmental assistance pursuant to a mentor-protégé program.

(c) *Non-affiliation.* For purposes of the Small Business Act, a protégé firm is not considered an affiliate of a mentor firm solely because the protégé firm is receiving developmental assistance from the mentor firm under the program.

(d) *General policy.* (1) Eligible business prime contractors not included on the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" that are approved as mentor firms may enter into agreements with eligible protégé.

(2) A firm's status as a protégé under a DOS contract shall not have an effect on the firm's ability to seek other prime contracts or subcontracts.

(e) *Incentives for prime contractor participation.* (1) Under the Small Business Act (15 U.S.C. 637(d)(4)(E)), DOS is authorized to provide appropriate incentives to encourage subcontracting opportunities for small businesses consistent with the efficient and economical performance of the contract. This authority is limited to negotiated acquisitions.

(2) Before awarding a contract that requires a subcontracting plan, the existence of a mentor-protégé arrangement, and performance, if any, under an existing arrangement, may be considered by the contracting officer in:

(i) Evaluating the quality of a proposed subcontracting plan under FAR 19.704-5; and,

(ii) Assessing the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in determining contractor responsibility under FAR 19.705-5(a)(1).

(3) A non-monetary award may be presented annually (or as often as appropriate) to the mentoring firm providing the most effective developmental support of a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Operations Director, A/SDBU.

(f) *Measurement of program success.* The success of the DOS Mentor-Protégé Program will be measured by:

(1) The increase in the number and dollar value of contracts awarded to protégé firms under DOS contracts from the date the protégé enters the program;

(2) The increase in the number and dollar value of contracts and subcontracts awarded to the protégé under other Federal agencies and commercial contracts; and,

(3) The developmental assistance provided by the mentor firm and the resulting increase in the technical, managerial, financial or other capabilities of the protégé firm, as reported by the protégé.

(g) *Eligibility of mentor firms.* A mentor firm:

(1) May be either a large or small business;

(2) Must be eligible for award of U.S. Government contracts;

(3) Must be able to provide developmental assistance that will enhance the ability of protégé to perform as subcontractors; and,

(4) Will be encouraged to enter into arrangements with protégé and firms with whom they have established business relationships.

(h) *Eligibility of protégé firms.* (1) A protégé firm must be:

(i) A SB, HUBZone, SDB, WOSB, VOSB, or SDVOSB as those terms are defined in FAR 2.101;

(ii) Small in the NAICS code for the services or supplies to be provided by the protégé to the mentor; and,

(iii) Eligible for award of U.S. Government contracts.

(2) Except for SDB and HUBZone firms, a protégé firm may self-certify to a mentor firm that it meets the requirements set forth in paragraph

(h)(1) of this subsection. Mentors may rely in good faith on written representations by potential protégé that they meet the specified eligibility requirements. SDB status eligibility and documentation requirements are determined by FAR 19.304. HUBZone status eligibility and documentation requirements are determined by FAR 19.1303.

(3) Protégé may have multiple mentors. protégé participating in mentor-protégé programs in addition to DOS's program should maintain a system for preparing separate reports of

mentoring activity for each agency's program.

(i) *Selection of protégé firms.* (1) Mentor firms are solely responsible for selecting protégé firms. The mentor is encouraged to identify and select a broad base of protégé firms whose core competencies support DOS's mission.

(2) Mentors may have multiple protégé.

(3) The selection of protégé firms by mentor firms may not be protested, except that any protest regarding the size or eligibility status of an entity selected by a mentor shall be handled in accordance with FAR and SBA regulations.

(j) *Application and agreement process for mentor-protégé teams to participate in the program.* (1) Firms interested in becoming a mentor firm shall apply in writing to A/SDBU. The application

(Form DS-4053, Department of State Mentor-Protégé Program Application), shall be evaluated by the nature and extent of technical and managerial support proposed as well as the extent of financial assistance in the form of equity investment, loans, joint-venture support, and traditional subcontracting support proposed.

(2) A proposed mentor shall submit the application form and associated information to A/SDBU.

(k) *A/SDBU review of application.* (1) A/SDBU shall review the information to ensure the mentor and protégé are eligible and the information provided is complete. A/SDBU shall consult with the contracting officer on the adequacy of the proposed mentor-protégé arrangement, and its review shall be complete no later than 30 calendar days after receipt of the application by A/SDBU.

(2) Upon completion of the review, A/SDBU will advise the mentor if its application is acceptable. The mentor may then implement the developmental assistance program in accordance with the approved agreement.

(3) The agreement defines the relationship between the mentor and protégé firms only. The agreement itself does not create any privity of contract between the mentor or protégé and the DOS.

(1) *Developmental assistance.* The forms of developmental assistance a mentor can provide to a protégé include:

(1) Management guidance relating to:

(i) Financial management;

(ii) Organizational management;

(iii) Overall business management/planning;

(iv) Business development; and,

(v) Technical assistance.

(2) Loans;

(3) Rent-free use of facilities and/or equipment;

(4) Property;

(5) Temporary assignment of personnel to protégé for purpose of training; and,

(6) Any other types of permissible, mutually beneficial assistance.

(m) *Obligation.* (1) A mentor or protégé firm may voluntarily withdraw from the program. However, in no event shall such withdrawal impact the program mission and contractual requirements under the prime contract.

(2) Mentor and protégé firms shall submit to A/SDBU annual reports on program progress of the mentor-protégé agreements. Large business mentors may submit these reports as part of their SB, HUBZone, SDB, WOSB, VOSB, and SDVOSB plan submission in accordance with the due date on the SF-295. DOS shall consider the following in evaluating these reports:

(i) Specific actions taken by the contractor, during the evaluation period, to increase the participation of protégés as suppliers to the U.S. Government and to commercial entities;

(ii) Specific actions taken by the mentor, during the evaluation period, to develop the technical and corporate administrative expertise of a protégé as defined in the agreement;

(iii) To what extent the protégé has met the developmental objectives in the agreement; and,

(iv) To what extent the mentor firm's participation in the Mentor-Protégé Program resulted in the protégé receiving contract(s) and subcontract(s) from private firms and agencies other than the DOS.

(3) The DOS A/SDBU shall submit the annual reports to the cognizant contracting officer regarding participating prime contractor(s) performance in the program.

(4) Mentor and protégé firms shall submit an evaluation to the A/SDBU at the conclusion of the mutually agreed upon program period, the conclusion of the contract, or the voluntary withdrawal by either party from the program, whichever comes first.

(n) *Internal controls.* (1) A/SDBU shall oversee the program and shall work with the cognizant contracting officer to achieve program objectives.

(2) DOS may rescind approval of an existing Mentor-Protégé agreement if it determines that such an action is in the Department's best interest. The rescission shall be in writing and sent to the mentor and protégé firms after approval by the A/SDBU Operations Director. Rescission of an agreement does not change the terms of the subcontract between the mentor and the protégé or the prime contractor's obligations under its subcontracting plan.

(o) *Solicitation provision and contract clause.* (1) The contracting officer shall insert the provision at 652.219-72, Department of State Mentor-Protégé Program, in all unrestricted solicitations exceeding \$500,000 (\$1,000,000 for construction) that offer subcontracting opportunities.

(2) The contracting officer shall insert the clause at DOSAR 652.219-73, Mentor Requirements and Evaluation, in all contracts where the prime contractor has signed a Mentor-Protégé Agreement with the Department of State.

■ 32. Subpart 619.7 is amended by revising the subpart heading to read as follows:

Subpart 619.7—The Small Business Subcontracting Program

■ 33. Section 619.705-1 is revised to read as follows:

619.705-1 General support of the program.

It is the Department's policy to incorporate its current fiscal year goals as negotiated with the SBA into all pertinent Department solicitations, in addition to the standard subcontract clauses. Incorporation of the goals does not require that large prime contractors must subcontract, but does require that to the extent they plan to subcontract, specific goals be established for doing business with small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business firms. Where funds are available, an incentive clause such as that found in FAR 52.219-10, Incentive Subcontracting Program, is encouraged.

■ 34. Section 619.705-3 is revised to read as follows:

619.705-3 Preparing the solicitation.

To further promote the use of small, disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business firms by large prime contractors, contracting officers are encouraged to consider the adequacy of the subcontracting plans, and/or past performance in achieving negotiated subcontract goals, as part of the overall evaluation of the technical proposals.

■ 35. Section 619.705-4 is revised to read as follows:

619.705-4 Reviewing the subcontracting plan.

A/SDBU shall review subcontracting plans to determine if small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned

small business concerns are afforded the maximum practicable opportunity to participate as subcontractors. A/SDBU shall recommend to the contracting officer changes needed to subcontracting plans found to be deficient.

■ 36. Section 619.705-6-70 is amended by revising the first sentence in paragraph (b) to read as follows:

619.705-6-70 Reporting responsibilities.

* * * * *

(b) Contracting officers shall collect subcontracting data from contractors required to establish subcontracting plans in support of small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business concerns. * * *

619-708-70 [Amended]

■ 37. Section 619.708-70 is amended by removing the words "and Small Disadvantaged Business".

619.801 [Removed]

■ 38. Section 619.801 is removed.

■ 39. Section 619.805-2 is amended by adding a new paragraph (a)(2) to read as follows:

619.805-2 Procedures.

(a) * * *

(2) In accordance with a waiver approved by SBA, contract actions for services exceeding \$3 million and supplies exceeding \$5 million that supplement the security of U.S. diplomatic posts and protect the lives of Department personnel may be awarded non-competitively. Contracting officers do not need to compete 8(a) acquisitions as stated when those acquisitions exceed the 8(a) competition thresholds. This waiver is in effect for the duration of the national state of emergency as declared by the President of the United States. If a contracting officer has a question as to whether a particular action falls under this waiver, the contracting officer should contact A/SDBU.

* * * * *

PART 622—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

■ 40. Subpart 622.13 is amended by revising the subpart heading to read as follows:

Subpart 622.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

■ 41. Section 622.1303 is redesignated as section 622.1305. Newly designated

622.1305 is amended by revising the citation "FAR 22.1303" at the end of the sentence to read "FAR 22.1305."

■ 42. Section 622.1308 is redesignated as section 622.1310. Newly designated 622.1310 is amended by revising the citation "FAR 22.1308(a)(2) and (c)" at the end of the sentence to read "FAR 22.1310(a)(1)(ii) and (a)(2)."

■ 43. A new subpart 622.15, consisting of section 622.1503, is added to read as follows:

Subpart 622.15—Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

622.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.

(e) The contracting officer shall refer to the DOS Inspector General for Investigation any instances where the contracting officer has reason to believe that forced or indentured child labor was used to mine, produce, or manufacture an end product furnished pursuant to a contract awarded subject to the certification required in FAR 22.1503(c).

PART 623—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 44. Part 623 is amended by revising the heading to read as set forth above.

Subpart 623.1 [Removed]

■ 45. Subpart 623.1, consisting of sections 623.104 and 623.107, is removed.

623.400 [Amended]

■ 46. Section 623.400 is amended by removing the words "made and/or performed" and inserting the word "awarded" in their place in the second sentence.

■ 47. Section 623.404 is revised to read as follows:

623.404 Agency affirmative procurement programs.

(a) The Department's affirmative procurement program has been established by A/OPE. It is available on the A/OPE Internet and Intranet Web sites at <http://www.statebuy.state.gov/green.htm> and <http://aope.a.state.gov/green2.htm>, respectively.

PART 625—FOREIGN ACQUISITION

625.102 [Removed]

■ 48. Section 625.102 is removed.

■ 49. A new section 625.103 is added to read as follows:

625.103 Exceptions.

(a) The authority to make the determination prescribed in FAR 25.103(a) is delegated, without power of redelegation, to the head of the contracting activity.

■ 50. Section 625.105 is revised to read as follows:

625.105 Determining reasonableness of cost.

(a)(1) The authority to make the determinations prescribed in FAR 25.105(a)(1) is delegated, without power of redelegation, to the head of the contracting activity.

625.108 [Removed]

■ 51. Section 625.108 is removed.

■ 52. Section 625.202 is revised to read as follows:

625.202 Exceptions.

(a)(1) The authority to make the determination prescribed in FAR 25.202(a)(1) is delegated, without power of redelegation, to the head of the contracting activity.

625.203 [Removed]

■ 53. Section 625.203 is removed.

■ 54. Section 625.204 is revised to read as follows:

625.204 Evaluating offers of foreign construction material.

(b) The head of the contracting activity is the agency head for the purposes of FAR 25.204(b).

Subpart 625.3 [Removed]

■ 55. Subpart 625.3, consisting of sections 625.300, 625.300–70, 625.302, and 625.304 is removed.

Subpart 625.7 [Removed]

■ 56. Subpart 625.7, consisting of section 625.703, is removed.

PART 626—OTHER SOCIOECONOMIC PROGRAMS

■ 57. Part 626, consisting of subpart 626.2 and section 626.200–70, is removed.

Subchapter E—General Contracting Requirements

PART 628—BONDS AND INSURANCE

628.203 [Amended]

■ 58. Section 628.203 is amended in paragraph (g) by removing the words "Office of the Inspector General" and inserting the words "Assistant Inspector General for Investigations" in their place.

Subpart 628.70 [Removed]

628.7001 [Removed]

■ 59. Subpart 628.70, consisting of section 628.7001, is removed.

PART 630—COST ACCOUNTING STANDARDS ADMINISTRATION

■ 60. A new part 630 is added to read as follows:

PART 630—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 630.2—CAS Program Requirements

630.201 Contract requirements.

630.201–5 Waiver.

(a) The Procurement Executive is the head of the agency for the purposes of FAR 30.201–5(a) and (b).

PART 632—CONTRACT FINANCING

632.006–2 [Amended]

■ 61. Section 632.006–2 is amended by removing the words "Assistant Inspector General for Investigations" and inserting the words "Procurement Executive" in their place.

■ 62. Subpart 632.4 is amended by revising the Subpart heading to read as follows:

Subpart 632.4—Advance Payments for Non-Commercial Items

632.903 [Removed]

■ 63. Section 632.903 is removed.

■ 64. A new section 632.906 is added to read as follows:

632.906 Making payments.

(a) *General.* The authority to make the determination prescribed in FAR 32.906(a) is delegated, without power of redelegation, to the head of the contracting activity. Before making this determination, the head of the contracting activity shall consult with the appropriate financial office.

Subchapter F—Special Categories of Contracting**PART 636—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

■ 65. Section 636.101–70 is revised to read as follows:

636.101–70 Exception.

Contracts for overseas construction, including capital improvements, alterations, and major repairs, may be excepted where necessary from the provisions of the FAR (48 CFR Chapter 1) under the authority of section 3 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 294). The Director/Chief Operating Officer of the Bureau of Overseas Buildings Operations is authorized to approve such exceptions.

■ 66. Sections 636.104, 636.104–70 and 636.104–71, are added to read as follows:

636.104 Policy.**636.104–70 Foreign Service Buildings Act of 1926, as amended.**

(a) *Policy.* Section 11 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 302) limits competition for the construction, alteration, or repair of buildings or grounds abroad exceeding \$5 million to:

- (1) American-owned firms; or
- (2) Firms from countries which permit or agree to permit substantially equal access to American firms for comparable diplomatic and consular building projects.

(b) *Limitation.* This participation may be permitted by or limited to:

- (1) Host-country firms where required by international agreement; or
- (2) By the laws of the host country; or
- (3) Where determined by the Secretary of State to be necessary in the interest of bilateral relations or necessary to carry out the construction project.

(c) *Evaluation preference.* For purposes of determining competitive status, American-owned firms shall receive a ten (10) percent price preference reduction, provided that two prospective responsible bidders/offers submit a bid/offer.

636.104–71 Omnibus Diplomatic Security and Antiterrorism Act.

(a) *Preference for United States contractors.* The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99–399; 22 U.S.C. 4852) limits certain construction projects abroad to United States persons or qualified United States joint venture persons. The Omnibus Diplomatic

Security and Antiterrorism Act of 1986 applies to the following, as determined by the Assistant Secretary for Diplomatic Security:

(1) Diplomatic construction or design projects abroad exceeding \$10 million; or,

(2) Diplomatic construction projects abroad at any dollar amount that involve technical security, unless the project involves low-level technology.

(b) *Exception.* This preference shall not apply with respect to any diplomatic construction or design project in a foreign country whose statutes prohibit the use of United States contractors on such projects.

(c) *Subcontracting limitation.* With respect to a diplomatic construction project, a prime contractor may not subcontract more than 50 percent of the total value of the contract for that project.

■ 67. Section 636.202 is added to read as follows:

636.202 Specifications.

(d) The Director/Chief Operating Officer of the Bureau of Overseas Building Operations is the head of the agency for the purposes of FAR 36.202(d)(3) and (4).

■ 68. Section 636.513 is amended by adding the following sentence to the end of paragraph (a):

636.513 Accident prevention.

(a) * * * The contracting officer shall confer with OBO/OM/SHEM if there are any questions on any factors listed in paragraph (4) of the clause, or if the contracting officer has any questions regarding construction safety issues.

■ 69. Section 636.570 is added to read as follows:

636.570 Additional DOSAR provisions.

(a) The contracting officer shall insert the provision at 652.236–71, Foreign Service Buildings Act, As Amended, in all contracts exceeding \$5,000,000 for the construction, alteration, or repair of buildings and grounds overseas, unless:

- (1) An international agreement with or laws of the host country government permits or limits the participation to host-country firms; or,
- (2) The Secretary of State determines that it is necessary to the interest of bilateral relations or to carry out the project to either permit or limit the participation to host-country firms; or,
- (3) The provision at DOSAR 652.236–72 applies.

(b) The contracting officer shall insert the provision at 652.236–72, Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act, in all diplomatic construction or

design solicitations exceeding \$10 million; or, diplomatic construction projects abroad at any dollar amount that involve technical security, unless the project involves low-level technology, as determined by the Assistant Secretary of Diplomatic Security.

636.602–4 [Removed]

■ 70. Section 636.602–4 is removed.

PART 637—SERVICE CONTRACTING

■ 71. Section 637.102 and section 637.102–70 are added to read as follows:

637.102 Policy.**637.102–70 Special requirements for the acquisition of local guard services overseas.**

(a) *Policy.* Section 136 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (22 U.S.C. 4864) encourages the participation of United States persons and qualified United States joint venture persons in local guard contracts overseas under diplomatic security programs.

(b) *Evaluation preference.* For purposes of determining competitive status, proposals of United States persons and qualified United States joint venture persons shall receive a ten (10) percent price preference reduction.

637.104–70 [Amended]

■ 72. Section 637.104–70 is amended by removing the words “Office of Foreign Buildings” and inserting the words “Bureau of Overseas Buildings Operations” in their place, and by removing the words “and the Moscow Embassy Buildings Control Office” in paragraph (f).

■ 73. Section 637.110 is amended by adding a new paragraph (d) to read as follows:

637.110 Solicitation provisions and contract clauses.

* * * * *

(d) The contracting officer shall insert the provision at 652.237–73, Statement of Qualifications for Preference as a U.S. Person, in all overseas local guard solicitations.

■ 74. A new Subpart 637.6, consisting of section 637.601, is added to read as follows:

Subpart 637.6—Performance-Based Contracting**637.601 General.**

It is the Department’s policy that all new service contracts be performance-based, with clearly defined deliverables and performance standards. Any

deviations from this policy shall be fully justified in writing and approved by the Departmental Competition Advocate.

Subchapter G—Contract Management

PART 642—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 75. Section 642.271 is redesignated as section 642.272. A new section 642.271 is added to read as follows:

642.271 Government Technical Monitor (GTM).

(a) *Policy.* The contracting officer may appoint a Government Technical Monitor (GTM) to assist the Contracting Officer's Representative (COR) in monitoring a contractor's performance. The contracting officer may appoint a GTM because of physical proximity to the contractor's work site, or because of special skills or knowledge necessary for monitoring the contractor's work. The contracting officer may also appoint a GTM to represent the interests of another requirements office or post concerned with the contractor's work. A GTM shall be a direct-hire U.S. Government employee.

■ 76. Subpart 642.15, consisting of sections 642.1503 and 642.1503–70, is added to read as follows:

Subpart 642.15—Contractor Performance Information 642.1503 Procedures.

642.1503–70 Contractor Performance System (CPS).

(a) The Department of State subscribes to the Contractor Performance System (CPS) maintained by the National Institutes of Health. CPS is an Internet-based tool allowing contracting officers to input past performance information and view past performance information input by other contracting officers in other locations and agencies.

(b) All DOS contracting officers with access to the Internet shall use CPS to evaluate contractor's past performance for all contracts exceeding \$100,000, including options. Contracting officers shall also use the CPS to evaluate the past performance of offerors on all competitive negotiated acquisitions exceeding \$100,000, including options, unless the contracting officer documents in the contract file why past performance is not an appropriate evaluation factor. The CPS may also be used for evaluating acquisitions not exceeding \$100,000 to conform to the general principle of considering past performance in all acquisitions.

(c) Form DS–1771, *Contractor Past Performance Evaluation*, shall be used only:

(1) When the CPS is temporarily unavailable. When the CPS becomes available, data from any DS–1771 created in the interim shall be promptly entered into the CPS; or

(2) At overseas locations where access to the Internet is not practicable.

(d) Heads of contracting activities shall send a list of the names, work addresses, and phone numbers of all acquisition personnel whom they wish to have access to the CPS to A/LM/AQM.

PART 651—USE OF GOVERNMENT SOURCES BY CONTRACTORS

651.701 [Amended]

■ 77. Section 651.701 is amended by removing the last sentence of paragraph (c).

Subchapter H—Clauses and Forms

PART 652—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 78. Section 652.216–70 is amended by revising the clause date and by revising paragraph (b) to read as follows:

652.216–70 Ordering—Indefinite-Delivery Contract.

* * * * *

Ordering—Indefinite-Delivery Contract (APR 2004)

* * * * *

(b) The DS–2076, Purchase Order, Receiving Report and Voucher, and DS–2077, Continuation Sheet.

■ 79. Section 652.219–70 is revised to read as follows:

652.219–70 Department of State Subcontracting Goals.

As prescribed in 619.708–70, insert a provision substantially the same as follows:

Department of State Subcontracting Goals (APR 2004)

(a) The offeror shall provide a Small, Small Disadvantaged, Woman-Owned Small, HUBZone Small, and Service-Disabled Veteran-Owned Small Enterprise Subcontracting Plan that details its approach to selecting and using Small, Small Disadvantaged, Woman-Owned Small, HUBZone Small, and Service-Disabled Veteran-Owned Small Business Enterprises.

(b) For the fiscal year [insert appropriate fiscal year], the Department's subcontracting goals are as follows:

(1) Goal for subcontracting to SB:

(2) Goal for subcontracting to SDB:

(3) Goal for subcontracting to SWB:

(4) Goal for subcontracting to HUBZone Firms:

(5) Goal for subcontracting to SDVO:

(6) Omnibus goals (if applicable):

(i) 10% to minority business

(ii) 10% to small business

(End of provision)

■ 80. Section 652.219–72 is added to read as follows:

652.219–72 Department of State Mentor-Protégé Program.

As prescribed in 619.202–70(o)(1), insert the following provision:

Department of State Mentor-Protégé Program (APR 2004)

(a) Large and small businesses are encouraged to participate in the Department of State Mentor-Protégé Program. Mentor firms provide eligible small business protégés with developmental assistance to enhance their business capabilities and ability to obtain Federal contracts.

(b) Mentor firms are large prime contractors or eligible small businesses capable of providing developmental assistance. Protégé firms are small businesses, as defined in 13 CFR parts 121, 124, and 126.

(c) Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance that aids protégés. Firms interested in participating in the program are encouraged to contact the Department of State OSDBU for further information. (End of provision)

■ 81. Section 652.219–73 is added to read as follows:

652.219–73 Mentor Requirements and Evaluation.

As prescribed in 619.202–70(o)(2), insert the following clause:

Mentor Requirements and Evaluation (APR 2004)

(a) Mentor and protégé firms shall submit an evaluation to the Department of State's OSDBU at the conclusion of the mutually agreed upon program period, the conclusion of the contract, or the voluntary withdrawal by either party from the program, whichever occurs first. At the conclusion of each year in the mentor-protégé program, the prime contractor and protégé will formally brief the Department of State Mentor-Protégé Program Manager regarding program accomplishments under their mentor-protégé agreement.

(b) A mentor or protégé shall notify the OSDBU and the contracting officer, in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the program. A mentor firm shall notify the OSDBU and the contracting officer upon receipt of a protégé's notice of withdrawal from the program. (End of clause)

652.226–70 [Removed]

■ 82. Section 652.226–70 is removed.

652.228–70 [Removed and Reserved]

■ 83. Section 652.228–70 is removed and reserved.

- 84. Section 652.236–70 is amended—
 ■ (a) By revising the date of the clause;
 ■ (b) By revising paragraph (a)(4) to read as set forth below; and,
 ■ (c) By revising paragraph (d)(1) to read as set forth below:

652.236–70 Accident Prevention.

* * * * *

Accident Prevention (APR 2004)

(a) * * *

(4) For overseas construction projects, the contracting officer shall specify in writing additional requirements regarding safety if the work involves:

- (i) Scaffolding;
- (ii) Work at heights above two (2) meters;
- (iii) Trenching or other excavation greater than one (1) meter in depth;
- (iv) Earth moving equipment;
- (v) Temporary wiring, use of portable electric tools, or other recognized electrical hazards. Temporary wiring and portable electric tools require the use of a ground fault circuit interrupter (GFCI) in the affected circuits; other electrical hazards may also require the use of a GFCI;
- (vi) Work in confined spaces (limited exits, potential for oxygen less than 19.5 percent or combustible atmosphere, potential for solid or liquid engulfment, or other hazards considered to be immediately dangerous to life or health such as water tanks, transformer vaults, sewers, cisterns, etc.);
- (vii) Hazardous materials—a material with a physical or health hazard including but not limited to, flammable, explosive, corrosive, toxic, reactive or unstable, or any operations which creates any kind of contamination inside an occupied building such as dust from demolition activities, paints, solvents, etc.; or
- (viii) Hazardous noise levels.

* * * * *

(d) * * *

(1) Submit a written plan to the contracting officer for implementing this clause. The plan shall include specific management or technical procedures for effectively controlling hazards associated with the project; and,

* * * * *

■ 85. Section 652.236–71 is added to read as follows:

652.236–71 Foreign Service Buildings Act, as Amended.

As prescribed in 636.570(a), insert the following provision:

Foreign Service Buildings Act, as Amended (APR 2004)

(a) This solicitation is subject to Section 11 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 302). This statute limits competition under this solicitation to:

- (1) American-owned firms, as described in paragraph (b) of this provision; and,
- (2) Firms from countries that permit or agree to permit substantially equal access to

American firms for comparable diplomatic and consular building projects.

(b) To qualify as an American-owned firm for purposes of this solicitation, the bidder/offeree must demonstrate evidence of:

- (1) Performance of similar construction work in the United States; and
- (2) Either—
 (i) Ownership in excess of 50% by U.S. citizens or permanent residents; or
 (ii) Incorporation in the United States for more than three (3) years and employment of U.S. citizens or permanent residents in more than half of the company's permanent full-time professional and managerial positions in the United States.

(c) For purposes of determining competitive status, offers submitted by American-owned firms shall be reduced by ten (10) percent, provided that two responsible bidders/offerees submit a bid/offer.

(d) *Evidence of qualification.* (1) Performance of similar construction work in the United States. The bidder/offeree must describe below one or more similar projects completed in the United States. For each project, provide the following information:

Location: _____
 (City and State) _____
 Complexity: _____

(Office building, etc.) _____
 Type of construction: _____
 Value of project: _____
 Location: _____
 (City and State) _____
 Complexity: _____

(Office building, etc.) _____
 Type of construction: _____
 Value of project: _____
 Location: _____
 (City and State) _____
 Complexity: _____

(Office building, etc.) _____
 Type of construction: _____
 Value of project: _____

If the bidder/offeree's participation was as a partner or co-venture, indicate the percentage of the project performed by the bidder/offeree: _____ %

(2) Corporate location or ownership.

(i) The bidder/offeree certifies that it ☐ is ☐ is not owned in excess of fifty (50) percent by United States citizens or permanent residents.

(ii) The bidder/offeree certifies that it ☐ has ☐ has not been incorporated in the United States for more than three years and that it ☐ employs ☐ does not employ United States citizens or permanent residents in more than half of its permanent full-time professional and managerial positions in the United States.

(e) By signing this bid/offer, the bidder/offeree certifies to the best of its knowledge, all of the representations and certifications provided in this provision are accurate, current and complete. (End of provision)

■ 86. Section 652.236–72 is added to read as follows:

652.236–72 Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act.

As prescribed in 636.570(b), insert the following provision:

Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act (APR 2004)

(a) This solicitation is subject to Section 402 and Section 406(c) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (P.L. 99–399; 22 U.S.C. 4852). The Act limits certain construction projects abroad to United States persons or United States joint venture persons, and excludes organizations that have business arrangements with Libya. This Statement of Qualifications shall be used to determine if a bidder/offeree meets the definition of a "United States person" or a "United States joint venture person" and whether they have any business arrangements with Libya that may disqualify them from participating in this solicitation.

(b) *Definition.* As used in this provision—

U.S. person means a company, partnership, or joint venture that the Government determines, after consideration of all available information, including but not limited to that provided by the bidder/offeree in response to this solicitation, to be qualified pursuant to Section 402.

(c) *Representation.* The bidder/offeree represents as part of its bid/offer that it ☐ does ☐ does not meet the qualifications as a U.S. person as set forth in Section 402 of the Act.

[Complete a Statement of Qualifications for Purposes of Determining Status as a U.S. Person if the offeror represents that it is eligible. See paragraph (d) of this provision.]

Warning: Any material misrepresentation made in the Statement of Qualifications may be the basis for disqualification of a bidder/offeree and reference for consideration of suspension or debarment or for prosecution under Federal law (cf. 18 U.S.C. 1001). Bidder/offeree qualifications will be determined primarily on the basis of information submitted in the Statement of Qualifications, including attachments thereto, but the Government may, at its discretion, rely on information contained elsewhere in the bidder's/offeree's bid/proposal or obtained from other sources.

(d) *Statement of Qualifications for Purposes of Determining Status as a U.S. Person (22 U.S.C. 4852).* A bidder/offeree that represents that it is a U.S. person must provide the following information.

Statement of Qualifications for Purposes of Determining Status as a U.S. Person (22 U.S.C. 4852)

Name and address of U.S. person organization providing this information:

Introduction. Section 402 of the Omnibus Diplomatic Security and Antiterrorism Act (Public Law 99–399) provides that a "United States person" or a "qualified United States joint venture" must meet certain requirements, listed in sections 402(c)(2) and (3) of the Act, to be eligible to compete. To assist business entities to determine whether

they qualify as a U.S. person or U.S. joint venture person, guidance is hereby provided. For ease of reference, the statutory language is quoted immediately before the definitions that apply to it. Space for the required information is provided immediately following each definition.

Note: The Statement of Qualifications shall provide information correctly applicable to the U.S. person whose qualifications are being certified, and shall not include information pertaining to corporate affiliates or subsidiaries. Organizations that wish to use the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related organizations, must do so by way of a joint venture. A prospective bidder/offeree may be an individual organization or firm, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a de facto joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance. To be considered a "qualified United States joint venture person," the joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. person listed in Section 402. By signing this bid/proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

1. *Section 402(c)(2)(A):* "The term 'United States person' means a person which—(A) is incorporated or legally organized under the laws of the United States, including the District of Columbia, and local laws."

Definitions for purposes of Section 402 determinations of eligibility—

Incorporated means the successful de jure incorporation of a business organization pursuant to the laws of any United States jurisdiction or component thereof.

Legally organized means the legally recognized existence of an organization other than a de jure corporation (e.g., a partnership) under the laws of any United States jurisdiction or component thereof. Only organizations that have a legal status, including the right to bring suit, to sign contracts, and to hold property under the law of the jurisdiction where they are doing business will qualify as legally organized. A natural person who is a United States citizen acting in his or her entrepreneurial capacity will be deemed to be a "person legally organized" within the scope of this definition, provided that the prospective bidder/offeree holds all required licenses to do business in the jurisdiction where he or she is located.

United States means any jurisdiction that is one of the fifty States, the District of Columbia, a United States territory, a United States possession, or the Commonwealths of Puerto Rico and the Northern Mariana Islands.

Question 1. The organization seeking eligibility under Section 402 is ☐ incorporated or is ☐ legally organized under the laws of what jurisdiction?

2. *Section 402(c)(2)(B):* "The term 'United States person' means a person which—(B) has its principal place of business in the United States."

Definitions for purposes of Section 402 determinations of eligibility—

Principal place of business means the main location of the prospective bidder/offeree. For purposes of this section, a prospective bidder/offeree shall identify only one principal place of business, and such location shall include at least the offices of the chief operating officer and headquarters staff. The named location must be a United States jurisdiction from which a tax return has been filed or will be filed during the calendar year in which the prospective bidder/offeree submits this bid/offeree.

United States means any jurisdiction that is one of the fifty States, the District of Columbia, a United States territory, a United States possession, or the Commonwealths of Puerto Rico and the Northern Mariana Islands.

Question 2(a). The organization seeking eligibility has its principal place of business in what city and state?

Question 2(b). What kind of tax return was or will be filed, and in what jurisdiction, during the current calendar year?

(i) Jurisdiction:

(e.g., federal, state, city)

(ii) Type of return (e.g., income tax, franchise tax, etc.). Include all that apply:

3. *Section 402(c)(2)(C):* "The term 'United States person' means a person which has been incorporated or legally organized in the United States—

(i) for more than 5 (five) years before the issuance date of the invitation for bids or request for proposals with respect to a construction project under subsection (a)(1); and,

(ii) for more than 2 (two) years before the issuance date of the invitation for bids or request for proposals with respect to a construction or design project abroad that involves technical security under subsection (a)(2)."

Definitions for purposes of Section 402 determinations of eligibility—

Has been incorporated or legally organized means that the organization can show continuity as an ongoing business. Organizations that have changed only their names meet the continuity requirement of this subsection. Organizations that have been bought, sold, merged, or otherwise substantially altered or enlarged their principal business activities will have the burden of proving that there have been ongoing operations by the same business entity for the required period of time. If the successor entity has acquired all of the assets and liabilities of the predecessor business and the predecessor business has no further existence, the successor may claim the incorporation date of the predecessor. In any other circumstance, the prospective bidder/offeree must show that the law of the jurisdiction in which it operates regards the prospective bidder/offeree as the complete successor in interest of the predecessor

business for purpose of contractual obligations.

Issuance date means the date in Block 3 of the Standard Form 1442 accompanying this solicitation.

Years means calendar years measured from day of the month to day of the month. For example, January 1, 2002 through December 31, 2002 is one calendar year, as is July 1, 2002 through July 1, 2003.

Question 3:

(i) On what date was the organization seeking eligibility incorporated or legally organized?

(ii) If this date is less than the required number of years before the issuance date, on the basis of what documentation does the organization seeking eligibility claim that it has been in business for the requisite period of time? _____ (Identify, and forward copies as an Attachment to this Statement. This material may include such items as certificates of incorporation, partnership agreements, resolutions of boards of directors, etc.).

4. *Section 402(c)(2)(D):* "The term 'United States person' means a person which has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the contract being bid."

Definitions for purposes of Section 402 determination of eligibility—

Administrative and technical, professional, or construction services means the kind of work in which the prospective bidder/offeree is interested. If the proposed contract is for construction management services, the prospective bidder/offeree will be expected to demonstrate construction management expertise. In general, "administrative" means the capacity or ability to manage; "technical" means the specific skills peculiar to the type of work required; "professional" means expert services resulting from advanced training in the type of work required; and "construction" experience if it has not directly performed all of the actual construction activities. Thus, an entity whose only construction work experience was performed by its legally distinct subsidiary or parent will not be considered to have construction experience.

Complexity means the physical size and technical size and demands of the project. "Performed" means projects that have been fully completed by the prospective bidder/offeree and accepted by the owner or other party to the transaction. Projects still in progress have not yet been performed for purposes of this definition.

Type of construction means the overall nature of the facilities to be built, including the kinds of materials to be used. Thus, if the contract will require the construction of a multi-story office building, the prospective bidder/offeree will be expected to demonstrate experience with facilities of this type.

Value means the total contract price of the project, not to the profit or loss to the bidder/offeree.

Within the United States means a United States jurisdiction that is the place where the

subject matter of the contract or other arrangement was in fact completed. It does not mean the place where the contract or other arrangement was negotiated or signed. The term "United States" means any jurisdiction that is one of the 50 states, the District of Columbia, a United States territory, a United States possession, or the Commonwealth of Puerto Rico and the Northern Mariana Islands.

Question 4: List on this page, and an attachment (if necessary), one or more similar projects completed by the prospective bidder/offeror. For each project, provide the following information:

Location:
(City and State, or Country)

Type of service:
(administrative, etc.)

Complexity:
(office building, etc.)

Type of construction:

Value of project:

If the prospective bidder/offeror's participation was as a partner or co-venturer, indicate the percentage of the project performed by the prospective offeror:
%

5. *Section 402(c)(2)(E):* "The term 'United States person' means a person which—with respect to a construction project under subsection (a)(1)—has achieved a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)(i)."

Definitions of purposes of Section 402 determination of eligibility—

3 years of the 5-year period before the date specified in subparagraph (C)(i) means the three to five calendar year period immediately preceding the issuance date of this solicitation.

Total business volume means the U.S. dollar value of the gross income or receipts reported by the prospective bidder/offeror on its annual federal income tax returns.

Years means the business year of the prospective bidder/offeror, as reflected on its annual federal income tax returns.

Question 5: Please complete the information below for at least three of the five listed years.

The gross receipts for the business year:
(list year and amount).

The gross receipts for the business year:
(list year and amount).

The gross receipts for the business year:
(list year and amount).

The gross receipts for the business year:
(list year and amount).

The gross receipts for the business year:
(list year and amount).

6. *Section 402(c)(2)(F):* "The term 'United States person' means a person which—(i) employs United States citizens in at least 80 percent of its principal management positions in the United States; (ii) employs United States citizens in more than half of its permanent, full-time positions in the United States; and (iii) will employ United States

citizens in at least 80 percent of the supervisory positions on the foreign buildings office project site."

Definitions for purposes of Section 402 determinations of eligibility—

In the United States refers to those positions that the prospective bidder/offeror maintains within all jurisdictions which are one of the 50 states, the District of Columbia, a United States territory, a United States possession, or the Commonwealths of Puerto Rico and the Northern Mariana Islands.

Permanent, full-time positions means positions with the prospective bidder/offeror that are intended to be indefinite, as opposed to limited, seasonal, or project-duration periods. The term 'full-time' refers to positions in which the occupants are expected to and ordinarily work 40 hours a week. The term 'permanent, full-time positions' covers the portion of the prospective bidder's/offeror's workforce that continues to be employed without regard to the fluctuating requirements of production or projects.

Principal management positions refers to chief operating officer and those management officials reporting directly to him or her. In the case of a partnership, the term refers to every general partner. In the case of a corporation, the term refers to those officers of the corporation who are active in running its day-to-day operations. Members of corporation boards of directors who do not have operational responsibilities do not occupy "principal management positions" simply by virtue of their service on the board. In all cases, the term "principal management positions" also includes the position or positions held by the individual or individuals who will have primary corporate management oversight responsibility for this contract if the prospective bidder/offeror is awarded the contract. Each prospective bidder/offeror is responsible for listing all of its principal management positions and identifying their current occupants by name and citizenship.

Supervisory positions means all positions with significant authority to direct the work of others as well as those for which access to classified or controlled documents is required. Such positions will be identified in each contract.

United States citizen means natural persons with United States citizenship by virtue either of birth or of naturalization.

Question 6(a): The bidder/offeror has the following staff:

(i) Principal management positions in the United States:

Chief Operating Officer:

(name)

(citizenship)

(ii) For each individual reporting directly to the above-named Chief Operating Officer, list position, name, and citizenship:

Position:

Name:

Citizenship:

(iii) Individual(s) expected to have primary management oversight responsibility for contract if it is awarded:

(name)

(citizenship)

Question 6(b): Number of permanent, full-time positions in the United States:

Question 6(c): Number of United States citizens currently employed in permanent, full-time positions in the United States:

Question 6(d): Certification of intent to employ U.S. citizens in a minimum of 80 percent of the supervisory positions identified by the Government on this project:
I so certify:

(signature)

(name typed or printed)

(position)

(date)

7. *Section 402(c)(2)(G):* "The term 'United States person' means a person which has the existing technical and financial resources in the United States to perform this contract."

Definitions for purposes of Section 402 determinations of eligibility—

Existing technical and financial resources means the capability of the prospective bidder/offeror to mobilize adequate staffing and monetary arrangements from within the United States sufficient to perform the contract. Adequate staffing levels may be demonstrated by presenting the resumes of current United States citizens and resident aliens with skills and expertise necessary for the work in which the prospective bidder/offeror is interested or some other indication of available United States citizen or permanent legal resident human resources. Demonstration of adequate financial resources must be issued by entities that are subject to the jurisdiction of United States courts and have agents located within the United States for acceptance of service of process.

Question 7: Submit, as an Attachment to this Statement, materials demonstrating existing technical and financial resources in the United States.

8. *Section 402(c)(3):* "The term 'qualified United States joint venture person' means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture."

Definitions for purposes of Section 402 determinations of eligibility—

Assets means tangible and intangible things of value conveyed or made available to the joint venture by the co-venturers.

Joint venture means a formal or *de facto* arrangement by and through which two or more persons or entities associate for the purpose of carrying out the prospective contract. Prospective bidders/offerors are advised that a joint venture may not be acceptable to projects requiring a Department of Defense facility security clearance because each co-venturer may post particular problems in obtaining security clearances. To be acceptable, all members of a joint venture must be individually and severally liable for

the full performance of and resolution of any and all matters arising out of the contract, notwithstanding any provision of the joint venture agreement of law of the jurisdiction under which the joint venture was created.

Question 8(a): The bidder/offeree ☐ is ☐ is not a joint venture.

Question 8(b): If the bidder/offeree is a joint venture, the U.S. person participant is:

(name)

(address)

Question 8(c): If the bidder/offeree is a joint venture, the names and countries of citizenship for all co-venturers are as follows:

(name)

(citizenship)

(name)

(citizenship)

(name)

(citizenship)

Question 8(d): If the bidder/offeree is a joint venture, the U.S. person will own at least 51 percent of the assets of the joint venture.

I so certify:

(signature)

(name typed printed)

(position)

(title)

9. *Libya.* Section 406(c) states "No person doing business with Libya may be eligible for any contract awarded pursuant to this Act."

Definitions for purposes of Section 406 eligibility—

Contract awarded establishes a time frame for the bar on doing business with Libya. The time during which a relationship with Libya is prohibited begins on the date the Section 406 information is submitted. For bidders/offerees not selected for contract award, the prohibition ceases on the date of award. For the bidder/offeree that is awarded the contract, the bar continues through the life of the contract, ending on the date of final acceptance of the work.

Doing business means all transactions of any kind agreed to or performed after the earlier of the date on which a bid/proposal is submitted to the Department of State under this solicitation or on which the contract, subcontract, program, or other arrangement with the Department of State is awarded or becomes effective. Any transaction commenced prior to the date of submittal or award and not yet completed must be reported. Transactions that call for continued or future performance shall be disqualifying. Transactions that have been completely performed but for which payment has not yet been made must be reported, but shall not be disqualifying unless any event other than payment of a previously-agreed upon sum occurs. Examples of disqualifying actions include any pending litigation arising out of business transactions with Libya,

renegotiation of the terms of a loan, and refinancing an amount owed or owing.

Person means any individual or legal entity, whether U.S. or foreign. Subcontractors and others who do not have a direct contractual relationship with the United States are not covered by this section.

With Libya means transactions between any person and the Government of Libya, government entities of Libya, or any other organization wholly owned or effectively controlled by the Government of Libya. It is the responsibility of the entity submitting Section 406 information to disclose existing relationships with the entities that it has reasonable grounds to believe are or may be Libyan. In case of doubt or dispute, the Department of State shall determine, at its sole discretion, whether any organization is a governmental entity of Libya, wholly owned by the Government of Libya, or effectively controlled by the Government of Libya.

Certification

Based on the foregoing, I hereby certify on behalf of this organization that it ☐ is ☐ is not doing business with Libya as those terms are used in Section 406(c) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(e) *Signature:* By signing this document, the offeror indicates that to the best of his or her knowledge, all of the representations and certifications provided in response to the questions contained in this Statement of Qualifications are accurate, current, and complete and that the offeror is aware of the penalty prescribed in 18 U.S.C. 1001 for making false statements.
(End of provision)

■ 87. Section 652.237–71 is revised to read as follows:

652.237–71 Identification/Building Pass.

As prescribed in 637.110(b), insert the following clause.

Identification/Building Pass (APR 2004)

(a) *Contractors working in domestic facilities who already possess a security clearance.*

(1) The contractor shall obtain a Department of State building pass for all employees performing under this contract who require frequent and continuing access to Department of State facilities. The Bureau of Diplomatic Security, Office of Domestic Facilities Protection, shall issue passes. They shall be used for the purpose of facility access only, and shall not be used for any other purpose.

(2) The contractor shall submit a Visitor Authorization Request (VAR) Letter to the Bureau of Diplomatic Security, Information Security Programs Division, Industrial Security Branch (DS/ISP/INB) on its cleared employees containing the following information:

- (i) Contractor employee's full name, social security number, and date of birth;
- (ii) Contractor's company name;
- (iii) Security clearance level;
- (iv) Date the clearance was granted;
- (v) Name of the contractor's Facility Security Officer;

(vi) Contracting Officer's Representative (COR); and,

(vii) Contract number.

(3) DS/ISP/INB shall process and approve the VAR letter, if appropriate. The approved VAR letter shall be forwarded to the contractor for their records.

(4) The contractor employee shall hand-carry the following documentation to the Building Pass Office, Department of State, 520 23rd Street, courtyard of Columbia Plaza, Washington, DC:

(i) A Department of State sponsorship letter from the COR, addressing the following:

(A) The purpose for which the pass is being requested;

(B) The employee's valid security clearance level (reflected on the VAR);

(C) Contract number and period of performance;

(D) Type of access (24/7, normal business hours, escort authority or no escort authority granted); and

(E) Expiration date of building pass (1 year or 3 years);

(ii) Letter on company letterhead to accompany the application, containing the following information:

(A) The purpose for which the pass is being requested;

(B) Verification of employment;

(C) The employee's valid security clearance level; and,

(D) Contract number and period of performance;

(iii) The DS-1838, *Request for Building Pass Identification Card*.

(b) *Contractors working in domestic facilities where security clearances are not required.*

(1) The contractor shall obtain a Department of State building pass for all employees performing under this contract who require frequent and continuing access to Department of State facilities. The Bureau of Diplomatic Security, Office of Domestic Facilities Protection, shall issue passes. They shall be used for the purpose of facility access only, and shall not be used for any other purpose.

(2) The contractor shall submit the following paperwork, in original, to the Bureau of Diplomatic Security, Information Security Programs Division, Industrial Security Branch (DS/ISP/INB):

(i) SF-85P, *Questionnaire for Public Trust Positions*;

(ii) SF-85P/S, *Supplemental Questionnaire for Selected Positions*; and,

(iii) DOS Credit Release, which may be obtained from DS/ISP/INB via mail or facsimile.

(3) DS/ISP/INB shall conduct a preliminary background check. If the background check is favorable, DS/ISP/INB will forward a letter to the company Facility Security Officer (FSO) notifying them that the individual may proceed to the Building Pass Office to continue the badging process. DS/ISP/INB will forward a copy of this letter to the Building Pass Office.

(4) When a contractor employee is approved to receive a building pass, he/she shall hand-carry the following documentation to the Contractor Building Pass Office, Department of State, 520 23rd

Street, NW., courtyard of Columbia Plaza, NW., Washington, DC.:

(i) A Department of State sponsorship letter from the COR, addressing the following:

(A) The purpose for which the pass is being requested;

(B) Whether or not the employee has a valid security clearance;

(C) Contract number and period of performance;

(D) Type of access (24/7, normal business hours, escort authority or no escort authority granted); and

(E) Expiration date of building pass (1 year or 3 years);

(ii) DS Form 1838, *Request for Building Pass Identification Card*;

(iii) Letter on company letterhead to accompany the application, containing the following information:

(A) The purpose for which the pass is being requested;

(B) Verification of employment;

(C) Whether or not the applicant has a valid security clearance; and,

(D) Contract number and period of performance;

(iv) Original SF-85P or a copy of the SF-85P, with an original signature and current date;

(v) Original SF-85P/S or a copy of the SF-85P/S, with an original signature and current date;

(vi) Copy of the DOS Credit Release, with an original signature and current date; and,

(vii) Original proof of U.S. citizenship, such as a birth certificate or valid U.S. passport. Non-U.S. citizens must submit a valid photo Immigration and Naturalization Service Employment Authorization Document (INS EAD).

(5) Applicants shall be fingerprinted at the Building Pass Office and the process for a building pass shall be initiated. The approval process shall take at least 48 hours.

Applicants shall not return to the Building Pass Office until they receive notification from DS/ISP/INB that the process is complete. Once DS/ISP/INB receives notification from the Building Pass Office that a building pass can be issued, DS/ISP/INB shall notify the FSO and the COR that the applicant has been approved for initial contract performance.

(c) *Contractors working in overseas facilities.* Contractors shall submit appropriate documentation to obtain building passes as specified in the contract.

(d) All contractor employees, both domestic and overseas, shall wear the passes in plain sight at all times while in Department of State buildings. All contractor employees shall show their passes, where appropriate, when entering these buildings and upon request of uniformed guards or any other authorized personnel.

(e) All passes shall be returned to the COR upon separation of the employee, or expiration or termination of the contract. Final payment under this contract shall not be made until all passes are returned to the COR.

(End of clause)

■ 88. Section 652.237-72 is amended by revising the date of the clause to read

“(APR 2004)” and by removing the words “the preceding Friday is observed; when any such day falls on a Sunday” and by inserting the words “or Sunday” in their place in the first sentence of paragraph (b).

■ 89. Section 652.237-73 is added to read as follows:

652.237-73 Statement of Qualifications for Preference as a U.S. Person.

As prescribed in 637.110(d), insert the following provision:

Statement of Qualifications for Preference as a U.S. Person (APR 2004)

(a) This solicitation is subject to Section 136 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (22 U.S.C. 4864). The Act encourages the participation of United States persons and qualified United States joint venture persons in the provision of local guard services overseas, and provides for a preference for eligible offers.

(b) *Definitions.* As used in this provision—

Eligible offer means an offer that (1) is otherwise responsive to the solicitation; and (2) contains a fully prepared Statement of Qualifications (see paragraph (d) of this provision), which upon review is determined by the Government to meet the requirements of Section 136 for assignment of preference as a U.S. person.

Preference means subtraction by the Government of ten percent (10%) from the total evaluated price of an offer.

U.S. person means a company, partnership, or joint venture that the Government determines, after consideration of all available information, including but not limited to that provided by the offeror in response to the solicitation, to be qualified for assignment of preference pursuant to Section 136.

(c) *Representation.* The offeror represents as part of its offer that it ☐ is, ☐ is not eligible for preference as a U.S. person. [*Complete a Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person if the offeror represents that it is eligible. See paragraph (d) of this provision.*]

Warning: Any material misrepresentation made in the Statement of Qualifications may be the basis for disqualification of an offeror and reference for consideration of suspension or debarment or for prosecution under Federal law (cf. 18 U.S.C. 1001). The Government will determine offeror qualifications primarily on the basis of information submitted in the Statement of Qualifications, including Attachments thereto, but the Government may, at its discretion, rely on information contained elsewhere in the offeror's proposal or obtained from other sources.

(d) *Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person (22 U.S.C. 4864).* An offeror that represents that it is eligible for preference as a U.S. person must provide the following information. This Statement of Qualifications must be a complete and certified document, and submitted as a separate Volume 5, with all necessary attachments, as defined in Section L of this solicitation.

Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person (22 U.S.C. 4864)

Name and address of U.S. person or organization providing this information:

Introduction. Section 136 of the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991, Public Law 101-246 (22 U.S.C. 4864), as amended, provides that a “United States person” or a “qualified United States joint venture” must meet certain requirements, listed in the Act, to be eligible for the statutory preference. To assist business entities to determine whether they qualify as a U.S. person or U.S. joint venture person entitled to preference under Section 136, guidance is hereby provided. Only those prospective offerors submitting a properly completed and certified Volume 5 with their initial proposals will be considered in the determination of eligibility for assignment of preference as a U.S. person or U.S. joint venture person. For ease of reference, statutory language is quoted immediately before the definitions that apply to it. Space for the required information is provided immediately following each definition.

Note: The Statement of Qualifications shall provide information correctly applicable to the U.S. person whose qualifications are being certified, and shall not include information pertaining to corporate affiliates or subsidiaries. Organizations that wish to use the experience or financial resources of another organization or individual, including parent companies, subsidiaries, or local, national or offshore organizations, must do so by way of a joint venture. The contract resulting from this solicitation shall not allow subcontracting. A prospective offeror may be a sole proprietorship, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a de facto joint venture with no written agreement. To be considered a “qualified joint venture person,” the joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. joint venture person listed in Section 136. By signing this proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

1. *Section 136(d)(1):* “The term ‘United States person’ means a person which—(A) is incorporated or legally organized under the laws of the United States, including the laws of any State, locality, or the District of Columbia.”

Definitions for purposes of Section 136 determinations of eligibility—

Incorporated means the state of legal recognition as an artificial person that may be afforded to a business entity pursuant to the laws of any United States jurisdiction or component thereof.

Legally organized means the state of legal recognition that may be afforded to a business entity that is other than a corporation pursuant to the laws of any United States jurisdiction or component thereof. This is the least form of legal

recognition that will qualify an offeror for this preference. Only those prospective offerors that have legal status, including the right to bring suit, to sign contracts, and to hold property under the law of the jurisdiction under which they are doing business will qualify as legally organized. A natural person who is a United States citizen acting in his or her entrepreneurial capacity will be deemed to be a "person legally organized" within the scope of this definition, provided that the prospective offeror holds all required licenses to do business in the jurisdiction where he or she is located.

United States means any jurisdiction that is one of the fifty States, the District of Columbia, a United States territory, a United States possession, or the Commonwealth of Puerto Rico and the Northern Mariana Islands.

Question 1. The organization seeking eligibility under Section 136 is ☐ incorporated or is ☐ legally organized under the laws of what jurisdiction?

2. *Section 136(d)(1):* "The term 'United States person' means a person that—(B) has its principal place of business in the United States."

Definitions for purposes of Section 136 determinations of eligibility—

Principal place of business means the geographic location of the main office or seat of management of the prospective offeror. For purposes of this Statement, a prospective offeror shall identify only one principal place of business, and such location shall include at least the offices of the chief operating officer and headquarters staff. The named location must be a United States jurisdiction in which the prospective offeror may bring suit and be sued and in which service of process shall be accepted.

Question 2(a). The organization seeking eligibility has its principal office in what city and state?

Question 2(b). What kind of tax return was or will be filed, and in what jurisdiction, during the current calendar year? The jurisdiction identified herein need not be the same jurisdiction identified in Question 2(a).

(i) Jurisdiction:

(ii) Type of return (e.g., income tax, franchise tax, etc.). Include all that apply:

3. *Section 136(d)(1):* "The term 'United States person' means a person which—(C) has been incorporated or legally organized in the United States—(i) for more than 2 (two) years before the issuance date of the invitation for bids or request for proposals with respect to the contract under subsection (c) of this section."

Definitions for purposes of Section 136 determinations of eligibility—

Has been incorporated or legally organized means that the organization can show continuity as an ongoing business. Organizations that have changed only their names meet the continuity requirement of this subsection. Organizations that have been bought, sold, merged, or otherwise

substantially altered or enlarged their principal business activities will have the burden of proving that there have been ongoing operations by the same business entity for the required period of time. If the successor entity has acquired all of the assets and liabilities of the predecessor entity and the predecessor entity has no further existence, the successor may claim the incorporation or legal organization date of the predecessor. In any other circumstance, the prospective offeror must show that the law of the jurisdiction in which it operates regards the prospective offeror as the complete successor in interest of the predecessor entity for purpose of contractual obligations.

Issuance date means the date in Block 5 of the Standard Form 33 accompanying this solicitation.

Years means calendar years measured from day of the month to day of the month. For example, January 1, 2002 through December 31, 2002 is one calendar year, as is July 1, 2002 through July 1, 2003.

Question 3:

(i) On what date was the organization seeking eligibility incorporated or legally organized?

(ii) If this date is less than two years before the issuance date, on the basis of what documentation does the organization seeking eligibility claim that it has been in business for the requisite period of time?

(Identify, and forward copies as an Attachment to this Statement).

4. *Section 136(d)(1):* "The term 'United States person' means a person which—(D) has performed within the United States or overseas security services similar in complexity to the contract being bid."

Definitions for purposes of Section 136 determination of eligibility—

Complexity means the physical size or extent of the effort, as described in Section B and Exhibit A of this solicitation; combined with the required quality of the effort as described in Sections C and H of this solicitation.

Overseas means within any jurisdiction that is not a part of the United States as defined below.

Performed means contracts that have been fully completed by the prospective offeror and accepted by the other party to the transaction. Contracts still in progress have been performed for purposes of this definition if performance in complexity to the contract being bid has been ongoing for at least one year. Contracts need not have been with the U.S. Government.

Security services means work of a kind as to fall within or compare closely with those described in the Statement of Work in Section C of this solicitation. An entity whose only security services experience was performed by its legally distinct parent or subsidiary organization will not be considered to have security services experience.

Within the United States means within the legal geographic boundaries of a United States jurisdiction that is the place where the subject matter (e.g., services) of the contract

or other arrangement was in fact completed. The place where the contract or other arrangement was negotiated or signed is not relevant to this definition.

Question 4: Describe in an Attachment to this Statement (see L.1.3.5), the qualifying similar contracts or other arrangements performed by the prospective offeror. Provide required information on a sufficient number of arrangements to show that similar services have been performed overseas or in the United States. The description must consist of the following information on each arrangement, which shall be submitted as an Attachment to this Statement:

Location: (city and state or country).

Type of service: (for example, stationary guards, roving patrol, quick-reaction force, etc.).

Complexity: (type of facilities guarded, and number or extent of facilities, number of guards, etc.).

5. *Section 136(d)(1):* "The term 'United States person' means a person which—(E) with respect to the contract under subsection (c) of this section, has achieved a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)."

Definitions of purposes of Section 136 determination of eligibility—

3 years of the 5-year period before the date specified in subparagraph (C) means the three to five calendar year period immediately preceding the issuance date of this solicitation.

Total business volume means the U.S. dollar value of the gross income or receipts reported by the prospective offeror on its annual federal income tax returns.

Years means calendar years.

Question 5: Describe in an Attachment to this Statement (see L.1.3.5), for at least three of the five twelve-month income tax periods (fiscal years) defined below, the gross receipts of the organization seeking eligibility.

(i) The fiscal year ending during the calendar year that includes the date of this solicitation.

(ii) The fiscal year ending in the calendar year immediately prior to the calendar year that includes the date of this solicitation.

(iii) The fiscal year ending in the calendar year two years before the calendar year that includes the date of this solicitation.

(iv) The fiscal year ending in the calendar year three years before the calendar year that includes the date of this solicitation.

(v) The fiscal year ending in the calendar year four years before the calendar year that includes the date of this solicitation.

An entity will be deemed to have met this requirement if the total cumulative business volume for the three years presented exceeds the contract price at time of award under this solicitation for the full term for which prices are solicited, including any option periods.

6. *Section 136(d)(1):* "The term 'United States person' means a person which—(F)(i) employs United States citizens in at least 80 percent of its principal management positions in the United States; and (F)(ii) employs United States citizens in more than half of its permanent full-time positions in the United States."

Definitions for purposes of Section 136 determinations of eligibility—

Full-time (positions) means those personnel positions in which the occupants are expected to and ordinarily work for 40 or more hours per week.

In the United States refers to those personnel positions that are encumbered as of the date of this solicitation and that the prospective offeror maintains in geographic locations within the jurisdictions defined above as constituting the United States.

Permanent (positions) means personnel positions that are intended to be indefinite as to length of employment, as opposed to limited, seasonal, or project-length personnel appointments.

Permanent, full-time positions means that portion of the prospective offeror's workforce that continues to be employed without regard to the ordinary fluctuations of production or projects.

Principal management positions means those personnel positions including at least the chief executive officer (if any) and the chief operating officer (whether by title or by function) of the organization seeking eligibility, together with all those management officials who constitute the highest levels of management authority within the organization. In the case of a partnership, all general partners are deemed to hold principal management positions. In the case of a corporation, those officers of the corporation who are principally responsible for the day-to-day operation of the corporation. Members of corporation boards of directors do not occupy "principal management positions" simply by virtue of their service on the board. In all cases, the term "principal management positions" also includes the position or positions held by the individual or individuals in the United States who will have primary corporate management oversight responsibility for this contract if the prospective contractor is awarded the contract.

United States citizen means natural persons with United States citizenship by virtue either of birth or of naturalization.

Question 6(a): The organization seeking eligibility shall list all of its principal management positions and identify the current occupant of each listed position by name and citizenship. Provide the information as an Attachment to this Statement in the following format:

(i) Principal management positions in the United States:
Chief Executive Officer (if any):

(name)

(citizenship)

Chief Operating Officer:

(name)

(citizenship)

(ii) For each additional corporate officer having principal responsibility for the day-to-day operations of the corporation, list position, name, and citizenship.

Position:

Name:

Citizenship:

(iii) Individual(s) in the United States expected to have primary management oversight responsibility for contract if it is awarded:

(name)

(citizenship)

Question 6(b): Number of permanent, full-time, currently encumbered personnel positions that are located in the United States (good faith estimates acceptable):

Question 6(c): Number of United States citizens currently employed in permanent, full-time positions that are located in the United States (good faith estimates acceptable):

7. Section 136(d)(1): "The term 'United States person' means a person which—(G) has the existing technical and financial resources in the United States to perform the contract."

Definitions for purposes of Section 136 determinations of eligibility—

Existing technical and financial resources means technical and financial capability within the United States to mobilize adequate staffing, equipment and organizational arrangements to perform the contract. Adequate technical resources may be demonstrated by presenting an organization chart, and résumés of current officers and employees in the United States who possess skills and expertise necessary to provide management and oversight of the work. Other indicia will be considered if offered to demonstrate that the prospective offeror has available resources in the United States adequate to provide home office management and oversight of the work. Adequate financial resources may be demonstrated by proof of possession of a combination of net worth, bank lines of credit, or bank guarantees. If lines of credit or bank guarantees are used to demonstrate adequate financial resources, they must be from entities within the United States.

Question 7: Submit, as an Attachment to this Statement, materials demonstrating existing technical and financial resources in the United States (see L.1.3.5).

8. Section 136(d)(2): "The term 'qualified United States joint venture person' means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture."

Definitions for purposes of Section 136 determinations of eligibility—

Assets means tangible and intangible things of value conveyed or made available to the joint venture by the co-venturers. To be qualified for U.S. preference, 51 percent of the assets of the joint venture must be owned by the U.S. person co-venturer(s).

Joint venture means a formal or de facto association of two or more persons or entities to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skills, and knowledge. To be acceptable, all members of a joint venture must be jointly and severally liable for full performance and resolution of matters arising out of the contract.

Question 8(a): The prospective offeror ☐ is ☐ is not a joint venture.

Question 8(b): If the prospective offeror is a joint venture, the U.S. person participant is:

(name)

(address)

Question 8(c): If the prospective offeror is a joint venture, the names and countries of citizenship for all co-venturers are as follows:

(name)

(citizenship)

(name)

(citizenship)

(name)

(citizenship)

Question 8(d): If the prospective offeror is a joint venture, the U.S. person will own at least 51 percent of the assets of the joint venture.

I so certify: (name)

(position)

(title)

(e) **Signature:** By signing this document, the offeror indicates that to the best of his or her knowledge, all of the representations and certifications provided in response to the questions contained in this Statement of Qualifications are accurate, current, and complete and that the offeror is aware of the penalty prescribed in 18 U.S.C. 1001 for making false statements.

(End of provision)

652.242–70 [Amended]

■ 90. Section 652.242–70 is amended by removing "642.271" and inserting "642.272(a)" in its place in the clause prescription.

652.242–73 [Amended]

■ 91. Section 652.242–73 is amended by removing "642.271(b)" and inserting "642.272(b)" in its place in the clause prescription and in Alternate 1.

PART 653—FORMS

653.101–70 [Amended]

■ 92. Section 653.101–70 is amended by adding a sentence at the end reading as follows: "The State Department forms are available through the Department's Intranet Web site at <http://arpsdir.a.state.gov/efrms.html>."

■ 93. Section 653.219–71 is added to read as follows:

653.219–71 DOS form DS–4053, Department of State Mentor-Protégé Program Application.

As prescribed in 619.102–70(i), DS–4053 is prescribed for use in applying

for an agreement under the Department of State Mentor-Protégé Program.

Subpart 653.3 [Removed]

■ 94. Subpart 653.3, consisting of sections 653.000 and 653.303, is removed.

Dated: March 11, 2004.

Corey M. Rindner,

Procurement Executive, Bureau of Administration, Department of State.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 001005281-00369-02; I.D. 040704B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Closure

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS closes the commercial hook-and-line fishery for king mackerel in the exclusive economic zone (EEZ) in the southern Florida west coast subzone. This closure is necessary to protect the Gulf group king mackerel resource.

DATES: Effective 12:01 a.m., local time, April 9, 2004, through June 30, 2004.

FOR FURTHER INFORMATION CONTACT: Mark Godcharles, telephone: 727-570-5727, fax: 727-570-5583, e-mail: Mark.Godcharles@noaa.gov.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Based on the Councils' recommended total allowable catch and the allocation ratios in the FMP, on April 30, 2001 (66 FR 17368, March 30, 2001), NMFS implemented a commercial quota of 2.25 million lb (1.02 million kg) for the eastern zone (Florida) of the Gulf migratory group of king mackerel. That quota is further divided into separate quotas for the Florida east coast subzone and the northern and southern Florida west coast subzones. On April 27, 2000, NMFS implemented the final rule (65 FR 16336, March 28, 2000) that divided the Florida west coast subzone of the eastern zone into northern and southern subzones, and established their separate quotas. The quota implemented for the southern Florida west coast subzone is 1,040,625 lb (472,020 kg). That quota is further divided into two equal quotas of 520,312 lb (236,010 kg) for vessels in each of two groups fishing with hook-and-line gear and run-around gillnets (50 CFR 622.42(c)(1)(i)(A)(2)(i)).

Under 50 CFR 622.43(a), NMFS is required to close any segment of the king mackerel commercial fishery when its quota has been reached, or is projected to be reached, by filing a notification at the Office of the Federal Register. NMFS has determined that the commercial quota of 520,312 lb (236,010 kg) for Gulf group king mackerel for vessels using hook-and-line gear in the southern Florida west coast subzone was reached on April 6, 2004.

Accordingly, the commercial hook-and-line fishery for king mackerel in the southern Florida west coast subzone is closed effective 12:01 a.m., local time, April 9, 2004, through June 30, 2004, the end of the fishing year.

The Florida west coast subzone is that part of the eastern zone south and west of 25°20.4' N. lat. (a line directly east from the Miami-Dade County, FL boundary). The Florida west coast subzone is further divided into northern and southern subzones. The southern subzone is that part of the Florida west coast subzone which from November 1 through March 31 extends south and west from 25°20.4' N. lat. to 26°19.8' N. lat. (a line directly west from the Lee/Collier County, FL boundary), i.e., the area off Collier and Monroe Counties. From April 1 through October 31, the southern subzone is that part of the Florida west coast subzone which is between 26°19.8' N. lat. and 25°48' N. lat. (a line directly west from the Monroe/Collier County, FL boundary), i.e., the area off Collier County.

NMFS previously determined that the commercial quota for king mackerel from the western zone of the Gulf of Mexico was reached and closed that segment of the fishery on September 24,

2003 (68 FR 55554, September 26, 2003). Subsequently, NMFS determined that the commercial quota for Gulf group king mackerel in the northern Florida west coast subzone was reached and closed that segment of the fishery on November 13, 2003 (68 FR 64820; November 17, 2003). Thus, with this closure, all commercial fisheries for Gulf group king mackerel in the EEZ are closed from the U.S./Mexico border through the southern Florida west coast subzone through June 30, 2004, except for vessels fishing with run-around gillnets in the southern Florida west coast subzone.

Except for a person aboard a charter vessel or headboat, during the closure, no person aboard a vessel for which a commercial permit for king mackerel has been issued may fish for Gulf group king mackerel in the EEZ in the closed zones or subzones. A person aboard a vessel that has a valid charter vessel/headboat permit for coastal migratory pelagic fish may continue to retain king mackerel in or from the closed zones or subzones under the bag and possession limits set forth in 50 CFR 622.39(c)(1)(ii) and (c)(2), provided the vessel is operating as a charter vessel or headboat. A charter vessel or headboat that also has a commercial king mackerel permit is considered to be operating as a charter vessel or headboat when it carries a passenger who pays a fee or when there are more than three persons aboard, including operator and crew.

During the closure, king mackerel from the closed zones or subzones taken in the EEZ, including those harvested under the bag and possession limits, may not be purchased or sold. This prohibition does not apply to trade in king mackerel from the closed zones or subzones that were harvested, landed ashore, and sold prior to the closure and were held in cold storage by a dealer or processor.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such prior notice and opportunity for public comment is unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself already has been subject to notice and comment, and all that remains is to notify the public of the closure. Allowing prior notice and opportunity