

Federal Register

Thursday
August 8, 1996

Part IV

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

48 CFR Ch. 1, et al.

**Federal Acquisition Regulations;
Introduction of Miscellaneous
Amendments; Final and Interim Rules**

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Federal Acquisition Circular 90-41]

Federal Acquisition Regulation; Introduction of Miscellaneous Amendments

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

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final and interim rules.

SUMMARY: This document serves to introduce and relate together the interim and final rule documents which follow and which comprise Federal Acquisition Circular (FAC) 90-41. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to issue FAC 90-41 to amend the Federal Acquisition Regulation (FAR) to implement changes in the following subject areas. A companion document, the Small

Entities Compliance Guide, follows this FAC and may be located on the Internet at <http://www.gsa.gov/far/compliance>.

Item	Subject	FAR case	Analyst
I	Information Technology Management Reform Act of 1996	96-319	O'Neill.
II	Compliance with Immigration and Nationality Act Provisions	96-320	DeStefano.
III	Federal Acquisition and Community Right-to-Know	95-305	DeStefano.
IV	Restrictions on Certain Foreign Purchases	95-303	O'Such.
V	Legal Proceedings Costs	93-010	Olson.

DATES: For effective dates and comment dates, see individual documents which appear elsewhere in this separate part.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in relation to each FAR case or subject area. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC, 20405 (202) 501-4755. Please cite FAC 90-41 and FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-41 amends the FAR as specified below:

CASE SUMMARIES

For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

Item I—Information Technology Management Reform Act of 1996 (FAR Case 96-319)

This interim rule implements the Information Technology Management Reform Act (ITMRA) of 1996 (Division E of Public Law 104-106). ITMRA seeks to improve Federal information management and to facilitate acquisition of state-of-the-art information technology that is critical for improving the efficiency and effectiveness of Government operations. Under ITMRA, each executive agency is authorized to acquire information technology, including entering into contracts that provide for multi-agency acquisitions of information technology in accordance with guidance issued by the Office of

Management and Budget. This interim rule also contains certain policies and procedures from the Federal Information Resources Management Regulation (FIRMR). The changes to the FAR include (1) addition of a definition of "information technology" at 2.101; (2) relocation of the definition of "major system" from 34.001 to 2.101; (3) addition of a new Subpart 8.9, Financial Management Systems Software (FMSS) Mandatory Multiple Award Schedule (MAS) Contracts Program; (4) revision of Part 39, Acquisition of Information Technology; (5) addition of a new clause at 52.239-1, Privacy or Security Safeguards; and (6) various conforming amendments in other parts of the FAR.

Item II—Compliance with Immigration and Nationality Act Provisions (FAR Case 96-320)

This interim rule amends FAR 9.406 to implement Executive Order 12989 of February 13, 1996, Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions. The Executive Order provides that a contractor may be debarred upon a determination by the Attorney General that the contractor is not in compliance with the employment provisions of the Immigration and Nationality Act.

Item III—Federal Acquisition and Community Right-to-Know (FAR Case 95-305)

The interim rule published in FAC 90-34 is revised and finalized. The rule

implements Executive Order 12969, Federal Acquisition and Community Right-to-Know, which requires that Government contractors report in a public manner on toxic chemicals released into the environment. The final rule differs from the interim rule in that it amends FAR Subpart 23.9, the provision at 52.223-13, and the clause at 52.223-14 to clarify that (1) an offeror must submit a Certification of Toxic Chemical Release Reporting regarding only those facilities that it owns or operates, and (2) a contractor must file a Toxic Chemical Release Inventory Form with the Environmental Protection Agency only for its facilities that are subject to the reporting requirements of the Emergency Planning and Community Right-to-Know Act of 1986.

Item IV—Restrictions on Certain Foreign Purchases (FAR Case 95-303)

This final rule amends FAR Subpart 25.7 and the clause at 52.225-11 to (1) implement Executive Order 12959, Prohibiting Certain Transactions with Respect to Iran, and (2) reflect the regulations of the Department of the Treasury, Office of Foreign Assets Control (31 CFR Chapter V). Iran and Libya are added to the list of sources from which procurement is restricted; Vietnam, Cambodia, and South Africa are removed from the list.

Item V—Legal Proceedings Costs (FAR Case 93-010)

This final rule amends FAR 31.205-47 to make the costs of pre- or post-award protests unallowable. An

exception to this requirement is made for costs incurred to defend against a protest, if the costs are incurred pursuant to a written request from the contracting officer.

Dated: August 2, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

August 8, 1996; Number 90-41

Federal Acquisition Circular (FAC) 90-41 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

FAR case 96-320 is effective August 8, 1996. FAR cases 93-010, 95-303, and 95-305 are effective October 7, 1996. Far Case 96-319 is effective August 8, 1996, and applies to all information technology solicitations issued on or after August 8, 1996.

Dated: July 29, 1996.

Eleanor R. Spector,

Director, Defense Procurement.

Dated: July 23, 1996.

Edward C. Loeb,

Acting Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Tom Luedtke,

Deputy Associate Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 96-20186 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 7, 8, 9, 12, 15, 16, 17, 19, 22, 32, 33, 34, 37, 38, 39, 45, 46, 51, 52, and 53

[FAC 90-41, FAR Case 96-319, Item I]

RIN 9000-AHXX

Federal Acquisition Regulation; Information Technology Management Reform Act of 1996 (ITMRA)

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense

Acquisition Regulations Council have agreed to an interim rule amending the Federal Acquisition Regulation (FAR) to provide for a simplified, clear, and understandable process for acquiring information technology (IT) that addresses the management of risk. This interim rule implements the Information Technology Management Reform Act (ITMRA), Division E of Public Law 104-106, dated February 10, 1996. The interim rule also incorporates the recommendations of the Federal Information Resources Management Regulation (FIRMR) Transition Committee, relocating those provisions of the FIRMR, which were recommended for retention, in the FAR. This regulatory action was not subject to Office of Management and Budget (OMB) review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

DATES: Effective Date: August 8, 1996.

Applicability: This regulation applies to all IT solicitations issued on or after August 8, 1996. The General Services Board of Contract Appeals (GSBCA) will not accept any protest received on or after August 8, 1996.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 7, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRS), 18th & F Streets, NW, Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405.

Please cite FAC 90-41, FAR case 96-319 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-41, FAR case 96-319.

SUPPLEMENTARY INFORMATION:

A. Background

Federal information systems are critical to every American. The efficiency and effectiveness of the Federal Government is dependent upon the effective use of information. The Information Technology Management Reform Act (ITMRA) of 1996 seeks to improve Federal information management and to facilitate Federal Government acquisition of state-of-the-art IT that is critical for improving the efficiency and effectiveness of Federal Government operations.

Under ITMRA, each executive agency is authorized to acquire IT, including entering into contracts that provide for multi-agency acquisitions of IT in accordance with guidance issued by OMB. The Chief Information Officer (CIO) of each agency is responsible for the IT programs of the agency. The Director of OMB is responsible for improving the acquisition, use, and disposal of IT by the Federal Government. The development and use of best practices in the acquisition of IT will be encouraged. Additionally, the Director will monitor the effectiveness of, and compliance with, directives issued under ITMRA. The Director will also coordinate the development and review of policy by the Administrator, Office of Information and Regulatory Affairs, with the Office of Federal Procurement Policy.

In light of the passage of ITMRA, and the recognition by the CIO Council that a new regulatory framework is necessary to effect the tenor and tenets of the ITMRA, the FIRMR Transition Committee reviewed the FIRMR (41 CFR Chapter 201) and made recommendations as to provisions of the FIRMR that should be included in the FAR. The language resulting from those recommendations is included in this interim rule.

This interim rule implements ITMRA, the recommendations of the FIRMR Transition Committee, and the goals of transforming acquisition of IT into a results-oriented procurement system which ensures responsibility and accountability of Federal agencies in the use of IT in support of agency missions.

Section 5202 of ITMRA encourages agency heads to use modular contracting or incremental acquisition when acquiring a major information technology system. A proposed rule giving guidance to contracting officers on use of this technique will be developed after publication of this interim rule. Regulation drafters will work closely with industry and contracting agencies to ensure that the proposed rule provides guidance to agencies using this technique.

B. Regulatory Flexibility Act

This rule is expected to have a significant beneficial impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because the rule simplifies and streamlines procedures for the acquisition of information technology. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy of the Small Business

Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subparts will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C 601, *et seq.* (FAR Case 96-319), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the ITMRA, passed February 10, 1996, should be effective by August 8, 1996. Regulations should be in effect by that date. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 2, 5, 7, 8, 9, 12, 15, 16, 17, 19, 22, 32, 33, 34, 37, 38, 39, 45, 46, 51, 52 and 53

Government procurement.

Dated: August 2, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 2, 5, 7, 8, 9, 12, 15, 16, 17, 19, 22, 32, 33, 34, 37, 38, 39, 45, 46, 51, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR Parts 2, 5, 7, 8, 9, 12, 15, 16, 17, 19, 22, 32, 33, 34, 37, 38, 39, 45, 46, 51, 52 and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Section 2.101 is amended by adding, in alphabetical order, the definitions for "Information technology" and "Major system" to read as follows:

2.101 Definitions.

* * * * *

Information technology means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(a) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency which—

- (1) Requires the use of such equipment; or
- (2) Requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product.

(b) The term *information technology* includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

(c) The term *information technology* does not include any equipment that is acquired by a contractor incidental to a contract.

Major system means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof, but exclude construction or other improvements to real property. A system shall be considered a major system if—

(a) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for the acquisition exceeds \$300,000,000 (based on fiscal year 1980 constant dollars);

(b) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a "major system" established by the agency pursuant to Office of Management and Budget Circular A-109, entitled "Major System Acquisitions," whichever is greater; or

(c) The system is designated a "major system" by the head of the agency responsible for the system.

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

5.207 [Amended]

3. Section 5.207 is amended in paragraph (g)(1) by revising in the table the entry for "Code D" to read "Information technology services, including telecommunications services."; and in (g)(2) by revising in the table the entry for "Code 70" to read "General-purpose information technology equipment."

PART 7—ACQUISITION PLANNING

4. Section 7.403(b)(1) is revised to read as follows:

7.403 General Services Administration assistance.

* * * * *

(b) * * *

(1) Center for Strategic IT Analysis (MKS), Washington, DC 20405, for information on acquisition of information technology.

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.002 [Amended]

5. Section 8.002 is amended by removing paragraph (d) and redesignating paragraphs (e) through (g) as (d) through (f), respectively.

8.402 [Reserved]

6. Section 8.402 is removed and reserved.

7. Subpart 8.9 is added to read as follows:

Subpart 8.9—Financial Management Systems Software (FMSS) Mandatory Multiple Award Schedule (MAS) Contracts Program

- Sec.
- 8.901 General.
- 8.902 Policy.
- 8.903 Exceptions.
- 8.904 Procedures.

8.901 General.

(a) OMB has established a mandatory Governmentwide Financial Management Systems Software (FMSS) program.

(b) Agencies may obtain information and assistance concerning the use of the FMSS MAS contracts program from: General Services Administration, Procurement Services Center (KRB), FMSS Contracting Officer, 18th and F Streets, NW, Washington, DC 20405.

(c) OMB Circular No. A-127, Revised, "Financial Management Systems," provides further policy direction regarding the FMSS program.

8.902 Policy.

The FMSS MAS contracts program is mandatory for use by executive agencies for the acquisition of commercial software for core financial systems and for the acquisition of services and support related to the implementation of such software.

8.903 Exceptions.

(a) If an executive agency holds a licensing agreement for a software package that is available on the FMSS MAS contracts, and the package was obtained under a contract awarded before the award of the FMSS MAS contracts, the agency's use of the FMSS MAS contracts program is optional for the acquisition of services and support related to the implementation of that package until the previous non-MAS contract expires.

(b) Use of the FMSS MAS contracts program by Federal agencies that are not executive agencies is optional and is subject to the FMSS contractor accepting the order.

(c) An executive agency shall obtain a waiver from GSA if it determines that its requirements for financial management systems software cannot be satisfied through use of the FMSS MAS contracts program.

(1) The request for a waiver shall contain the following information—

- (i) A description of the agency's requirements;
- (ii) The reasons the FMSS MAS contracts program does not satisfy the requirements; and
- (iii) A description of how the agency proposes to satisfy its needs for financial management system software.

(2) Agencies shall send waiver requests to GSA at the address in 8.901(b).

8.904 Procedures.

(a) The contracting officer shall announce the agency's requirements in a letter of interest (LOI) to all contractors participating in the FMSS MAS contracts program.

(b) At the time of issuance, the contracting officer shall provide a copy of the LOI to—

- (1) GSA at the address in 8.901(b);
 - (2) OMB at: Office of Federal Financial Management, Federal Financial Systems Branch, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503; and
 - (3) Department of Treasury at: Division of Financial Management, Financial Management Service, Department of the Treasury, PG Center #2, Room 800A, Hyattsville, MD 20782.
- (c) The LOI shall—

(1) Contain sufficient information to enable a competitive acquisition under the FMSS MAS contracts program;

(2) Include instructions to the FMSS MAS contractors for responding to the LOI; and

(3) Include evaluation and award factors.

(d) The agency shall conduct an analysis of the offerings of the FMSS MAS contractors and issue a delivery order to the contractor that provides the most advantageous alternative to the Government.

(e) The contracting officer may issue single or multiple delivery orders to satisfy the total requirement.

(f) The contracting officer shall provide a copy of each delivery order, or modification thereto, to OMB and the Department of Treasury at the address shown in paragraph (b) of this section and to GSA at the address in 8.901(b).

PART 9—CONTRACTOR QUALIFICATIONS

8. Section 9.508(e) is revised to read as follows:

9.508 Examples.

* * * * *

(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

9. Section 12.603(c)(2)(xiii) is revised to read as follows:

12.603 Streamlined solicitation for commercial items.

* * * * *

(c) * * *

(2) * * *

(xiii) A statement regarding any additional contract requirement(s) or terms and conditions (such as contract financing arrangements or warranty requirements) determined by the contracting officer to be necessary for this acquisition and consistent with customary commercial practices.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.103 [Amended]

10. Section 13.103 is amended by removing "GSA Nonmandatory Schedule Contracts for FIP Resources," in paragraph (a).

11. Section 13.202(c)(3) is revised to read as follows:

13.202 Establishment of blanket purchase agreements (BPA's).

* * * * *

(c) * * *

(3) Federal Supply Schedule contractors if not inconsistent with the terms of the applicable schedule contract.

PART 15—CONTRACTING BY NEGOTIATION

15.805-1 [Amended]

12. Section 15.805-1(d) is amended in the sixth sentence by removing "the FIRMR", and by removing "regulatory" and inserting "regulations" in its place.

PART 16—TYPES OF CONTRACTS

13. Section 16.500 is amended by revising the fourth and fifth sentences to read as follows:

16.500 Scope of subpart.

* * * * * Therefore, GSA regulations and the coverage for the Federal Supply Schedule program in subpart 8.4 and part 38 take precedence over this subpart. This subpart may be used to acquire information technology requirements that are not satisfied under the Federal Supply Schedule program. * * *

PART 17—SPECIAL CONTRACTING METHODS

14. Section 17.200 is revised to read as follows:

17.200 Scope of subpart.

This subpart prescribes policies and procedures for the use of option solicitation provisions and contract clauses. Except as provided in agency regulations, this subpart does not apply to contracts for (a) services involving the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other kinds of real property; (b) architect-engineer services; and (c) research and development services. However, it does not preclude the use of options in those contracts.

15. Section 17.204(e) is amended by removing the last sentence and adding in its place two new sentences to read as follows:

17.204 Contracts.

* * * * *

(e) * * * These limitations do not apply to information technology contracts. However, statutes applicable to various classes of contracts, for example, the Service Contract Act (see 22.1002-1), may place additional restrictions on the length of contracts.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

16. Subsection 19.502-1 is amended by revising the last sentence to read as follows:

19.502-1 Requirements for setting aside acquisitions.

* * * This requirement does not apply to purchases of \$2,500 or less, or purchases from required sources of supply under Part 8 (e.g., Federal Prison Industries, Committee for Purchase from People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1006 [Amended]

17. Section 22.1006(e)(1) is amended by removing the acronym "ADP" and inserting "information technology" in its place.

PART 32—CONTRACT FINANCING

18. Section 32.602(h) is revised to read as follows:

32.602 General.

* * * * *

(h) Reimbursement of costs, as provided in 33.102(b) and 33.104(h)(1), paid by the Government where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

19. Section 32.603 is revised to read as follows:

32.603 Applicability.

Except as otherwise specified, this subpart applies to all debts to the Government arising in connection with contracts and subcontracts for the acquisition of supplies or services, and debts arising from the Government's payment of costs, as provided in 33.102(b) and 33.104(h)(1), where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

PART 33—PROTESTS, DISPUTES, AND APPEALS

20. Section 33.102 is amended by revising the first sentence of paragraph (a); in (b)(3)(i) by removing "or GSBICA"; in (c) by removing "or GSBICA" and by removing "90 working" and inserting "100" in its place; and by revising (e). The revised text reads as follows:

33.102 General.

(a) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency or the General Accounting Office (GAO). * * *

* * * * *

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR part 21).

33.104 [Amended]

21. Section 33.104 is amended in paragraph (a)(3)(i) introductory text by removing "35" and inserting "30" in its place, and in paragraph (f) by removing "125" and inserting "100" in its place.

33.105 [Reserved]

22. Section 33.105 is removed and reserved.

PART 34—MAJOR SYSTEM ACQUISITION

34.001 [Amended]

23. Section 34.001 is amended by removing the definition for "Major system".

PART 37—SERVICE CONTRACTING

24. Section 37.202(a) is revised to read as follows:

37.202 Exclusions.

* * * * *

(a) Routine information technology services unless they are an integral part of a contract for the acquisition of advisory and assistance services.

* * * * *

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

38.000 [Amended]

25. Section 38.000 is amended by removing the second sentence.

26. Part 39 is revised to read as follows:

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

Sec.

- 39.000 Scope of part.
- 39.001 Applicability.
- 39.002 Definitions.

Subpart 39.1—General

- 39.101 Policy.
- 39.102 Management of risk.
- 39.103 [Reserved]
- 39.104 [Reserved]
- 39.105 Privacy.
- 39.106 Contract clause.

39.000 Scope of part.

This part prescribes acquisition policies and procedures for use in acquiring information technology consistent with other parts of this chapter and OMB Circular No. A-130, Management of Federal Information Resources.

39.001 Applicability.

This part applies to the acquisition of information technology by or for the use of agencies except for acquisitions of information technology for national security systems. However, acquisitions of information technology for national security systems shall be conducted in accordance with 40 U.S.C. 1412 with regard to requirements for performance and results-based management; the role of the agency Chief Information Officer in acquisitions; and accountability. These requirements are addressed in OMB Circular No. A-130.

39.002 Definitions.

National security system, as used in this part, means any telecommunications or information system operated by the United States Government, the function, operation, or use of which—

- (a) Involves intelligence activities;
- (b) Involves cryptologic activities related to national security;
- (c) Involves command and control of military forces;
- (d) Involves equipment that is an integral part of a weapon or weapons system; or

(e) Is critical to the direct fulfillment of military or intelligence missions. This does not include a system that is to be used for routine administrative and business applications, such as payroll, finance, logistics, and personnel management applications.

Subpart 39.1—General

39.101 Policy.

In acquiring information technology, agencies shall identify their requirements pursuant to OMB Circular A-130, including consideration of

security of resources, protection of privacy, national security and emergency preparedness, accommodations for individuals with disabilities, and energy efficiency. When developing an acquisition strategy, contracting officers should consider the rapidly changing nature of information technology through market research (see part 10) and the application of technology refreshment techniques.

39.102 Management of risk.

(a) Prior to entering into a contract for information technology, an agency should analyze risks, benefits, and costs. (See part 7 for additional information regarding requirements definition.) Reasonable risk taking is appropriate as long as risks are controlled and mitigated. Contracting and program office officials are jointly responsible for assessing, monitoring and controlling risk when selecting projects for investment and during program implementation.

(b) Types of risk may include schedule risk, risk of technical obsolescence, cost risk, risk implicit in a particular contract type, technical feasibility, dependencies between a new project and other projects or systems, the number of simultaneous high risk projects to be monitored, funding availability, and program management risk.

(c) Appropriate techniques should be applied to manage and mitigate risk during the acquisition of information technology. Techniques include, but are not limited to: prudent project management; use of modular contracting; thorough acquisition planning tied to budget planning by the program, finance and contracting offices; continuous collection and evaluation of risk-based assessment data; prototyping prior to implementation; post implementation reviews to determine actual project cost, benefits and returns; and focusing on risks and returns using quantifiable measures.

39.103–39.104 [Reserved]

39.105 Privacy.

Agencies shall ensure that contracts for information technology address protection of privacy in accordance with the Privacy Act (5 U.S.C. 552a) and part 24. In addition, each agency shall ensure that contracts for the design, development, or operation of a system of records using commercial information technology services or information technology support services include the following:

(a) Agency rules of conduct that the contractor and the contractor's employees shall be required to follow.

(b) A list of the anticipated threats and hazards that the contractor must guard against.

(c) A description of the safeguards that the contractor must specifically provide.

(d) Requirements for a program of Government inspection during performance of the contract that will ensure the continued efficacy and efficiency of safeguards and the discovery and countering of new threats and hazards.

39.106 Contract clause.

The contracting officer shall insert a clause substantially the same as the clause at 52.239–1, Privacy or Security Safeguards, in solicitations and contracts for information technology which require security of information technology, and/or are for the design, development, or operation of a system of records using commercial information technology services or support services.

PART 45—GOVERNMENT PROPERTY

45.608–1 [Amended]

27. Section 45.608–1 is amended in Table 45–1 under the Screening Category “Special Items” by removing in the second column “Automatic data processing equipment.”, and in the third column by removing “(see 45.608–5(d))” and revising “(see 45.608–5(e))” to read “(see 45.608–5(d))”.

45.608–5 [Amended]

28. Section 45.608–5 is amended by removing paragraph (d) and by redesignating paragraph (e) as (d).

PART 46—QUALITY ASSURANCE

29. Section 46.801 is amended by revising the first sentence of paragraph (a) to read as follows:

46.801 Applicability.

(a) This subpart applies to contracts other than those for (1) information technology, including telecommunications, (2) construction, (3) architect-engineer services, and (4) maintenance and rehabilitation of real property. * * *

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

30. Section 51.103(c) is revised to read as follows:

51.103 Ordering from Government supply sources.

* * * * *

(c) Contractors placing orders under indefinite delivery contracts issued by GSA for automatic data processing equipment, software and maintenance, communications equipment and supplies, and teleprocessing services shall follow the terms of the applicable contract and the procedures in 51.103(a)(1) and (2).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

31. Section 52.212–5 is amended by revising the clause date; by removing from paragraph (a)(2) “and 40 U.S.C. 759” and from the introductory text of paragraph (b) “and FIRMR”; and by revising (b)(16) and (17) to read as follows:

52.212–5 Contract terms and conditions required to implement statutes or executive orders—commercial items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Aug. 1996)

* * * * *

(b) * * *
 _____ (16) 52.239–1, Privacy or Security Safeguards (5 U.S.C. 552a).
 _____ (17) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241).

* * * * *

(End of clause)

32. Section 52.222–48 is amended by revising the section heading, the clause heading and date, and by removing from paragraph (a)(2) “ADP” and inserting “information technology” in its place. The revised text reads as follows:

52.222–48 Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment—Contractor Certification.

* * * * *

Exemption From Application of Service Contract Act Provisions For Contracts For Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment—Contractor Certification (Aug. 1996)

* * * * *

(End of clause)

33. Section 52.233–2 is revised to read as follows:

52.233–2 Service of Protest.

As prescribed in 33.106(a), insert the following provision:

Service of Protest (Aug. 1996)

(a) Protests, as defined in section 33.101 of the Federal Acquisition Regulation, that are filed directly with an agency, and copies of any protests that are filed with the General Accounting Office (GAO), shall be served on the Contracting Officer (addressed as follows) by obtaining written and dated acknowledgment of receipt from _____. [Contracting Officer designate the official or location where a protest may be served on the Contracting Officer.]

(b) The copy of any protest shall be received in the office designated above within one day of filing a protest with the GAO.

(End of provision)

34. Section 52.233-3 is amended by revising the clause date and the first sentence of paragraph (f) to read as follows:

52.233-3 Protest after Award.

* * * * *

Protest After Award (Aug. 1996)

* * * * *

(f) If, as the result of the Contractor's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this contract is sustained, and the Government pays costs, as provided in FAR 33.102(b)(2) or 33.104(h)(1), the Government may require the Contractor to reimburse the Government the amount of such costs. * * *

(End of clause)

* * * * *

35. Section 52.239-1 is added to read as follows:

52.239-1 Privacy or Security Safeguards.

As prescribed in 39.106, insert a clause substantially the same as the following:

Privacy or Security Safeguards (Aug. 1996)

(a) The Contractor shall not publish or disclose in any manner, without the Contracting Officer's written consent, the details of any safeguards either designed or developed by the Contractor under this contract or otherwise provided by the Government.

(b) To the extent required to carry out a program of inspection to safeguard against threats and hazards to the security, integrity, and confidentiality of Government data, the Contractor shall afford the Government access to the Contractor's facilities, installations, technical capabilities, operations, documentation, records, and databases.

(c) If new or unanticipated threats or hazards are discovered by either the Government or the Contractor, or if existing safeguards have ceased to function, the discoverer shall immediately bring the situation to the attention of the other party. (End of clause)

PART 53—FORMS

36. Section 53.245(a) is amended by revising the last sentence to read as follows:

53.245 Government property.

* * * * *

(a) * * * (See 45.608-2(b)(2) and 45.608-8.)

* * * * *

[FR Doc. 96-20187 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 9

[FAC 90-41, FAR Case 96-320, Item II]

RIN 9000-AHXX

Federal Acquisition Regulation; Compliance With Immigration and Nationality Act Provisions

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

ACTION: Interim rule with request for comment.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to an interim rule amending the Federal Acquisition Regulation (FAR) Part 9 to implement Executive Order 12989 of February 13, 1996, Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Nationality Act Provisions. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

DATES: Effective Date: August 8, 1996.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 7, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), 18th & F Streets, NW, Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405. Please cite FAC 90-41, FAR case 96-320, in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-41, FAR case 96-320.

SUPPLEMENTARY INFORMATION:

A. Background

Executive Order 12989, Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Nationality Act Provisions, was signed on February 13, 1996. The Executive Order provides that a contractor may be debarred upon a determination by the Attorney General that the contractor is not in compliance with the employment provisions of the Immigration and Nationality Act (INA). This interim rule revises FAR 9.406-2, to specify that such a determination by the Attorney General is a basis for debarment, and 9.406-4, to stipulate the duration of the debarment mandated by the Executive order.

B. Regulatory Flexibility Act

This interim rule is not expected to have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Only a small number of Federal contractors are likely to be the subject of a determination, by the Attorney General, that they are not in compliance with the employment provisions of the Immigration and Nationality Act. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR Case 96-320), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling

reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Executive Order 12989, Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Nationality Act Provisions, which was effective upon its execution (February 13, 1996). However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 9

Government procurement.

Dated: August 2, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 9 is amended as set forth below:

1. The authority citation for 48 CFR Part 9 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Section 9.406-2 is amended in paragraph (a)(4) in the second parenthetical by removing "section" and inserting "Section" in its place, and by revising (b) to read as follows:

9.406-2 Causes for debarment.

* * * * *

(b)(1) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of the Drug-Free Workplace Act of 1988 (Public Law 100-690), as indicated by—

(A) The offeror's submission of a false certification;

(B) The contractor's failure to comply with its certification; or

(C) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in

or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Public Law 102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Public Law 102-558)).

(2) The debarring official may debar a contractor, based on a determination by the Attorney General of the United States, or designee, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989). The Attorney General's determination is not reviewable in the debarment proceedings.

* * * * *

3. Section 9.406-4 is amended by revising paragraphs (a) and (b) to read as follows:

9.406-4 Period of debarment.

(a)(1) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that—

(i) Debarment for violation of the provisions of the Drug-Free Workplace Act of 1988 (see 23.506) may be for a period not to exceed 5 years; and

(ii) Debarments under 9.406-2(b)(2) shall be for one year unless extended pursuant to paragraph (b) of this subsection.

(2) If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. Debarments under 9.406-2(b)(2) may be extended for additional periods of one year if the Attorney General or designee determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. If debarment for an additional period is determined to be necessary, the procedures of 9.406-3 shall be followed to extend the debarment.

* * * * *

[FR Doc. 96-20190 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 23 and 52

[FAC 90-41; FAR Case 95-305; Item III]

RIN 9000-AG68

Federal Acquisition Regulation; Federal Acquisition and Community Right-to-Know

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) Parts 23 and 52 to implement Executive Order 12969. The Executive order requires that Federal agency contractors report in a public manner on toxic chemicals released to the environment. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: October 7, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-41, FAR case 95-305.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule with request for public comment was published on October 30, 1995 (60 FR 55306). Thirty-four comments were received from eight respondents. As a result of analyzing the public comments, the rule was revised to clarify that the owner or operator of a facility that is subject to the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and the Pollution Prevention Act (PPA) reporting requirements is required to file Toxic Chemical Release Inventory Forms with the Environmental Protection Agency, and that offerors will submit certifications regarding only those facilities that the offeror owns or operates that will be used in performing the contract. This final rule also

simplifies the language of the certification at FAR 52.223-13.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The rule requires only that offerors in competitive acquisitions exceeding \$100,000 in value agree to comply with, or identify the basis for their exemption from, existing EPCRA and PPA reporting requirements. There were no public comments in response to the Regulatory Flexibility Statement published with the interim rule. The rule does not apply to acquisitions of commercial items or to contractor facilities located outside the United States.

C. Paperwork Reduction Act

The final rule imposes no new information collection requirements that require approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* The information collection requirements imposed by the interim rule have been approved by OMB under OMB Clearance Number 9000-0139 through September 30, 1996.

List of Subjects in 48 CFR Parts 23 and 52

Government procurement.

Dated: August 2, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 23 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 23 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

2. Section 23.901 is amended by adding a parenthetical at the end to read as follows:

23.901 Purpose.

* * * (See also EPA Notice, "Guidance Implementing Executive Order 12969" (60 FR 50738, September 29, 1995).)

23.902 [Amended]

3. Section 23.902 is amended by redesignating the first sentence as paragraph (a) and adding a comma after the word "land", and redesignating the second sentence as (b) and revising it to read as follows:

23.902 General.

* * * * *

(b) Under EPCRA section 313 (42 U.S.C. 11023), and PPA section 6607 (42 U.S.C. 13106), the owner or operator of certain manufacturing facilities is required to submit annual reports on toxic chemical releases and waste management activities to the Environmental Protection Agency (EPA) and the States.

4. Section 23.903(b)(1) is revised to read as follows:

23.903 Applicability.

* * * * *

(b) * * *
(1) Acquisitions of commercial items as defined in part 2; or

* * * * *

5. Section 23.906 is amended by revising paragraphs (a), (b), and (c) to read as follows:

23.906 Requirements.

(a) E.O. 12969 requires that solicitations for competitive contracts expected to exceed \$100,000 (including all options) include, to the maximum extent practicable, as an award eligibility criterion, a certification by the offeror that, if awarded a contract, either—

(1) As the owner or operator of facilities to be used in the performance of the contract that are subject to Form R filing and reporting requirements, the offeror will file, and will continue to file throughout the life of the contract, for such facilities, the Toxic Chemical Release Inventory Form (Form R) as described in EPCRA sections 313 (a) and (g) and PPA section 6607; or

(2) Facilities to be used in the performance of the contract are exempt from Form R filing and reporting requirements because the facilities—

(i) Do not manufacture, process, or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

(ii) Do not have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A);

(iii) Do not meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) (including the alternate thresholds at 40 CFR 372.27, provided an appropriate

certification form has been filed with EPA);

(iv) Do not fall within Standard Industrial Classification Code (SIC) designations 20 through 39 as set forth in 19.102; or

(v) Are not located within any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, or any other territory or possession over which the United States has jurisdiction.

(b) A determination that it is not practicable to include the solicitation provision at 52.223-13, Certification of Toxic Chemical Release Reporting, in a solicitation or class of solicitations shall be approved by a procurement official at a level no lower than the head of the contracting activity. Prior to making such a determination for a solicitation or class of solicitations with an estimated value in excess of \$500,000 (including all options), the agency shall consult with the Environmental Protection Agency, Director, Environmental Assistance Division, Office of Pollution Prevention and Toxic Substances (Mail Code 7408), Washington, DC 20460.

(c) Award shall not be made to offerors who do not certify in accordance with paragraph (a) of this section when the provision at 52.223-13, Certification of Toxic Chemical Release Reporting, is included in the solicitation. If facilities to be used by the offeror in the performance of the contract are not subject to Form R filing and reporting requirements and the offeror fails to check the appropriate box(es) in 52.223-13, Certification of Toxic Chemical Release Reporting, such failure shall be considered a minor informality or irregularity.

* * * * *

6. Section 23.907 is revised in the introductory text and paragraph (a) to read as follows:

23.907 Solicitation provision and contract clause.

Except for acquisitions of commercial items as defined in part 2, the contracting officer shall—

(a) Insert the provision at 52.223-13, Certification of Toxic Chemical Release Reporting, in all solicitations for competitive contracts expected to exceed \$100,000 (including all options) and competitive 8(a) contracts, unless it has been determined in accordance with 23.906(b) that to do so is not practicable; and

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Section 52.223-13 is revised to read as follows:

52.223-13 Certification of Toxic Chemical Release Reporting.

As prescribed in 23.907(a), insert the following provision:

CERTIFICATION OF TOXIC CHEMICAL RELEASE REPORTING

October 7, 1996

(a) Submission of this certification is a prerequisite for making or entering into this contract imposed by Executive Order 12969, August 8, 1995.

(b) By signing this offer, the offeror certifies that—

(1) As the owner or operator of facilities that will be used in the performance of this contract that are subject to the filing and reporting requirements described in section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11023) and section 6607 of the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13106), the offeror will file and continue to file for such facilities for the life of the contract the Toxic Chemical Release Inventory Form (Form R) as described in sections 313(a) and (g) of EPCRA and section 6607 of PPA; or

(2) None of its owned or operated facilities to be used in the performance of this contract is subject to the Form R filing and reporting requirements because each such facility is exempt for at least one of the following reasons: (*Check each block that is applicable.*)

□ (i) The facility does not manufacture, process, or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

□ (ii) The facility does not have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A);

□ (iii) The facility does not meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) (including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been filed with EPA);

□ (iv) The facility does not fall within Standard Industrial Classification Code (SIC) designations 20 through 39 as set forth in Section 19.102 of the Federal Acquisition Regulation; or

□ (v) The facility is not located within any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, or any other territory or possession over which the United States has jurisdiction.

(End of provision)

8. Section 52.223-14 is revised to read as follows:

52.223-14 Toxic Chemical Release Reporting.

As prescribed in 23.907(b), insert the following clause:

TOXIC CHEMICAL RELEASE REPORTING
October 7, 1996

(a) Unless otherwise exempt, the Contractor, as owner or operator of a facility used in the performance of this contract, shall file by July 1 for the prior calendar year an annual Toxic Chemical Release Inventory Form (Form R) as described in sections 313(a) and (g) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11023(a) and (g)), and section 6607 of the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13106). The Contractor shall file, for each facility subject to the Form R filing and reporting requirements, the annual Form R throughout the life of the contract.

(b) A Contractor owned or operated facility used in the performance of this contract is exempt from the requirement to file an annual Form R if—

(1) The facility does not manufacture, process, or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

(2) The facility does not have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A);

(3) The facility does not meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) (including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been filed with EPA);

(4) The facility does not fall within Standard Industrial Classification Code (SIC) designations 20 through 39 as set forth in Section 19.102 of the Federal Acquisition Regulation (FAR); or

(5) The facility is not located within any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, or any other territory or possession over which the United States has jurisdiction.

(c) If the Contractor has certified to an exemption in accordance with one or more of the criteria in paragraph (b) of this clause, and after award of the contract circumstances change so that any of its owned or operated facilities used in the performance of this contract is no longer exempt—

(1) The Contractor shall notify the Contracting Officer; and

(2) The Contractor, as owner or operator of a facility used in the performance of this contract that is no longer exempt, shall (i) submit a Toxic Chemical Release Inventory Form (Form R) on or before July 1 for the prior calendar year during which the facility becomes eligible; and (ii) continue to file the annual Form R for the life of the contract for such facility.

(d) The Contracting Officer may terminate this contract or take other action as appropriate, if the Contractor fails to comply accurately and fully with the EPCRA and PPA toxic chemical release filing and reporting requirements.

(e) Except for acquisitions of commercial items as defined in FAR Part 2, the Contractor shall—

(1) For competitive subcontracts expected to exceed \$100,000 (including all options), include a solicitation provision substantially the same as the provision at FAR 52.223-13, Certification of Toxic Chemical Release Reporting; and

(2) Include in any resultant subcontract exceeding \$100,000 (including all options), the substance of this clause, except this paragraph (e).

(End of clause)

[FR Doc. 96-20191 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 25 and 52**

[FAC 90-41; FAR Case 95-303; Item IV]

RIN 9000-AG82

Federal Acquisition Regulation; Restrictions on Certain Foreign Purchases

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) Parts 25 and 52 to implement Executive Order 12959, Prohibiting Certain Transactions with Respect to Iran, and to conform the FAR to other current restrictions of the Department of the Treasury. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: October 7, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such, at (202) 501-1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-41, FAR case 95-303.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule amends FAR Parts 25 and 52 to implement Executive Order

12959, Prohibiting Certain Transactions with Respect to Iran, which became effective May 6, 1995, and to conform the FAR to current restrictions in 31 CFR Chapter V (Office of Foreign Assets Control, Department of the Treasury). Subpart 25.7 and the clause at 52.225-11 are revised to add Iran and Libya to the list of prohibited sources, and to delete restrictions on procurement from Vietnam, Cambodia, and South Africa. A proposed rule was published in the Federal Register on February 22, 1996, at 61 FR 6910. No public comments were received. No changes were made to the proposed rule.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any new requirements on contractors, large or small. The rule merely notifies contractors of changes in the existing prohibitions against transactions with certain countries. This change should have minimal impact on U.S. firms. There were no public comments in response to the Regulatory Flexibility Act Statement published with the proposed rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: August 2, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 25 and 52 are amended as set forth below:

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

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 25—FOREIGN ACQUISITION

2. Subpart 25.7 is revised to read as follows:

Subpart 25.7—Restrictions on Certain Foreign Purchases

Sec.

- 25.701 Restrictions.
25.702 Contract clause.

25.701 Restrictions.

(a) The Government does not acquire supplies or services from foreign governments or their organizations when these supplies or services cannot be imported lawfully into the United States. Therefore, agencies and their contractors and subcontractors shall not acquire any supplies or services originating from sources within, or that were located in or transported from or through—

- (1) Cuba (31 CFR part 515);
- (2) Iran (31 CFR part 560);
- (3) Iraq (31 CFR part 575);
- (4) Libya (31 CFR part 550); or
- (5) North Korea (31 CFR part 500).

(b) Agencies and their contractors and subcontractors shall not acquire any supplies or services from entities controlled by the Government of Iraq (Executive Orders 12722 and 12724).

(c) Questions concerning these restrictions should be referred to the Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, (202) 622-2520.

25.702 Contract clause.

The contracting officer shall insert the clause at 52.225-11, Restrictions on Certain Foreign Purchases, in solicitations and contracts over \$2,500.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.225-11 is revised to read as follows:

52.225-11 Restrictions on Certain Foreign Purchases.

As prescribed in 25.702, insert the following clause:

Restrictions on Certain Foreign Purchases
October 7, 1996

(a) Unless advance written approval of the Contracting Officer is obtained, the Contractor shall not acquire, for use in the performance of this contract, any supplies or services originating from sources within, or that were located in or transported from or through, countries whose products are banned from importation into the United States under regulations of the Office of Foreign Assets Control, Department of the Treasury. Those countries include Cuba, Iran, Iraq, Libya, and North Korea.

(b) The Contractor shall not acquire for use in the performance of this contract any supplies or services from entities controlled by the Government of Iraq.

(c) The Contractor agrees to insert the provisions of this clause, including this paragraph (c), in all subcontracts hereunder.

(End of clause)

[FR Doc. 96-20188 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 90-41; FAR Case 93-010; Item V]

RIN 9000-AG65

Federal Acquisition Regulation; Legal Proceedings Costs

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to make the costs of pre- or post-award protests unallowable. An exception to this requirement is made for costs incurred to defend against a protest, if the costs are incurred pursuant to a written request from the contracting officer. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: October 7, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-41, FAR case 93-010.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule adds another category of unallowable costs to the list at 31.205-47(f). The rule disallows costs in connection with protests or the defense against protests of solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the contracting officer. A proposed rule was published in the Federal Register on October 26, 1995, at 60 FR 54918. Twelve sources submitted public comments. All comments were considered in developing the final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies to this final rule and a Final Regulatory Flexibility Analysis (FRFA) has been performed. Although a number of respondents took exception to the statement in the Federal Register that the proposed rule "is not expected to have a significant economic impact on a substantial number of small entities * * * because most contracts awarded to small entities are awarded on a competitive, fixed-price basis and the cost principles do not apply", they added that (1) many contracts awarded to small entities are cost-reimbursable and cost principles apply; (2) cost principles apply when small entities negotiate annual overhead rates; and (3) cost principles apply whenever a cost analysis is performed. We agree that cost principles apply in these cases, but the analysis concluded that a substantial number of small businesses are not involved. In addition, this rule only applies to those small entities (1) whose contracts are governed by cost principles; and (2) who file a protest, or are defending against a protest. Based on the data available, the analysis concludes that the percentage of small entities who meet this second criterion is well below 5 percent. A copy of the FRFA may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: August 2, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 31 is amended as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR Part 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 31.205-47 is amended by adding paragraph (f)(8) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(f) * * *

(8) Protests of Federal Government solicitations or contract awards, or the defense against protests of such solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the cognizant contracting officer.

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[FR Doc. 96-20192 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration as the Federal Acquisition Regulation (FAR) Council. This Small Entity Compliance Guide has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 90-41 which amend the FAR. Further information regarding these rules may be obtained by referring to FAC 90-41 which precedes this notice. This document may be obtained from the Internet at <http://www.gsa.gov/far/compliance>.

FOR FURTHER INFORMATION CONTACT: Beverly Fayson, FAR Secretariat, (202) 501-4755.

SUPPLEMENTARY INFORMATION:

LIST OF RULES IN FAC 90-41

Item	Subject	FAR case
I	Information Technology Management Reform Act of 1996.	96-319

LIST OF RULES IN FAC 90-41—Continued

Item	Subject	FAR case
II	Compliance with Immigration and Nationality Act Provisions.	96-320
III	Federal Acquisition and Community Right-to-Know.	95-305
IV	Restrictions on Certain Foreign Purchases.	95-303
V	Legal Proceedings Costs.	93-010

Item I—Information Technology Management Reform Act of 1996 (FAR Case 96-319)

This interim rule implements the Information Technology Management Reform Act (ITMRA) of 1996 (Division E of Public Law 104-106). ITMRA seeks to improve Federal information management and to facilitate acquisition of state-of-the-art information technology that is critical for improving the efficiency and effectiveness of Government operations. Under ITMRA, each executive agency is authorized to acquire information technology, including entering into contracts that provide for multi-agency acquisitions of information technology in accordance with guidance issued by the Office of Management and Budget. This interim rule also contains certain policies and procedures from the Federal Information Resources Management Regulation (FIRMR). The changes to the FAR include (1) addition of a definition of "information technology" at 2.101; (2) relocation of the definition of "major system" from 34.001 to 2.101; (3) addition of a new Subpart 8.9, Financial Management Systems Software (FMSS) Mandatory Multiple Award Schedule (MAS) Contracts Program; (4) revision of Part 39, Acquisition of Information Technology; (5) addition of a new clause at 52.239-1, Privacy or Security Safeguards; and (6) various conforming amendments in other parts of the FAR.

Item II—Compliance With Immigration and Nationality Act Provisions (FAR Case 96-320)

This interim rule amends FAR 9.406 to implement Executive Order 12989 of February 13, 1996, Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions. The Executive Order provides that a contractor may be debarred upon a determination by the Attorney General that the contractor is not in compliance with the employment

provisions of the Immigration and Nationality Act.

Item III—Federal Acquisition and Community Right-to-Know (FAR Case 95-305)

The interim rule published in FAC 90-34 is revised and finalized. The rule implements Executive Order 12969, Federal Acquisition and Community Right-to-Know, which requires that Government contractors report in a public manner on toxic chemicals released into the environment. The final rule differs from the interim rule in that it amends FAR Subpart 23.9, the provision at 52.223-13, and the clause at 52.223-14 to clarify that (1) an offeror must submit a Certification of Toxic Chemical Release Reporting regarding

only those facilities that it owns or operates, and (2) a contractor must file a Toxic Chemical Release Inventory Form with the Environmental Protection Agency only for its facilities that are subject to the reporting requirements of the Emergency Planning and Community Right-to-Know Act of 1986.

Item IV—Restrictions on Certain Foreign Purchases (FAR Case 95-303)

This final rule amends FAR Subpart 25.7 and the clause at 52.225-11 to (1) implement Executive Order 12959, Prohibiting Certain Transactions with Respect to Iran, and (2) reflect the regulations of the Department of the Treasury, Office of Foreign Assets Control (31 CFR Chapter V). Iran and Libya are added to the list of sources

from which procurement is restricted; Vietnam, Cambodia, and South Africa are removed from the list.

Item V—Legal Proceedings Costs (FAR Case 93-010)

This final rule amends FAR 31.205-47 to make the costs of pre- or post-award protests unallowable. An exception to this requirement is made for costs incurred to defend against a protest, if the costs are incurred pursuant to a written request from the contracting officer.

Dated: August 2, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.
[FR Doc. 96-20189 Filed 8-7-96; 8:45 am]

BILLING CODE 6820-EP-P