
Friday
August 22, 1997

48 CFR
Chapter I
Subchapter A
Part 101

Part III

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

48 CFR Chapter I, et al.
Federal Acquisition Regulations (FAR);
Final Rules

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Chapter 1

**Federal Acquisition Circular 97-01;
Introduction**

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 summarizes the Federal Acquisition Regulation (FAR) rules issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 97-01. Each rule follows this document in the order listed below. A companion document, the Small Entity Compliance Guide follows this FAC and may be located on the Internet.

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears (in the table below) in relation to each FAR case or subject area. For general information, contact Beverly Fayson, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 97-01 and specific FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 97-01 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR case	Analyst
I	Business Process Innovation	97-006	De Stefano.
II	FASA and the Walsh-Healey Public Contracts Act	96-601	O'Neill.
III	Irrevocable Letters of Credit and Alternatives to Miller Act Bonds	95-301	O'Neill.
IV	Automatic Data Processing Equipment Leasing Costs	96-010	Olson.
V	Environmentally Sound Products	92-054A	De Stefano.
VI	New FAR Certifications	96-329	De Stefano.
VII	Service Contracting	95-311	O'Neill.
VIII	ADP/Telecommunications Federal Supply Schedules	96-602	Nelson.
IX	Certificate of Competency (Interim)	96-002	Moss.
X	Economically Disadvantaged Individuals	97-008	Moss.
XI	Minority Small Business and Capital Ownership	95-028	Moss.
XII	Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts (Interim)	94-610	O'Neill.
XIII	Designation of Hong Kong	97-019	Linfield.
XIV	Foreign Differential Pay	96-012	Olson.
XV	Local Government Lobbying Costs	96-003	Nelson.
XVI	Independent Government Estimates—Construction	97-005	O'Neill.
XVII	Year 2000 Compliance	96-607	Nelson.
XVIII	Modification of Existing Contracts under FASA and FARA	96-606	De Stefano.

**Item I—Business Process Innovation
(FAR Case 97-006)**

This final rule amends FAR 1.102-4(e) to encourage contracting officers, in their role as members of the Government acquisition team, to take the lead in encouraging business process innovations and ensuring that business decisions are sound.

**Item II—FASA and the Walsh-Healey
Public Contracts Act (FAR Case 96-601)**

The interim rule published as Item I of Federal Acquisition Circular 90-43 is converted to a final rule without change. The rule amends the FAR to eliminate the requirement that covered contractors under the Walsh-Healey Public Contracts Act must be either the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

**Item III—Irrevocable Letters of Credit
and Alternatives to Miller Act Bonds
(FAR Case 95-301)**

The interim rule published as Item XVII of FAC 90-39 is revised and finalized. The rule amends FAR Parts 28

and 52 to provide for use of Irrevocable Letters of Credit as substitutes for corporate or individual surety on Miller Act bonds, and to provide alternatives to Miller Act payment bonds for construction contracts valued at \$25,000 to \$100,000, which are no longer subject to the Miller Act, in accordance with Section 4104(b)(1) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).

**Item IV—Automatic Data Processing
Equipment Leasing Costs (FAR Case 96-010)**

The interim rule published as Item I of FAC 90-44 is converted to a final rule without change. The rule amends FAR Part 31 to remove the automatic data processing equipment leasing cost principle.

**Item V—Environmentally Sound
Products (FAR Case 92-054A)**

The interim rule published as Item II of FAC 90-27 is revised and finalized. The rule amends FAR Parts 1, 7, 10, 11, 13, 15, 23, 36, 42, and 52 to incorporate policies for the acquisition of environmentally preferable and energy-efficient products and services. The

final rule differs from the interim rule in that it clarifies the acceptability of used, reconditioned, or remanufactured supplies, or former Government surplus property, proposed for use under a contract; revises the clause at 52.211-5 regarding acceptability of such material and limits its use in solicitations and contracts for commercial items; eliminates the provisions at 52.211-6 and 52.223-8 and the clause at 52.211-7; revises the clause at 52.223-9 to streamline reporting requirements regarding the recovered material content of EPA-designated items; and eliminates references to agency designation of items requiring minimum recovered material content.

**Item VI—New FAR Certifications (FAR
Case 96-329)**

This final rule adds a new section at FAR 1.107 to reflect the provisions of Section 4301(b)(2) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). Section 4301(b)(2) prohibits the inclusion of a new certification requirement in the FAR for contractors or offerors unless the certification requirement is specifically imposed by statute, or unless a written justification for such

certification requirement is provided to the Administrator for Federal Procurement Policy by the FAR Council and the Administrator approves in writing the inclusion of the certification.

Item VII—Service Contracting (FAR Case 95-311)

This final rule amends FAR Parts 7, 16, 37, 42, 46, and 52 to implement Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, Service Contracting. The OFPP policy letter prescribes policies and procedures for use of performance-based contracting methods.

Item VIII—ADP/Telecommunications Federal Supply Schedules (FAR Case 96-602)

This final rule amends FAR Subpart 8.4 to clarify procedures for placing orders and obtaining price reductions under GSA Federal supply schedule contracts, and to add information regarding the "GSA Advantage!" on-line shopping service. Related amendments are made at FAR 13.202(a)(4) and 51.103.

Item IX—Certificate of Competency (FAR Case 96-002)

This interim rule amends FAR Parts 9 and 19 to implement revisions made to the Small Business Administration's (SBA) procurement assistance programs contained in 13 CFR Part 125. The rule notably (1) increases the threshold over which contracting officers may appeal the award of a Certificate of Competency (COC) from \$25,000 to \$100,000; (2) updates the names of SBA offices involved in processing COC's; and (3) implements the requirement that compliance with the limitations on subcontracting be considered an element of responsibility. In addition, this interim rule removes language implementing Section 15(c) of the Small Business Act (15 U.S.C. 644(c)) as amended by Section 305 of Public Law 103-403, Small Business Administration Reauthorization and Amendments Act of 1994. Section 305, which authorized public and private organizations for the handicapped to participate in acquisitions set aside for small businesses, has expired.

Item X—Economically Disadvantaged Individuals (FAR Case 97-008)

This final rule amends the definition of "small disadvantaged business concern" at FAR 19.001 to update the categories of individuals considered to be socially and economically disadvantaged. In accordance with the

Small Business Administration's regulations at 13 CFR 124.105, the Maldives Islands has been added to the category of "Subcontinent Asian Americans"; and Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, and Nauru have been added to the category of "Asian Pacific Americans."

Item XI—Minority Small Business and Capital Ownership (FAR Case 95-028)

The interim rule published as Item VII of FAC 90-43 is revised and finalized. The rule amends the FAR to reflect changes to the Small Business Administration's (SBA) regulations at 13 CFR Parts 121 and 124, which address the Minority Small Business and Capital Ownership Development Program. The rule clarifies eligibility and procedural requirements for procurements under the 8(a) program. The final rule differs from the interim rule in that it amends FAR 19.804-2 to reflect changes that the SBA is making in its processing of 8(a) requirements.

Item XII—Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts (FAR Case 94-610)

This interim rule adds a new FAR Subpart 22.12 implementing Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts, of October 20, 1994. The Executive Order and the interim rule require that workers on certain building service contracts be given the right of first refusal for employment with the successor contractor, if they would otherwise lose their jobs as a result of the award of the successor contract.

Item XIII—Designation of Hong Kong (FAR Case 97-019)

This final rule amends FAR 25.401 to add Hong Kong as a designated country under the Trade Agreements Act of 1979, as directed by the United States Trade Representative.

Item XIV—Foreign Differential Pay (FAR Case 96-012)

The interim rule published as Item VI of FAC 90-44 is converted to a final rule without change. The rule amends FAR 31.205-6 to remove the prohibition on the calculation of foreign differential pay based directly on an employee's specific increase in income taxes resulting from assignment overseas.

Item XV—Local Government Lobbying Costs (FAR Case 96-003)

The interim rule published as Item XI of FAC 90-43 is converted to a final rule without change. The rule amends FAR

31.205-22 to make allowable the costs of any lobbying activities to influence local legislation in order to directly reduce contract costs, or to avoid material impairment of the contractor's authority to perform the contract.

Item XVI—Independent Government Estimates—Construction (FAR Case 97-005)

This final rule amends FAR 36.203(a) and 36.605(a) to raise the threshold for a mandatory independent Government estimate of construction costs and architect-engineer costs from \$25,000 to \$100,000.

Item XVII—Year 2000 Compliance (FAR Case 96-607)

The interim rule published as Item XIV of FAC 90-45 is revised and finalized. The rule provides guidance regarding the acquisition of information technology that is Year 2000 compliant. The final rule differs from the interim rule in that it makes clarifying revisions to the definition of "Year 2000 compliant" at FAR 39.002.

Item XVIII—Modification of Existing Contracts Under FASA and FARA (FAR Case 96-606)

The interim rule published as Item VIII of FAC 90-44 is converted to a final rule without change. The rule amends FAR 43.102 to implement subsection 10002(e) of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) and subsections 4402 (d) and (e) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). The rule authorizes, but does not require, contracting officers, if requested by the contractor, to modify existing contracts without requiring consideration, to incorporate changes authorized by the Act.

Dated: August 14, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97-01 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.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 97-01 are effective October 21, 1997, except for Items IX, XII, and XIII, which are effective August 22, 1997.

Dated: August 7, 1997.
Eleanor R. Spector,
Director, Defense Procurement.

Dated: August 7, 1997.
Tom Luedtke,
*Deputy Associate Administrator for
Procurement National Aeronautics and Space
Administration.*

Dated: August 7, 1997.
Edward C. Loeb,
*Acting Deputy Associate Administrator,
Office of Acquisition Policy, General Services
Administration.*
[FR Doc. 97-22074 Filed 8-15-97; 1:12 pm]
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DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Part 1

[FAC 97-01; FAR Case 97-006; Item I]

RIN 9000-AH64

**Federal Acquisition Regulation;
Business Process Innovation**

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 amending the
Federal Acquisition Regulation (FAR) to
state that contracting officers, in their
role as members of the Government
acquisition team, should take the lead in
encouraging business process
innovations and ensuring that business
decisions are sound. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The
FAR Secretariat, Room 4035, GS
Building, Washington, DC 20405 (202)
501-4755 for information pertaining to
status or publication schedules. For
clarification of content, contact Mr.
Ralph De Stefano, Procurement Analyst,
at (202) 501-1758. Please cite FAC 97-
01, FAR case 97-006.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 1.102-
4(e) by adding a statement that
contracting officers, in their role as
members of the Government acquisition
team, should take the lead in
encouraging business process
innovations and ensuring that business
decisions are sound.

B. Regulatory Flexibility Act

The final rule does not constitute a
significant FAR revision within the
meaning of FAR 1.501 and Pub. L. 98-
577, and publication for public
comment is not required. However,
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.* (FAC 97-01, FAR case 97-
006), 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 the Office
of Management and Budget under 44
U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 1

Government procurement.

Dated: August 7, 1997.

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

Therefore, 48 CFR Part 1 is amended
as set forth below:

**PART 1—FEDERAL ACQUISITION
REGULATIONS SYSTEM**

1. The authority citation for 48 CFR
Part 1 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 1.102-4 is amended by
adding the following sentence at the end
of paragraph (e):

1.102-4 Role of the acquisition team.

* * * * *

(e) * * * Contracting officers should
take the lead in encouraging business
process innovations and ensuring that
business decisions are sound.

[FR Doc. 97-21486 Filed 8-21-97; 8:45 am]
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DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

**48 CFR Parts 1, 9, 14, 19, 22, 33, and
52**

[FAC 97-01; FAR Case 96-601; Item II]
RIN 9000-AH31

**Federal Acquisition Regulation; FASA
and the Walsh-Healey Public Contracts
Act**

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency
Acquisition Council and the Defense
Acquisition Regulations Council have
agreed to convert the interim rule
published as Item I of Federal
Acquisition Circular 90-43 on
December 20, 1996, to a final rule
without change. The rule amends the
Federal Acquisition Regulation (FAR) to
eliminate the requirement that covered
contractors under the Walsh-Healey
Public Contracts Act must be either the
manufacturer of or a regular dealer in
the materials, supplies, articles, or
equipment to be manufactured or used
in the performance of the contract. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The
FAR Secretariat, Room 4035, GS
Building, Washington, DC 20405 (202)
501-4755 for information pertaining to
status or publication schedules. For
clarification of content, contact Mr. Jack
O'Neill, Procurement Analyst, at (202)
501-3856. Please cite FAC 97-01, FAR
case 96-601.

SUPPLEMENTARY INFORMATION:

A. Background

On December 20, 1996 (61 FR 67409),
the DoD, GSA, and NASA published an
interim FAR rule implementing the
Federal Acquisition Streamlining Act of
1994 (Pub. L. 103-355) amendments to
the Walsh-Healey Public Contracts Act.
The interim rule deleted the
"manufacturer" or "regular dealer"
requirements and all related definitions
from the FAR, consistent with a
Department of Labor final rule issued on

August 5, 1996 (61 FR 40714). No comments were received in response to the interim FAR rule. Therefore, the interim FAR rule is being converted to a final rule without change.

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 this rule merely amends the FAR to conform to revisions to Department of Labor (DoL) regulations reflecting repeal of the "manufacturer" and "regular dealer" requirements under the Walsh-Healey Public Contracts Act. DoL has determined that the revisions to its regulations will not have a significant economic impact on a substantial number of small entities.

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 1, 9, 14, 19, 22, 33, and 52

Government procurement.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Parts 1, 9, 14, 19, 22, 33, and 52 which was published at 61 FR 67409, December 20, 1996, is adopted as a final rule without change.

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

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.
[FR Doc. 97-21487 Filed 8-21-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 28, and 52

[FAC 97-01; FAR Case 95-301; Item III]

RIN 9000-AG99

Federal Acquisition Regulation; Irrevocable Letters of Credit and Alternatives to Miller Act Bonds

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

ACTION: Interim rule adopted as final with changes.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt as final, with changes, the interim rule published as Item XVII of Federal Acquisition Circular 90-39 on June 20, 1996. The rule amends the Federal Acquisition Regulation (FAR) to address the use of irrevocable letters of credit in lieu of surety on Miller Act bonds (OFPP Policy Letter 91-4) and alternatives to Miller Act Bonds, as required by Section 4101(b) of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355). 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.

DATE: Effective October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAC 97-01, FAR case 95-301.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 1, 28, and 52 to provide for use of Irrevocable Letters of Credit as substitutes for corporate or individual surety on Miller Act bonds, and provides alternatives to Miller Act payment bonds for construction contracts valued at \$25,000 to \$100,000, which are no longer subject to the Miller Act, in accordance with Section 4104(b)(1) of FASA. An interim rule with request for comment was

published in the **Federal Register** on June 20, 1996 (61 FR 31651). Comments were received from seven respondents. The final rule includes the following changes in response to public comments:

- Update of the references to reflect the current version of the Uniform Customs and Practice for Documentary Credits.
- Amendment of the definition of Irrevocable Letter of Credit (ILC). Deletion of application of the term "unconditional" to ILCs.
- Incorporation of requirements for a specific expiration date for ILCs used in lieu of surety on performance or payment bonds, with automatic extension for one-year periods, until the contracting officer notifies the financial institution that the Government is waiving the right to payment.
- Limitation of the requirement for confirmation of ILCs over \$5 million to those issued by financial institutions that had letter of credit business of less than \$25 million in the past year.
- Incorporation of an explicit requirement for credit rating service to be as specified in Office of Federal Procurement Policy Pamphlet No. 7.
- Amendment of the clause at 52.228-13, Alternative Payment Protections, to specify the amount of payment protection as 50 percent of the contract price, and to require payment protection within a certain number of days after contract award.

The Councils did not adopt a comment which recommended a change in the expiration date for ILCs from 60 to 75 days after the close of the bid acceptance period, as the comment appeared to be based on a misinterpretation of the rule. The recommended 75-day expiration period was based on the need for 60 days to cover the bid acceptance period, plus 10 days to cover the time necessary for submission of payment and performance bonds, and 5 additional days to cover mailing time. However, as written, the rule provides for 60 days in addition to the number of days required for the bid acceptance period; *i.e.*, if the bid acceptance period is 60 days, the rule requires the ILC to cover a total of 120 days before expiration.

B. Regulatory Flexibility Act

The final rule is expected to have a significant positive 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 provides alternatives to Miller Act bonds for construction contracts between \$25,000 and \$100,000, which may be beneficial to

construction contractors. A Final Regulatory Flexibility Analysis (FRFA) has, therefore, been prepared and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The analysis is summarized as follows:

This rule will apply to all businesses, large and small, which contract with the Government for construction. The objective is to make it easier for small construction contractors to provide payment protection, by providing alternatives for construction contracts valued between \$25,000 and \$100,000. In addition, the rule permits the use of Irrevocable Letters of Credit as security for Miller Act bonds, in lieu of corporate or individual sureties. The rule imposes no new recordkeeping or reporting requirements, and provides alternatives to Miller Act payment bonds for construction contracts which do not exceed \$100,000.

C. Paperwork Reduction Act

This rule will reduce the information collection requirements which the Office of Management and Budget (OMB) previously approved under 44 U.S.C. 3501, *et seq.* (OMB Control No. 9000-0045). The rule will reduce the number of respondents and responses by identifying and correcting an overlap in reporting of performance and payment and bid bonds.

List of Subjects in 48 CFR Parts 1, 28, and 52

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Accordingly, the interim rule amending 48 CFR Parts 28 and 52 which was published at 61 FR 31651, June 20, 1996, is adopted as final with changes as set forth below:

1. The authority citation for 48 CFR Parts 1, 28, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. The table in section 1.106 is amended by removing the entries for 28.106-1(b) and 52.228-3; revising the entry for 52.228-2; and adding entries in numerical order to read as follows:

1.106 OMB Approval under the Paperwork Reduction Act.

FAR seg- ment	OMB control No.				
	*	*	*	*	*
28.106-1(e).	9000-0001				
28.106-1(n).	9000-0119				
	*	*	*	*	*
52.228-2	9000-0045 and 9000-0119				
52.228-13	9000-0045				
52.228-15	9000-0045				
52.228-16	9000-0045 and 9000-0119				
	*	*	*	*	*

PART 28—BONDS AND INSURANCE

3. Section 28.000 is revised to read as follows:

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against losses under sealed bid and negotiated contracts. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance. The terms "bid" and "bidders" include "proposal" and "offerors."

4. Section 28.001 is amended by revising the definitions for "Irrevocable letter of credit" and "Penal sum" to read as follows:

28.001 Definitions.

* * * * *

Irrevocable letter of credit (ILC) means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/contractor can revoke or condition the letter of credit.

Penal sum or penal amount means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

* * * * *

Subpart 28.1—Bonds and Other Financial Protections

5. The heading of Subpart 28.1 is revised to read as set forth above.

6. Section 28.100 is revised to read as follows:

28.100 Scope of subpart.

This subpart prescribes requirements and procedures for the use of bonds, alternative payment protections, and all types of bid guarantees.

7. Section 28.102-2 is amended by revising the introductory text of paragraph (b)(1) and paragraphs (b)(2), (c)(1), and (c)(2) to read as follows:

28.102-2 Amount required.

* * * * *

(b) * * * (1) The penal amount of payment bonds or the amount of alternative payment protection shall equal—

* * * * *

(2) If the original contract price is \$5 million or less, the Government may require additional protection if the contract price is increased.

(i) The penal amount of the total protection as revised shall meet the requirement of paragraph (b)(1) of this subsection.

(ii) The Government shall secure the required additional protection by directing the contractor to increase the penal sum of the existing bond or to obtain an additional bond, or to furnish additional alternative payment protection.

* * * * *

(c) * * * (1) When determining the penal sum of bonds or the amount of alternative payment protection for requirements contracts, the contracting officer shall consider the contract price to be the price payable for the estimated quantity.

(2) When determining the penal sum of bonds or the amount of alternative payment protection for indefinite-quantity contracts, the contracting officer shall consider the contract price to be the price payable for the specified minimum quantity. When the minimum quantity is exceeded, paragraphs (a)(2) and (b)(2) of this subsection apply.

* * * * *

8. Section 28.102-3 is amended by revising the section heading and the last sentence of paragraph (b) to read as follows:

28.102-3 Contract clauses.

* * * * *

(b) * * * Complete the clause by specifying the payment protections selected (see 28.102-1(b)(1)) and the deadline for submission.

9. Section 28.106-3 is revised to read as follows:

28.106-3 Additional bond and security.

(a) When additional bond coverage is required and is secured in whole or in part by the original surety or sureties, agencies shall use Standard Form 1415,

Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction, and a copy of the form is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(b) When additional bond coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 28.204 in lieu of corporate or individual surety, agencies shall use Standard Form 25, Performance Bond; Standard Form 1418, Performance Bond for Other Than Construction Contracts; Standard Form 25-A, Payment Bond; or Standard Form 1416, Payment Bond for Other Than Construction Contracts.

10. Section 28.106-8 is revised to read as follows:

28.106-8 Payment to subcontractors or suppliers.

The contracting officer will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

Subpart 28.2—Sureties and Other Security for Bonds

11. The heading of Subpart 28.2 is revised as set forth above.

12. Section 28.200 is revised to read as follows:

28.200 Scope of subpart.

This subpart prescribes procedures for the use of sureties and other security to protect the Government from financial losses.

28.201 Requirements for security.

13. Section 28.201 is amended by revising the section heading as set forth above, and in paragraph (b) by inserting the word "other" after "or" the first time it appears.

14. Section 28.204 is amended in paragraph (a) by revising the second sentence to read as follows:

28.204 Alternatives in lieu of corporate or individual sureties.

(a) * * * When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. * * *

15. Section 28.204-3 is amended by revising paragraphs (b), (c), (f) introductory text, (f)(2) introductory

text, (f)(2)(ii)(B), (g) introductory text, (g)(1) and (h) to read as follows:

28.204-3 Irrevocable letter of credit (ILC).

* * * * *

(b) The ILC shall be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.

(c) To draw on the ILC, the contracting officer shall use the sight draft set forth in the clause at 52.228-14, and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).

* * * * *

(f) The period for which financial security is required shall be as follows:

* * * * *

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the contracting officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

* * * * *

(ii) * * *

(B) For performance bonds only, until completion of any warranty period.

(g) Only federally insured financial institutions rated investment grade or higher shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The offeror/contractor shall provide the contracting officer a credit rating from a recognized commercial rating service as specified in Office of

Federal Procurement Policy Pamphlet No. 7 (see 28.204-3(h)) that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

* * * * *

(h)(1) Additional information on credit rating services and investment grade ratings is contained within Office of Federal Procurement Policy Pamphlet No. 7, Use of Irrevocable Letters of Credit. This pamphlet may be obtained by calling the Office of Management and Budget's publications office at (202) 395-7332.

(2) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 1993 Revision, International Chamber of Commerce Publication No. 500, is available from: ICC Publishing, Inc., 156 Fifth Avenue, New York NY, 10010, Telephone: (212) 206-1150, Telefax: (212) 633-6025, E-mail: iccpub@interport.net

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

16. Section 52.228-2 is amended by revising the introductory text, the clause date, and paragraph (d) to read as follows:

52.228-2 Additional Bond Security.

As prescribed in 28.106-4(a), insert the following clause:

Additional Bond Security (Oct 1997)

* * * * *

(d) An irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting officer has the right to immediately draw on the ILC.

(End of clause)

17. Section 52.228-13 is amended by revising the clause date and paragraphs (b), (c) and (f) to read as follows:

52.228-13 Alternative Payment Protections.

* * * * *

Alternative Payment Protections (Oct 1997)

* * * * *

(b) The amount of the payment protection shall be 50 percent of the contract price.

(c) The submission of the payment protection is required within _____ days of contract award.

* * * * *

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material that signed the escrow agreement.

(End of clause)

18. Section 52.228-14 is amended by revising:

(a) The clause date and paragraphs (a), (b), (c) introductory text, (c)(2) introductory text, (c)(2)(ii)(B), and (d);

(b) Following paragraph (E) in the "Irrevocable Letter of Credit", paragraphs 1, 2, 4, and 6; and

(c) Following paragraph (f) in the ILC confirmation, paragraphs 3, 4(a), and 6. The revised sections read as follows:

52.228-14 Irrevocable Letter of Credit.

* * * * *

Irrevocable Letter of Credit (Oct 1997)

(a) "Irrevocable letter of credit" (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.

(b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause shall be used.

(c) The letter of credit shall be irrevocable, shall require presentation of no document other than a written demand and the ILC (including confirming letter, if any), shall be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and—

* * * * *

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/Contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or may submit an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the Contracting Officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

* * * * *

(ii) * * *

(B) For performance bonds only, until completion of any warranty period.

(d) Only federally insured financial institutions rated investment grade or higher shall issue or confirm the ILC. The offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial

institution that had letter of credit business of at least \$25 million in the past year.

(e) * * *

1. We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States \$_____. This Letter of Credit is payable at [issuing financial institution's and, if any, confirming financial institution's] office at [issuing financial institution's address and, if any, confirming financial institution's address] and expires with our close of business on _____, or any automatically extended expiration date.

2. We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.

* * * * *

4. This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment shall be only at the written direction of the Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

* * * * *

6. If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

(f) * * *

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. * * *

(a) At least 60 days prior to any such expiration date, we shall notify the Contracting Officer, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

* * * * *

6. If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

* * * * *

(End of clause)

[FR Doc. 97-21488 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1 and 31

[FAC 97-01; FAR Case 96-010; Item IV]

RIN 9000-AH41

Federal Acquisition Regulation; Automatic Data Processing Equipment Leasing Costs

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to convert the interim rule published as Item I of Federal Acquisition Circular 90-44 on December 31, 1996, to a final rule without change. The rule amends the Federal Acquisition Regulation (FAR) to remove the cost principle on automatic data processing equipment (ADPE) leasing costs. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, Procurement Analyst, at (202) 501-3221. Please cite FAC 97-01, FAR case 96-010.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published on December 31, 1996 (61 FR 69287). The interim rule deleted the ADPE definition at FAR 31.001, the cost principle at FAR 31.205-2, Automatic data processing equipment leasing costs, and references to the term ADPE found elsewhere in FAR Part 31. The interim rule is converted to a final rule without change.

Public comments were received from one source. The comments were considered in developing the final 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require application of the cost principle contained in this 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.* The interim rule deleted a reporting and recordkeeping requirement at FAR 31.205-2 under OMB Control Number 9000-0072.

List of Subjects in 48 CFR Parts 1 and 31

Government procurement.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Parts 1 and 31 which was published at 61 FR 69287, December 31, 1996, is adopted as a final rule without change.

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

Dated: August 7, 1997

Edward C. Loeb,

Director, Federal Acquisition Policy Division.
[FR Doc. 97-21489 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 10, 11, 13, 15, 23, 36, 42, and 52

[FAC 97-01; FAR Case 92-054A; Item V]

RIN 9000-AG40

Federal Acquisition Regulation; Environmentally Sound Products

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

ACTION: Interim rule adopted as final with changes.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt as final, with changes, the interim rule published as Item II of Federal Acquisition Circular 90-27 on May 31, 1995. The rule amends the Federal Acquisition Regulation (FAR) to incorporate policies for the acquisition of environmentally preferable and energy-efficient products and services. 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.

DATE: Effective October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-01, FAR case 92-054A.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published in the **Federal Register** at 60 FR 28494, May 31, 1995. Ninety comments were received from 18 respondents.

The Councils' analysis of those comments resulted in revisions to the rule to: revise the definitions of "new" and "reconditioned" at 11.001 and in the clause at 52.211-5; delete the definitions of "material" and "other than new" at 11.001 and in the clause at 52.211-5; add Executive Order No. 12909 of March 8, 1994, to the list of statutory authorities at 11.002; clarify the policy on acceptability of used, reconditioned, or remanufactured supplies, and former Government surplus property proposed for use under a contract; delete the definition of "source reduction" at 15.601; delete all requirements related to "agency designated items" in Subpart 23.4; add a definition of "pollution prevention" at 23.703; streamline the clauses at 52.211-5 through 52.211-7 by combining their requirements into the clause at 52.211-5; eliminate the solicitation provision at 52.223-8; and streamline the clause at 52.223-9.

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat. The FRFA is summarized as follows:

This action is being taken to implement the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901, *et seq.*), as amended; Executive Order 12873, Federal Acquisition, Recycling, and Waste Prevention; Executive Order 12902, Energy Efficiency and Water Conservation at Federal Facilities; and Office of Federal Procurement Policy (OFPP) Policy Letter 92-4, Procurement of Environmentally-Sound and Energy-Efficient Products and Services.

The objective of this rule is to amend the FAR to clearly reflect the Government's preference for the acquisition of environmentally-sound and energy-efficient products and services and to establish an affirmative procurement program favoring items containing the maximum practicable content of recovered materials. The rule also implements policies for procurement of items for which the Environmental Protection Agency (EPA) has designated minimum recovered material content.

We received no public comments which specifically addressed the Initial Regulatory Flexibility Analysis.

The final rule's policies regarding acceptable new and used materials apply to all small and large entities that perform or propose to perform Government contracts. No statistics are maintained on the number of offerors that propose used, reconditioned, or remanufactured materials for use under Government contracts.

The requirements for minimum recovered material content for EPA-designated items apply to all entities that supply such items, with a value exceeding \$10,000 per year, to the Government. However, the final rule exempts procurements under the simplified acquisition threshold of \$100,000 from recovered material content reporting requirements. Based on Fiscal Year 1995 Governmentwide procurement statistics for Federal Supply/Service Codes which comprise EPA-designated items, we estimate that the Federal Government receives approximately 20,875 covered proposals per year from small entities, and awards approximately 2,280 covered contracts per year to small entities.

Several reporting requirements were streamlined or eliminated in this final rule. Certifications of recovered material content are now required only in response to solicitations which are for, or which specify the use of, EPA-designated items. Such certifications are no longer required on an annual basis and are required only under contracts which exceed the simplified acquisition threshold.

Reporting requirements related to agency-designated items have been eliminated.

We considered elimination of the requirement that an offeror notify the contracting officer when the offeror proposes the use of used, remanufactured, or reconditioned supplies. However, we determined that use of such supplies under many contracts might be unacceptable. The notification requirement will allow contracting officers to continue to decide on a case-by-case basis whether to permit use of such supplies.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) is deemed to apply because the final rule contains information collection requirements. The final rule reduces the information collection requirements contained in the interim rule and approved by the Office of Management and Budget (OMB) under OMB Control Number 9000-0134.

List of Subjects in 48 CFR Parts 1, 10, 11, 13, 15, 23, 36, 42, and 52

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR Parts 1, 7, 10, 11, 13, 15, 23, 36, 42, and 52, which was published at 60 FR 28494, May 31, 1995, is hereby adopted as final with the following changes:

1. The authority citation for 48 CFR Parts 1, 7, 10, 11, 13, 15, 23, 36, 42, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Section 1.106 is amended in the list following the introductory paragraph by removing the entries "52.210-5" and "52.210-6" and the corresponding OMB control numbers "9000-0030" in both places; and by adding the following entries in numerical order:

FAR segment	OMB control No.
* * * * *	* * * * *
52.211-5	9000-0030
* * * * *	* * * * *
52.223-4	9000-0134
* * * * *	* * * * *
52.223-8	9000-0134
* * * * *	* * * * *

PART 11—DESCRIBING AGENCY NEEDS

3.-4. Section 11.001 is revised to read as follows:

11.001 Definitions.

As used in this part—

New means composed of previously unused components, whether manufactured from virgin material, recovered material in the form of raw

material, or materials and by-products generated from, and reused within, an original manufacturing process; *provided* that the supplies meet contract requirements, including, but not limited to, performance, reliability, and life expectancy.

Reconditioned means restored to the original normal operating condition by readjustments and material replacement.

Recovered material has the meaning provided such term in 23.402.

Remanufactured means factory rebuilt to original specifications.

Virgin material means previously unused raw material, including previously unused copper, aluminum, lead, zinc, iron, other metal or metal ore, or any undeveloped resource that is, or with new technology will become, a source of raw materials.

5. Section 11.002 is amended in paragraph (d) by revising the first sentence to read as follows:

11.002 Policy.

* * * * *

(d) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, *et seq.*), as amended, Executive Order 12873, dated October 20, 1993, and Executive Order 12902, dated March 8, 1994, establish requirements for the procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services. * * *

* * * * *

6. Section 11.101 is amended by revising paragraph (b) to read as follows:

11.101 Order of precedence for requirements documents.

* * * * *

(b) Agencies should prepare product descriptions to achieve maximum practicable use of recovered material, other materials that are environmentally preferable, and products that are energy-efficient (see subparts 23.4 and 23.7).

7. Subpart 11.3, consisting of sections 11.301 and 11.302, is revised to read as follows:

Subpart 11.3—Acceptable Material

11.301 Policy.

(a) Agencies shall not require virgin material or supplies composed of or manufactured using virgin material unless compelled by law or regulation or unless virgin material is vital for safety or meeting performance requirements of the contract.

(b) Except when acquiring commercial items, agencies shall require offerors to identify used, reconditioned, or remanufactured supplies, or unused

former Government surplus property, proposed for use under the contract. Such supplies or property may not be used in contract performance unless authorized by the contracting officer.

(c) When acquiring commercial items, the contracting officer shall consider the customary practices in the industry for the item being acquired. The contracting officer may require offerors to provide information on used, reconditioned, or remanufactured supplies, or unused former Government surplus property, proposed for use under the contract. The request for such information shall be included in the solicitation and shall, to the maximum practicable extent, be limited to information provided pursuant to normal commercial practices.

11.302 Contract clause.

Except when acquiring commercial items, the contracting officer shall insert the clause at 52.211-5, Material Requirements, in solicitations and contracts for supplies.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

8. Section 13.111 is amended by revising paragraph (h) to read as follows:

13.111 Inapplicable provisions and clauses.

* * * * *

(h) 52.223-9, Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items.

PART 15—CONTRACTING BY NEGOTIATION

15.601 [Amended]

9. Section 15.601 is amended by removing the definition "Source reduction".

10. Section 15.605 is amended by revising paragraph (b)(1)(iv) to read as follows:

15.605 Evaluation factors and subfactors.

* * * * *

(b) * * *

(1) * * *

(iv) Environmental objectives, such as promoting waste reduction and energy efficiency (see part 23), also shall be considered in every source selection, when appropriate. These considerations may be expressed in terms such as resource or energy conservation, pollution prevention, waste minimization, and recovered material content.

* * * * *

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

11. Section 23.400 is revised to read as follows:

23.400 Scope of subpart.

This subpart prescribes policies and procedures for acquisition of—

(a) Environmental Protection Agency (EPA) designated items for which agencies must develop and implement affirmative procurement programs pursuant to 42 U.S.C. 6901, *et seq.*, and Executive Order 12873; and

(b) Other products when preference is given to offers of products containing recovered material.

23.401 [Amended]

12. Section 23.401 is amended in the first sentence of paragraph (c) by inserting “as amended,” following “October 20, 1993.”

13. Section 23.402 is amended by adding an introductory sentence and revising the definitions “EPA designated item” and “Postconsumer material” to read as follows:

23.402 Definitions.

As used in this subpart—

EPA designated item means an item—

(1) That is or can be made with recovered material;

(2) That is listed by EPA in a procurement guideline (40 CFR part 247); and

(3) For which EPA has provided purchasing recommendations in a related Recovered Materials Advisory Notice (RMAN).

Postconsumer material means a material or finished product that has served its intended use and has been diverted or recovered from waste destined for disposal, having completed its life as a consumer item.

Postconsumer material is a part of the broader category of “recovered material.”

* * * * *

14. Sections 23.404 and 23.405 are revised to read as follows:

23.404 Procedures.

(a) *Applicability.* These procedures apply to all agency acquisitions of EPA designated items when—

(1) The price of the item exceeds \$10,000; or

(2) The aggregate amount paid for items, or for functionally equivalent items, in the preceding fiscal year was \$10,000 or more.

(b) *EPA designated items.* (1) EPA designates items that are or can be made with recovered materials in 40 CFR part

247 and accompanying RMAN's. The RMAN cites the applications for which the EPA items have been designated and the percentages of recovered material content.

(2) For EPA designated items, agencies shall establish an affirmative procurement program. The responsibilities for preparation, implementation, and monitoring of affirmative procurement programs shall be shared between technical or requirements personnel and procurement personnel. As a minimum, such programs shall include—

(i) A recovered materials preference program;

(ii) An agency promotion program;

(iii) A program for requiring reasonable estimates, certification, and verification of recovered material used in the performance of contracts; and

(iv) Annual review and monitoring of the effectiveness of the program.

(3) Acquisition of EPA designated items that do not meet the EPA minimum recovered material standards shall be approved by an official designated by the agency head based on a written determination that the items—

(i) Are not available within a reasonable period of time;

(ii) Are available only at unreasonable prices;

(iii) Are not available from a sufficient number of sources to maintain a satisfactory level of competition; or

(iv) Based on technical verification, fail to meet performance standards in the specifications. Technical or requirements personnel shall provide a written statement when this determination is used partially or totally as a basis for an exemption. This determination shall be made on the basis of National Institute of Standards and Technology guidelines in any case in which the material is covered by these guidelines.

(4) Contractor certifications required by the clause at 52.223-9 shall be consolidated and reported in accordance with agency procedures.

23.405 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.223-4, Recovered Material Certification, in solicitations that are for, or specify the use of, recovered materials.

(b) The contracting officer shall insert the clause at 52.223-9, Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items, in contracts exceeding the simplified acquisition threshold that are for, or specify the use of, an EPA designated item.

15. Section 23.703 is amended by adding an introductory sentence and, in alphabetical order, the definition “Pollution prevention”; and by revising the definition “Waste prevention” to read as follows:

23.703 Definitions.

As used in this subpart—

* * * * *

Pollution prevention means any practice that—

(1) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal, and reduces the hazards to public health and the environment associated with the release of such substances, pollutants, and contaminants; or

(2) Reduces or eliminates the creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources.

* * * * *

Waste prevention means any change in the design, manufacturing, purchase, or use of materials or products (including packaging) to reduce their amount or toxicity before they become municipal solid waste. Waste prevention also refers to the reuse of products or materials.

* * * * *

16. Section 23.704 is revised to read as follows:

23.704 Policy.

(a) Agencies shall implement cost-effective contracting preference programs favoring the acquisition of environmentally preferable and energy-efficient products and services, and shall employ acquisition strategies that affirmatively implement the objectives in paragraph (b) of this section.

(b) The following environmental objectives shall be addressed throughout the acquisition process:

(1) Obtaining products and services considered to be environmentally preferable (based on EPA-issued guidance).

(2) Obtaining products considered to be energy-efficient; *i.e.*, products that are in the upper 25 percent of energy-efficiency for all similar products, or products that are at least 10 percent more efficient than the minimum level that meets Federal standards (see Executive Order 12902, Section 507).

(3) Eliminating or reducing the generation of hazardous waste and the need for special material processing (including special handling, storage, treatment, and disposal).

(4) Promoting the use of nonhazardous and recovered materials.
(5) Realizing life-cycle cost savings.
(6) Promoting cost-effective waste reduction when creating plans, drawings, specifications, standards, and other product descriptions authorizing material substitutions, extensions of shelf-life, and process improvements.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

17. Section 36.601-3 is amended by revising paragraph (a) to read as follows:

36.601-3 Applicable contracting procedures.

(a) For facility design contracts, the statement of work shall require that the architect-engineer specify, in the construction design specifications, use of the maximum practicable amount of recovered materials consistent with the performance requirements, availability, price reasonableness, and cost-effectiveness. Where appropriate, the statement of work also shall require the architect-engineer to consider energy conservation, pollution prevention, and waste reduction to the maximum extent practicable in developing the construction design specifications.

* * * * *

18. Section 36.602-1 is amended by revising paragraph (a)(2) to read as follows:

36.602-1 Selection criteria.

(a) * * *
(2) Specialized experience and technical competence in the type of work required, including, where appropriate, experience in energy conservation, pollution prevention, waste reduction, and the use of recovered materials;

* * * * *

19. Section 36.602-3 is amended by revising paragraph (c) to read as follows:

36.602-3 Evaluation board functions.

* * * * *

(c) Hold discussions with at least three of the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services.

* * * * *

PART 42—CONTRACT ADMINISTRATION

20. Section 42.302 is amended by revising paragraph (a)(68) introductory text and (a)(68)(i) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) Evaluate the contractor's environmental practices to determine

whether they adversely impact contract performance or contract cost, and ensure contractor compliance with environmental requirements specified in the contract. Contracting officer responsibilities include, but are not limited to—

(i) Ensuring compliance with specifications requiring the use of environmentally preferable and energy-efficient materials and the use of materials or delivery of end items with the specified recovered material content. This shall occur as part of the quality assurance procedures set forth in part 46.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

21. Section 52.211-5 is revised to read as follows:

52.211-5 Material Requirements.

As prescribed in 11.302, insert the following clause:

Material Requirements (Oct 1997)

(a) *Definitions.*

As used in this clause—

New means composed of previously unused components, whether manufactured from virgin material, recovered material in the form of raw material, or materials and by-products generated from, and reused within, an original manufacturing process; *provided* that the supplies meet contract requirements, including but not limited to, performance, reliability, and life expectancy.

Reconditioned means restored to the original normal operating condition by readjustments and material replacement.

Recovered material means waste materials and by-products that have been recovered or diverted from solid waste including postconsumer material, but such term does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process.

Remanufactured means factory rebuilt to original specifications.

Virgin material means previously unused raw material, including previously unused copper, aluminum, lead, zinc, iron, other metal or metal ore, or any undeveloped resource that is, or with new technology will become, a source of raw materials.

(b) Unless this contract otherwise requires virgin material or supplies composed of or manufactured from virgin material, the Contractor shall provide supplies that are new, as defined in this clause.

(c) A proposal to provide unused former Government surplus property shall include a complete description of the material, the quantity, the name of the Government agency from which acquired, and the date of acquisition.

(d) A proposal to provide used, reconditioned, or remanufactured supplies shall include a detailed description of such supplies and shall be submitted to the Contracting Officer for approval.

(e) Used, reconditioned, or remanufactured supplies, or unused former Government surplus property, shall not be used unless the Contractor has proposed the use of such supplies, and the Contracting Officer has authorized their use.

(End of clause)

52.211-6 and 52.211-7 [Removed and Reserved]

22. Sections 52.211-6 and 52.211-7 are removed and reserved.

23. Section 52.223-4 is revised to read as follows:

52.223-4 Recovered Material Certification.

As prescribed in 23.405(a), insert the following provision:

Recovered Material Certification (Oct 1997)

As required by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6962(c)(3)(A)(i)), the offer certifies, by signing this offer, that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by the applicable contract specifications.

(End of provision)

52.223-8 [Removed and reserved]

24. Section 52.223-8 is removed and reserved.

25. Section 52.223-9 is revised to read as follows:

52.223-9 Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items.

As prescribed in 23.405(b), insert the following clause:

Certification and Estimate of Percentage of Recovered Material Content For EPA Designated Items (Oct 1997)

(a) As required by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6962(j)(2)(C)), the Contractor shall execute the following certification:

Certification

I, _____ (name of certifier), am an officer or employee responsible for the performance of this contract and hereby certify that the percentage of recovered material content for EPA Designated Items was at least the amount required by the applicable contract specifications.

[Signature of the Officer or Employee]

[Typed Name of the Officer or Employee]

[Title]

[Name of Company, Firm, or Organization]

[Date]

(End of certification)

(b) The Contractor also shall estimate the percentage of recovered materials actually used in the performance of this contract. The estimate is in addition to the certification in paragraph (a) of this clause.

ESTIMATE

EPA designated item	Total dollar value of EPA designated item	Percentage of recovered material content *
.....
.....
.....

*Where applicable, also include the percentage of postconsumer material content.

(c) The Contractor shall submit this certification and estimate upon completion of the contract to

*To be completed in accordance with agency procedures.

(End of clause)

26. Section 52.223-10 is amended by revising the clause date and paragraph (b) to read as follows:

52.223-10 Waste Reduction Program.

* * * * *

Waste Reduction Program (Oct 1997)

* * * * *

(b) Consistent with the requirements of Section 701 of Executive Order 12873, the Contractor shall establish a program to promote cost-effective waste reduction in all operations and facilities covered by this contract. Any such program shall comply with applicable Federal, State, and local requirements, specifically including Section 6002 of the Resource Conservation and Recovery Act (42 U.S.C. 6901, *et seq.*) and implementing regulations.

(End of clause)

[FR Doc. 97-21490 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1

[FAC 97-1; FAR Case 96-329; Item VI]

RIN 9000-AH67

Federal Acquisition Regulation; New FAR Certifications

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 amending the Federal Acquisition Regulation (FAR) to

reflect the provisions of Section 4301(b)(2) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). Section 4301(b)(2) prohibits the inclusion of a new certification requirement in the FAR for contractors or offerors unless the certification requirement is specifically imposed by statute, or unless written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the FAR Council and the Administrator approves in writing the inclusion of the certification. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-01, FAR case 96-329.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule adds a new section at FAR 1.107 to reflect the provisions of Section 4301(b)(2) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). Section 4301(b)(2) amends Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425) to prohibit the inclusion of a new certification requirement in the FAR for contractors or offerors unless the certification requirement is specifically imposed by statute, or unless written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the FAR Council and the Administrator approves in writing the inclusion of the certification.

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comment is not required. However, 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.* (FAC 97-1, FAR case 96-329), 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 the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 1

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 1 is amended as set forth below:

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1. The authority citation for 48 CFR Part 1 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 1.107 is added to read as follows:

1.107 Certifications.

In accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), as amended by Section 4301 of the Clinger-Cohen Act of 1996 (Public Law 104-106), a new requirement for a certification by a contractor or offeror may not be included in this chapter unless—

- (a) The certification requirement is specifically imposed by statute; or
- (b) Written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.

[FR Doc. 97-21491 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 16, 37, 42, 46, and 52

[FAC 97-01; FAR Case 95-311; Item VII]

RIN 9000-AH14

Federal Acquisition Regulation; Service Contracting

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 amending the Federal Acquisition Regulation (FAR) to implement Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, Service Contracting. The OFPP policy letter prescribes policies and procedures for use of performance-based contracting methods. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This action is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAC 97-01, FAR case 95-311.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 7, 16, 37, 42, 46, and 52 to establish policy for the Government's acquisition of services through the use of performance-based contracting methods.

A proposed rule was published in the **Federal Register** at 61 FR 40284, August 1, 1996. Thirty-three comments were received from nine respondents. All comments were considered in developing the final rule.

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis has been performed. The analysis is summarized as follows:

The rule revises the Federal Acquisition Regulation (FAR) to implement the Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, Service Contracting. It also implements the statutory requirements of Section 834, Public Law 101-510 by adding language concerning uncompensated overtime and a prescription for use of a new solicitation provision, "Identification of Uncompensated Overtime." Offerors are required to identify uncompensated overtime hours and the uncompensated overtime rate per hour, whether at the prime or subcontract level, when submitting a proposal responding to a solicitation estimated at \$100,000 or more, for services being acquired on the basis of the number of hours to be provided rather than on the task to be performed. The final rule applies to all businesses, large and small that submit offers of \$100,000 or more on service contracts that are based on the number of hours to be provided.

The adoption of the DoD provision concerning uncompensated overtime in the FAR conforms with the goals of the OFPP policy letter to avoid problems commonly found with service contracts resulting from: (1) Unnecessarily vague statements of work, which increase costs or make it difficult to control costs; (2) Insufficient use of fixed-price and incentive fee pricing arrangements for repetitive requirements, resulting in increased costs and inadequate incentive to improve performance; and (3) Inadequate contract administration plans, which lead to unauthorized commitments by the Government and delayed contract completion. The primary purpose for obtaining the information and using it during the source selection process is to discourage the use of mandatory uncompensated overtime in proposals from the entire professional and technical services industry. The provision regarding uncompensated overtime applies equally to large and small business entities and provides an additional method to improve the Government's ability to acquire services of the requisite quality and to assess contractor performance and price. Because both large and small business concerns must be dealt with equally in this matter, we believe that the rule does not create a disproportionate burden on small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act is deemed to apply because the final rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning service contracting was submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*, and approved under OMB Control No. 9000-0152. Public comments concerning this request were invited through the **Federal Register** notice published at 61 FR 40288, August 1, 1996.

List of Subjects in 48 CFR Parts 7, 16, 37, 42, 46, and 52

Government procurement.

Dated: August 7, 1997.

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

Therefore, 48 CFR Parts 7, 16, 37, 42, 46, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 7, 16, 37, 42, 46, 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 7—ACQUISITION PLANNING

2. Section 7.103 is amended by adding paragraph (q) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(q) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods and, therefore, fixed-price contracts (see 37.602-5) should occur for follow-on acquisitions.

3. Section 7.105 is amended in the introductory text by adding a sentence at the end of the paragraph; by revising paragraphs (a)(1), (a)(4), and (b)(6); by redesignating paragraphs (b)(18) through (b)(20) as (b)(19) through (b)(21) and adding a new (b)(18) to read as follows:

7.105 Contents of written acquisition plans.

* * * Acquisition plans for service contracts shall describe the strategies for implementing performance-based contracting methods or shall provide rationale for not using those methods (see subpart 37.6).

(a) *Acquisition background and objectives—(1) Statement of need.* Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort.

* * * * *

(4) *Capability or performance.* Specify the required capabilities or performance characteristics of the supplies or the performance standards of the services being acquired and state how they are related to the need.

* * * * *

(b) * * *
(6) *Product or service descriptions.* Explain the choice of product or service description types (including performance-based contracting descriptions) to be used in the acquisition.

* * * * *

(18) *Contract administration.* Describe how the contract will be administered. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced.

* * * * *

PART 16—TYPES OF CONTRACTS

4. Section 16.104 is amended by adding paragraph (k) to read as follows:

16.104 Factors in selecting contract types.

* * * * *

(k) *Acquisition history.* Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services

to be performed can be defined more clearly.

5. Section 16.402-2 is amended by revising the heading and paragraph (a); by redesignating paragraphs (b) through (g) as (c) through (h) and adding a new paragraph (b); and by revising the newly designated paragraph (e) to read as follows:

16.402-2 Performance incentives.

(a) Performance incentives may be considered in connection with specific product characteristics (e.g., a missile range, an aircraft speed, an engine thrust, or a vehicle maneuverability) or other specific elements of the contractor's performance. These incentives should be designed to relate profit or fee to results achieved by the contractor, compared with specified targets.

(b) To the maximum extent practicable, positive and negative performance incentives shall be considered in connection with service contracts for performance of objectively measurable tasks when quality of performance is critical and incentives are likely to motivate the contractor.

* * * * *

(e) Performance tests and/or assessments of work performance are generally essential in order to determine the degree of attainment of performance targets. Therefore, the contract must be as specific as possible in establishing test criteria (such as testing conditions, instrumentation precision, and data interpretation) and performance standards (such as the quality levels of services to be provided).

* * * * *

6. Section 16.405-1 is amended by revising the introductory text of paragraph (b)(1), and the last sentence of paragraph (b)(2) to read as follows:

16.405-1 Cost-plus-incentive-fee contracts.

* * * * *

(b) *Application.* (1) A cost-plus-incentive-fee contract is appropriate for services or development and test programs when—

* * * * *

(2) * * * This approach also may apply to other acquisitions, if the use of both cost and technical performance incentives is desirable and administratively practical.

* * * * *

PART 37—SERVICE CONTRACTING

7. Section 37.000 is amended by adding the following text as a new third sentence:

37.000 Scope of part.

* * * This part requires the use of performance-based contracting to the maximum extent practicable and prescribes policies and procedures for use of performance-based contracting methods (see subpart 37.6). * * *

8. Section 37.101 is amended by adding, in alphabetical order, the definition "Performance-based contracting" to read as follows:

37.101 Definitions.

* * * * *

Performance-based contracting means structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.

* * * * *

9. Section 37.102 is amended by redesignating paragraphs (a) through (g) as (b) through (h) and adding a new paragraph (a) to read as follows:

37.102 Policy.

(a) Agencies shall use performance-based contracting methods (see subpart 37.6), to the maximum extent practicable, for the acquisition of services, including those acquired under supply contracts, except—

- (1) Architect-engineer services acquired in accordance with 40 U.S.C. 541-544, as amended (see part 36);
- (2) Construction (see part 36);
- (3) Utility services (see part 41); or
- (4) Services that are incidental to supply purchases.

* * * * *

10. Section 37.103 is amended by redesignating paragraphs "(c)" and "(d)" as "(d)" and "(e)" respectively, and adding a new paragraph (c) to read as follows:

37.103 Contracting officer responsibility.

* * * * *

(c) Ensure that performance-based contracting methods are used to the maximum extent practicable when acquiring services.

* * * * *

11. Section 37.106 is amended by adding paragraph (c) to read as follows:

37.106 Funding and term of service contracts.

* * * * *

(c) Agencies with statutory multiyear authority shall consider the use of this authority to encourage and promote economical business operations when acquiring services.

12. Sections 37.115 through 37.115-3 are added to read as follows:

37.115 Uncompensated overtime.

37.115-1 Scope.

The policies in this section are based on Section 834 of Public Law 101-510 (10 U.S.C. 2331).

37.115-2 General policy.

(a) Use of uncompensated overtime is not encouraged.

(b) When professional or technical services are acquired on the basis of the number of hours to be provided, rather than on the task to be performed, the solicitation shall require offerors to identify uncompensated overtime hours and the uncompensated overtime rate for direct charge Fair Labor Standards Act—exempt personnel included in their proposals and subcontractor proposals. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

37.115-3 Solicitation provision.

The contracting officer shall insert the provision at 52.237-10, Identification of Uncompensated Overtime, in all solicitations valued above the simplified acquisition threshold, for professional or technical services to be acquired on the basis of the number of hours to be provided.

13. Subpart 37.6, consisting of sections 37.600 through 37.602-5, is added to read as follows:

Subpart 37.6—Performance-Based Contracting

Sec.

- 37.600 Scope of subpart.
- 37.601 General.
- 37.602 Elements of performance-based contracting.
 - 37.602-1 Statements of work.
 - 37.602-2 Quality assurance.
 - 37.602-3 Selection procedures.
 - 37.602-4 Contract type.
 - 37.602-5 Follow-on and repetitive requirements.

Subpart 37.6—Performance-Based Contracting

37.600 Scope of subpart.

This subpart prescribes policies and procedures for use of performance-based contracting methods. It implements OFPP Policy Letter 91-2, Service Contracting.

37.601 General.

Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed meet contract standards. Performance-based contracts—

(a) Describe the requirements in terms of results required rather than the methods of performance of the work;

(b) Use measurable performance standards (i.e., terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a));

(c) Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407); and

(d) Include performance incentives where appropriate.

37.602 Elements of performance-based contracting.

37.602-1 Statements of work.

(a) Generally, statements of work shall define requirements in clear, concise language identifying specific work to be accomplished. Statements of work must be individually tailored to consider the period of performance, deliverable items, if any, and the desired degree of performance flexibility (see 11.105). In the case of task order contracts, the statement of work for the basic contract need only define the scope of the overall contract (see 16.504(a)(4)(iii)). The statement of work for each task issued under a task order contract shall comply with paragraph (b) of this subsection. To achieve the maximum benefits of performance-based contracting, task order contracts should be awarded on a multiple award basis (see 16.504(c) and 16.505(b)).

(b) When preparing statements of work, agencies shall, to the maximum extent practicable—

(1) Describe the work in terms of “what” is to be the required output rather than either “how” the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101);

(2) Enable assessment of work performance against measurable performance standards;

(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work; and

(4) Avoid combining requirements into a single acquisition that is too broad for the agency or a prospective contractor to manage effectively.

37.602-2 Quality assurance.

Agencies shall develop quality assurance surveillance plans when acquiring services (see 46.103 and 46.401(a)). These plans shall recognize the responsibility of the contractor (see 46.105) to carry out its quality control

obligations and shall contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the statement of work. The quality assurance surveillance plans shall focus on the level of performance required by the statement of work, rather than the methodology used by the contractor to achieve that level of performance.

37.602-3 Selection procedures.

Agencies shall use competitive negotiations when appropriate to ensure selection of services that offer the best value to the Government, cost and other factors considered (see 15.605).

37.602-4 Contract type.

Contract types most likely to motivate contractors to perform at optimal levels shall be chosen (see subpart 16.1 and, for research and development contracts, see 35.006). To the maximum extent practicable, performance incentives, either positive or negative or both, shall be incorporated into the contract to encourage contractors to increase efficiency and maximize performance (see subpart 16.4). These incentives shall correspond to the specific performance standards in the quality assurance surveillance plan and shall be capable of being measured objectively. Fixed-price contracts are generally appropriate for services that can be defined objectively and for which the risk of performance is manageable (see subpart 16.1).

37.602-5 Follow-on and repetitive requirements.

When acquiring services that previously have been provided by contract, agencies shall rely on the experience gained from the prior contract to incorporate performance-based contracting methods to the maximum extent practicable. This will facilitate the use of fixed-price contracts for such requirements for services. (See 7.105 for requirement to address performance-based contracting strategies in acquisition plans. See also 16.104(k).)

PART 42—CONTRACT ADMINISTRATION

14. Section 42.1102 is amended by adding the following sentence to the end of the paragraph:

42.1102 Applicability.

* * * See part 37, especially subpart 37.6, regarding surveillance of contracts for services.

PART 46—QUALITY ASSURANCE

15. Section 46.103 is amended by revising paragraph (a) to read as follows:

46.103 Contracting office responsibilities.

* * * * *

(a) Receiving from the activity responsible for technical requirements any specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services (the activity responsible for technical requirements is responsible for prescribing contract quality requirements, such as inspection and testing requirements or, for service contracts, a quality assurance surveillance plan);

* * * * *

16. Section 46.401 is amended by revising paragraph (a) to read as follows:

46.401 General.

(a) Government contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors’ plants) as may be necessary to determine that the supplies or services conform to contract requirements. Quality assurance surveillance plans should be prepared in conjunction with the preparation of the statement of work. The plans should specify—

- (1) All work requiring surveillance; and
- (2) The method of surveillance.

* * * * *

17. Section 46.407 is amended in the introductory text of paragraph (f) by adding new second and third sentences to read as follows:

46.407 Nonconforming supplies or services.

* * * * *

(f) * * * For services, the contracting officer can consider identifying the value of the individual work requirements or tasks (subdivisions) that may be subject to price or fee reduction. This value may be used to determine an equitable adjustment for nonconforming services. * * *

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

18. Section 52.237-10 is added to read as follows:

52.237-10 Identification of Uncompensated Overtime.

As prescribed in 37.115-3, insert the following provision:

Identification of Uncompensated Overtime (Oct 1997)

(a) *Definitions.* As used in this provision—*Uncompensated overtime* means the hours worked without additional compensation in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act. Compensated personal absences such as holidays, vacations, and sick leave shall be included in the normal work week for purposes of computing uncompensated overtime hours.

Uncompensated overtime rate is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the proposed hours per week. For example, 45 hours proposed on a 40-hour work week basis at \$20 per hour would be converted to an uncompensated overtime rate of \$17.78 per hour (\$20.00×40 divided by 45=\$17.78).

(b) For any proposed hours against which an uncompensated overtime rate is applied, the offeror shall identify in its proposal the hours in excess of an average of 40 hours per week, by labor category at the same level of detail as compensated hours, and the uncompensated overtime rate per hour, whether at the prime or subcontract level. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

(c) The offeror's accounting practices used to estimate uncompensated overtime must be consistent with its cost accounting practices used to accumulate and report uncompensated overtime hours.

(d) Proposals that include unrealistically low labor rates, or that do not otherwise demonstrate cost realism, will be considered in a risk assessment and will be evaluated for award in accordance with that assessment.

(e) The offeror shall include a copy of its policy addressing uncompensated overtime with its proposal.

(End of provision)

[FR Doc. 97-21492 Filed 8-21-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 13, and 51

[FAC 97-01; FAR Case 96-602; Item VIII]

RIN 9000-AH29

Federal Acquisition Regulation; ADP/ Telecommunications Federal Supply Schedules

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 amending the Federal Acquisition Regulation (FAR) with respect to GSA's Federal Supply Schedules program. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 97-01, FAR case 96-602.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 8, 13, and 51 to recognize the reassignment of Federal Supply Schedule contracts for ADP/Telecommunications to GSA's Federal Supply Service to add new coverage on the "GSA Advantage!" program, clarify when ordering offices should seek price reductions under schedule contracts, and to clarify procedures for placing schedule orders above the maximum order threshold.

A proposed rule requesting comment was published in the **Federal Register** at 61 FR 52844, October 8, 1996. Thirty-eight comments were received from twelve respondents. All comments were considered in developing the final 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 merely updates and clarifies guidance for Government agencies regarding use of the GSA Federal Supply Schedule program.

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 8, 13, and 51

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 8, 13, and 51 are amended as set forth below:

1. The authority citation for 48 CFR Parts 8, 13, and 51 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 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Section 8.401 is revised to read as follows:

8.401 General.

(a) The Federal Supply Schedule program, directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying (also see 8.001). Indefinite delivery contracts (including requirements contracts) are established with commercial firms to provide supplies and services at stated prices for given periods of time. Similar systems of schedule-type contracting are used for military items managed by the Department of Defense. These systems are not included in the Federal Supply Schedule program covered by this subpart.

(b) The GSA schedule contracting office issues publications, entitled Federal Supply Schedules, containing the information necessary for placing delivery orders with schedule contractors. Ordering offices issue delivery orders directly to the schedule contractors for the required supplies and services. Ordering offices may request copies of schedules by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing List Service (7CAFL), P.O. Box 6477, Fort Worth, TX 76115. Copies of GSA Form 457 also may be obtained from this address.

(c) GSA offers an on-line shopping service called "GSA Advantage!" that enables ordering offices to search product specific information (*i.e.*, national stock number, part number, common name), review delivery options, place orders directly with contractors (or ask GSA to place orders on the agency's behalf), and pay

contractors for orders using the Governmentwide commercial purchase card (or pay GSA). Ordering offices may access the "GSA Advantage!" shopping service by connecting to the Internet and using a web browser to connect to the Acquisition Reform Network (<http://www.arnet.gov>) or the GSA, Federal Supply Service (FSS) Home Page (<http://www.fss.gsa.gov>). For more information or assistance, contact GSA at Internet e-mail address: gsa.advantage@gsa.gov.

3. Section 8.402 is added to read as follows:

8.402 Applicability.

Procedures in this subpart apply to Federal Supply Schedule contracts. Occasionally, special ordering procedures may be established. In such cases the procedures will be outlined in the "Federal Supply Schedules".

4. Section 8.404 is amended by revising paragraphs (a) and (b), and the paragraph heading of (c) to read as follows:

8.404 Using schedules.

(a) *General.* When agency requirements are to be satisfied through the use of Federal Supply Schedules as set forth in this subpart, the simplified acquisition procedures of part 13 and the small business set-aside provisions of subpart 19.5 do not apply except for the provision at 13.202(c)(3). Orders placed pursuant to a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued pursuant to full and open competition (see 6.102(d)(3)). Therefore, when placing orders under Federal Supply Schedules, ordering offices need not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides in accordance with subpart 19.5. GSA has already determined the prices of items under schedule contracts to be fair and reasonable. By placing an order against a schedule using the procedures in this section, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs.

(b) *Ordering procedures for optional use schedules*—(1) *Orders at or below the micro-purchase threshold.* Ordering offices can place orders at or below the micro-purchase threshold with any Federal Supply Schedule contractor.

(2) *Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold.* Orders

should be placed with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, ordering offices should consider reasonably available information about the supply or service offered under MAS contracts by using the "GSA Advantage!" on-line shopping service, or by reviewing the catalogs/pricelists of at least three schedule contractors and select the delivery and other options available under the schedule that meet the agency's needs. In selecting the supply or service representing the best value, the ordering office may consider—

- (i) Special features of the supply or service that are required in effective program performance and that are not provided by a comparable supply or service;
- (ii) Trade-in considerations;
- (iii) Probable life of the item selected as compared with that of a comparable item;
- (iv) Warranty considerations;
- (v) Maintenance availability;
- (vi) Past performance; and
- (vii) Environmental and energy efficiency considerations.

(3) *Orders exceeding the maximum order threshold.* Each schedule contract has an established maximum order threshold. This threshold represents the point where it is advantageous for the ordering office to seek a price reduction. In addition to following the procedures in paragraph (b)(2) of this section and before placing an order that exceeds the maximum order threshold, ordering offices shall—

(i) Review additional schedule contractors' catalogs/pricelists or use the "GSA Advantage!" on-line shopping service;

(ii) Based upon the initial evaluation, generally seek price reductions from the schedule contractor(s) appearing to provide the best value (considering price and other factors); and

(iii) After price reductions have been sought, place the order with the schedule contractor that provides the best value and results in the lowest overall cost alternative (see 8.404(a)). If further price reductions are not offered, an order may still be placed, if the ordering office determines that it is appropriate.

(4) *Blanket purchase agreements (BPAs).* The establishment of Federal Supply Schedule BPAs is permitted (see 13.202(c)(3)) when following the ordering procedures in this subpart. All schedule contracts contain BPA provisions. Ordering offices may use BPAs to establish accounts with contractors to fill recurring requirements. BPAs should address the

frequency of ordering and invoicing, discounts, and delivery locations and times.

(5) *Price reductions.* In addition to the circumstances outlined in paragraph (b)(3) of this section, there may be instances when ordering offices will find it advantageous to request a price reduction. For example, when the ordering office finds a schedule supply or service elsewhere at a lower price or when a BPA is being established to fill recurring requirements, requesting a price reduction could be advantageous. The potential volume of orders under these agreements, regardless of the size of the individual order, may offer the ordering office the opportunity to secure greater discounts. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual agency for a specific order.

(6) *Small business.* For orders exceeding the micro-purchase threshold, ordering offices should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

(7) *Documentation.* Orders should be documented, at a minimum, by identifying the contractor the item was purchased from, the item purchased, and the amount paid. If an agency requirement in excess of the micro-purchase threshold is defined so as to require a particular brand name, product, or a feature of a product peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, the ordering office shall include an explanation in the file as to why the particular brand name, product, or feature is essential to satisfy the agency's needs.

(c) *Ordering procedures for mandatory use schedules.* * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

5. Section 13.202 is amended by adding paragraph (a)(4) and revising paragraph (c)(3) to read as follows:

13.202 Establishment of blanket purchase agreements (BPAs).

(a) * * *

(4) There is no existing requirements contract for the same supply or service that the contracting activity is required to use.

* * * * *

(c) * * *

(3) Federal Supply Schedule contractors, if not inconsistent with the

terms of the applicable schedule contract.

* * * * *

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

51.103 [Amended]

6. Section 51.103 is amended by removing paragraph (c) and redesignating paragraph (d) as (c).

[FR Doc. 97-21493 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 19

[FAC 97-01; FAR Case 96-002; Item IX]

RIN 9000-AH66

Federal Acquisition Regulation; Certificate of Competency

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 on an interim rule amending the Federal Acquisition Regulation (FAR) to implement revisions made to the Small Business Administration's regulations covering the procurement assistance programs. 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 22, 1997

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 21, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: farcase.96-002@gsa.gov.

Please cite FAC 97-01, FAR case 96-002 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 97-01, FAR case 96-002.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends FAR Parts 9 and 19 to comply with revisions made to the Small Business Administration's (SBA) procurement assistance programs contained in 13 CFR Part 125 (61 FR 3310, January 31, 1996). This rule increases the threshold over which contracting officers may appeal the award of a Certificate of Competency (COC) from \$25,000 to \$100,000; updates the names of SBA offices involved in processing COCs; and implements the requirement that compliance with the limitations on subcontracting be considered an element of responsibility. Also, this interim rule removes language implementing Section 15(c) of the Small Business Act (15 U.S.C. 644(c)) as amended by Section 305 of Public Law 103-403, Small Business Administration Reauthorization and Amendments Act of 1994. Section 305, which authorized public and private organizations for the handicapped to participate in acquisitions set aside for small businesses, has expired.

B. Regulatory Flexibility Act

This interim rule is not expected to 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 Small Business Administration has certified that the revisions to 13 CFR 125 being implemented by this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subparts also 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.* (FAC 97-01, FAR case 96-002) 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 the Office of Management and Budget 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 urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to conform the Federal Acquisition Regulation to revisions made in 13 CFR Part 125, pertaining to the Small Business Administration (SBA) procurement assistance programs. The SBA revisions became effective on March 1, 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 formulating the final rule.

List of Subjects in 48 CFR Parts 9 and 19

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 9 and 19 are amended as set forth below:

1. The authority citation for 48 CFR Parts 9 and 19 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 9.103 is amended in paragraph (b) by revising the third sentence to read as follows:

9.103 Policy.

(b) * * * If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Responsibility.

* * * * *

3. Section 9.104-3 is amended in paragraph (a) by adding a sentence at the end, and in paragraph (d) by redesignating the text as paragraph

(d)(1) and by adding (d)(2) to read as follows:

9.104-3 Application of standards.

(a) * * * Consideration of a prime contractor's compliance with limitations on subcontracting shall take into account the time period covered by the contract base period or quantities plus option periods or quantities, if such options are considered when evaluating offers for award.

* * * * *

(d) * * * (1) * * *

(2) A small business that is unable to comply with the limitations on subcontracting at 52.219-14 may be considered nonresponsible.

PART 19—SMALL BUSINESS PROGRAMS

19.001 [Amended]

4. Section 19.001 is amended by removing definitions for "Handicapped individual" and "Public or private organization for the handicapped", and in the definition of "Nonmanufacturer rule" by removing "121.906" and inserting "121.406" in its place.

19.201 [Amended]

5. Section 19.201(c) is amended in the introductory text by removing "and 13 CFR 125.4(g)(7)".

19.302 [Amended]

6. Section 19.302 is amended:
 (a) In paragraph (c)(1) by removing the word "Regional" and inserting "Area" in its place;

(b) In the introductory text of paragraph (d) by removing "13 CFR 121.9" and inserting "13 CFR 121.10" in its place;

(c) In paragraphs (g)(2) and (i)(1) by removing "Regional Administrator" and inserting "Area Director" in its place;

(d) In (i)(2) by removing "a Regional Administrator's" and inserting "an Area Director's" in its place;

(e) In (i)(3) by removing "121.11" and inserting "121.1001" in its place; and

(f) In (j), in the first and third sentences, by removing the word "regional" and inserting "area" in its place; and in the first sentence parenthetical by removing "above" and inserting "of this section" in its place.

7. Section 19.508(e) is revised to read as follows:

19.508 Solicitation provisions and contract clauses.

* * * * *

(e) The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the

requirement is to be set aside for small business and the contract amount is expected to exceed \$100,000.

Subpart 19.6—Certificates of Competency and Determinations of Responsibility

8. The heading of Subpart 19.6 is revised to read as set forth above.

9. Section 19.601 is amended by revising paragraph (a); by redesignating (c) as (e); and by adding new paragraphs (c) and (d) to read as follows:

19.601 General.

(a) A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract.

* * * * *

(c) The COC program is applicable to all Government acquisitions. A contracting officer shall, upon determining an apparent successful small business offeror to be nonresponsible, refer that small business to the SBA for a possible COC, even if the next acceptable offer is also from a small business.

(d) When a solicitation requires a small business to adhere to the limitations on subcontracting, a contracting officer's finding that a small business cannot comply with the limitation shall be treated as an element of responsibility and shall be subject to the COC process. When a solicitation requires a small business to adhere to the definition of a nonmanufacturer, a contracting officer's determination that the small business does not comply shall be processed in accordance with subpart 19.3.

* * * * *

10. Section 19.602-1 is amended by revising the introductory text of paragraphs (a) and (a)(2), (c) introductory text, and (c)(2); and by adding (e) to read as follows:

19.602-1 Referral.

(a) Upon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility (including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting), the contracting officer shall—

* * * * *

(2) Refer the matter to the cognizant SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located, in accordance with agency procedures, except that referral is not necessary if the small business concern—

* * * * *

(c) The referral shall include—

* * * * *

(2) If applicable, a copy of the following:

- (i) Solicitation.
- (ii) Final offer submitted by the concern whose responsibility is at issue for the procurement.
- (iii) Abstract of bids or the contracting officer's price negotiation memorandum.
- (iv) Preaward survey.
- (v) Technical data package (including drawings, specifications and statement of work).
- (vi) Any other justification and documentation used to arrive at the nonresponsibility determination.

* * * * *

(e) Contract award shall be withheld by the contracting officer for a period of 15 business days (or longer if agreed to by the SBA and the contracting officer) following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.

11. Section 19.602-2 is revised to read as follows:

19.602-2 Issuing or denying a Certificate of Competency (COC).

Within 15 business days (or a longer period agreed to by the SBA and the contracting agency) after receiving a notice that a small business concern lacks certain elements of responsibility, the SBA Area Office will take the following actions:

(a) Inform the small business concern of the contracting officer's determination and offer it an opportunity to apply to the SBA for a COC. (A concern wishing to apply for a COC should notify the SBA Area Office serving the geographical area in which the headquarters of the offeror is located.)

(b) Upon timely receipt of a complete and acceptable application, elect to visit the applicant's facility to review its responsibility.

(1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer.

(2) The SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but may presume responsibility exists as to elements other than those cited as deficient.

(c) Consider denying a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(d) When the Area Director determines that a COC is warranted (for contracts valued at \$25,000,000 or less), notify the contracting officer and provide the following options:

(1) Accept the Area Director's decision to issue a COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale for the decision; or

(2) Ask the Area Director to suspend the case for one or more of the following purposes:

(i) To permit the SBA to forward a detailed rationale for the decision to the contracting officer for review within a specified period of time.

(ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file and to attempt to resolve any issues.

(iii) To submit any information to the SBA Area Office that the contracting officer believes the SBA did not consider (at which time the SBA Area Office will establish a new suspense date mutually agreeable to the contracting officer and the SBA).

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under 19.602-3. However, there is no contracting officer's appeal when the Area Office proposes to issue a COC valued at \$100,000 or less.

(e) At the completion of the process, notify the concern and the contracting officer that the COC is denied or is being issued.

(f) Refer recommendations for issuing a COC on contracts greater than \$25,000,000 to SBA Headquarters.

12. Section 19.602-3 is revised to read as follows:

19.602-3 Resolving differences between the agency and the Small Business Administration.

(a) *COCs valued between \$100,000 and \$25,000,000.* (1) When disagreements arise about a concern's ability to perform, the contracting officer and the SBA shall make every effort to reach a resolution before the SBA takes final action on a COC. This shall be done through the complete exchange of information and in accordance with agency procedures. If agreement cannot be reached between the contracting officer and the SBA Area Office, the contracting officer shall request that the Area Office suspend action and refer the matter to SBA Headquarters for review. The SBA Area

Office shall honor the request for a review if the contracting officer agrees to withhold award until the review process is concluded. Without an agreement to withhold award, the SBA Area Office will issue the COC in accordance with applicable SBA regulations.

(2) SBA Headquarters will furnish written notice to the procuring agency's Director, Office of Small and Disadvantaged Business Utilization (OSDBU) or other designated official (with a copy to the contracting officer) that the case file has been received and that an appeal decision may be requested by an authorized official.

(3) If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a time period agreed upon by both agencies) that it intends to appeal the issuance of the COC.

(4) The appeal and any supporting documentation shall be filed by the procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a period agreed upon by both agencies) after SBA Headquarters receives the agency's notification in accordance with paragraph (a)(3) of this subsection.

(5) The SBA Associate Administrator for Government Contracting will make a final determination, in writing, to issue or to deny the COC.

(b) *SBA Headquarters' decisions on COCs valued over \$25,000,000.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency and offer it the following options:

(i) To request that the SBA suspend case processing to allow the agency to meet with SBA Headquarters personnel and review all documentation contained in the case file; or

(ii) To submit to SBA Headquarters for evaluation any information that the contracting agency believes has not been considered.

(2) After reviewing all available information, the SBA will make a final decision to either issue or deny the COC.

(c) *Reconsideration of a COC after issuance.* (1) The SBA reserves the right to reconsider its issuance of a COC, prior to contract award, if—

(i) The COC applicant submitted false information or omitted materially adverse information; or

(ii) The COC has been issued for more than 60 days (in which case the SBA may investigate the firm's current circumstances).

(2) When the SBA reconsiders and reaffirms the COC, the procedures in subsection 19.602-2 do not apply.

(3) Denial of a COC by the SBA does not preclude a contracting officer from awarding a contract to the referred concern, nor does it prevent the concern from making an offer on any other procurement.

[FR Doc. 97-21494 Filed 8-21-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 97-01; FAR Case 97-008; Item X]

RIN 9000-AH65

Federal Acquisition Regulation; Economically Disadvantaged Individuals

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 amending the Federal Acquisition Regulation (FAR) to update the definition of "small disadvantaged business concern" for conformance with Small Business Administration regulations. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 97-01, FAR case 97-008.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the definition of "small disadvantaged business concern" at FAR 19.001 to update the categories of individuals considered to be socially and economically

disadvantaged. In accordance with the Small Business Administration regulations at 13 CFR 124.105, the Maldives Islands has been added to the category of "Subcontinent Asian Americans"; and Macao, Hong Kong, Fiji, Tonga, Kirabati, Tuvalu, and Nauru have been added to the category of "Asian Pacific Americans."

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comment is not required. However, 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.* (FAC 97-01, FAR case 97-008), 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 the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 19

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 19 is amended as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

1. The authority citation for 48 CFR Part 19 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 19.001 is amended by revising paragraphs (b)(1) and (b)(2) under the definition "Small disadvantaged business concern" to read as follows:

19.001 Definitions.

* * * * *

Small disadvantaged business concern * * *

(b) * * * (1) *Subcontinent Asian Americans* means United States citizens whose origins are in India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, or Nepal.

(2) *Asian Pacific Americans* means United States citizens whose origins are

in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands (Republic of Palau), the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, the Federated States of Micronesia, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru.

* * * * *

[FR Doc. 97-21495 Filed 8-21-97; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 97-01; FAR Case 95-028; Item XI]

RIN 9000-AH34

Federal Acquisition Regulation; Minority Small Business and Capital Ownership

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

ACTION: Interim rule adopted as final with changes.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt as final, with changes, the interim rule that was published as Item VII of Federal Acquisition Circular 90-43 on December 20, 1996. The rule amends the Federal Acquisition Regulation (FAR) to reflect changes to the Small Business Administration's (SBA) regulations at 13 CFR Parts 121 and 124, which address the Minority Small Business and Capital Ownership Development Program. The rule clarifies eligibility and procedural requirements for procurements under the 8(a) program. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755 for information pertaining to status or publication schedules. For

clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 97-01, FAR case 95-028.

SUPPLEMENTARY INFORMATION:

A. Background

On June 7, 1995, SBA published, as a final rule, changes to its regulations at 13 CFR Parts 121 and 124, which cover the Minority Small Business and Capital Ownership Development Program. As a result of these modifications, the FAR had some inconsistencies regarding who was eligible for a particular 8(a) procurement. An interim FAR rule was published in the **Federal Register** at 61 FR 67420, December 20, 1996 to correct these inconsistencies. This rule finalizes the interim rule with minor amendments to reflect changes that SBA is making in its processing of 8(a) requirements. One comment was received in response to the interim rule. This comment was considered in the development of the final 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 offerors or contractors. The rule amends the FAR to reflect changes to Small Business Administration (SBA) regulations designed to streamline the operation of the 8(a) program and to ease certain restrictions perceived to be burdensome on program participants. The SBA has certified that the changes to its regulations will not have a significant economic impact on a substantial number of small entities.

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 19 and 52

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR Parts 19 and 52 which was published at 61 FR 67420, December 20, 1996, is adopted as final with the following change:

1. The authority citation for 48 CFR Parts 19 and 52 continues to read as follows:

PART 19—SMALL BUSINESS PROGRAMS

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

2. Section 19.804-2 is amended by revising paragraphs (b)(2) and (c) to read as follows:

19.804-2 Agency offering.

* * * * *

(b) * * *

(2) Sole source requirements, other than construction, should be forwarded directly to the district office that services the nominated firm. If the contracting officer is not nominating a specific firm, the offering letter should be forwarded to the district office servicing the geographical area in which the contracting office is located.

(c) All requirements for 8(a) competition, other than construction, should be forwarded to the district office servicing the geographical area in which the contracting office is located. All requirements for 8(a) construction competition should be forwarded to the district office servicing the geographical area in which all or the major portion of the construction is to be performed. All requirements, including construction, shall be synopsisized in the Commerce Business Daily. For construction, the synopsis shall include the geographical area of the competition set forth in the SBA's acceptance letter.

[FR Doc. 97-21496 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 97-01; FAR Case 94-610; Item XII]

RIN 9000-AH62

Federal Acquisition Regulation; Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts

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 on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts, signed by the President on October 20, 1994 (59 FR 53559, October 24, 1994). The Executive Order requires that workers on certain building service contracts be given the right of first refusal for employment with the successor contractor, if the workers would otherwise lose their jobs as a result of the award of the successor contract. 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 22, 1997.

Applicability: With respect to solicitations and contracts for building service contracts covered by this regulation, the following applies:

(1) For solicitations issued and contracts awarded on or after the effective date of this rule, include the clause at 52.222-50, Nondisplacement of Qualified Workers, except as provided in paragraph (2)(a) below.

(2) Include the clause at 52.222-50, Nondisplacement of Qualified Workers, where practicable by—

(a) Amending solicitations issued, but not awarded, prior to the effective date of the rule; or

(b) Modifying contracts awarded prior to the effective date of this rule.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 21, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: farcase.94-610@gsa.gov.

Please cite FAC 97-01, FAR case 94-610 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAC 97-01, FAR case 94-610.

SUPPLEMENTARY INFORMATION:

A. Background

Executive Order 12933 was signed October 20, 1994, by President Clinton and published in the **Federal Register** on October 24, 1994 (59 FR 53559). The purpose and need for the Executive Order are clearly stated in the Executive Order itself:

When a service contract for the maintenance of a public building expires and a follow-on contract is awarded for the same service, the successor contractor typically hires the majority of the predecessor's employees. On occasion, however, a follow-on contractor will hire a new work force, and the predecessor's employees are displaced.

As a buyer and participant in the marketplace, the Government is concerned about hardships to individuals that may result from the operation of our procurement system. Furthermore, the Government's procurement interests in economy and efficiency benefit from the fact that a carryover work force will minimize disruption to the delivery of services during any period of transition and provide the Government the benefits of an experienced and trained work force rather than one that may not be familiar with the Government facility.

In order to address these concerns, Section 1 of the Executive Order makes the following statement of policy:

It is the policy of the Federal Government that solicitations and building service contracts for public buildings shall include a clause that requires the contractor under a contract that succeeds a contract for performance of similar services at the same public building to offer those employees (other than managerial or supervisory employees) under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal to employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right

of first refusal has been provided. Nothing in this order shall be construed to permit a contractor to fail to comply with any provision of any other Executive order or laws of the United States.

The Executive Order requires implementing regulations to be issued by the Secretary of Labor in consultation with the Federal Acquisition Regulatory Council, and that Department of Labor (DoL) regulations and the Federal Acquisition Regulation require inclusion of a contract clause in covered Federal solicitations and contracts. The Executive Order provides that it does not confer any right or benefit enforceable against the United States, but that it is not intended to preclude judicial review of final decisions by the Secretary of Labor in accordance with the Administrative Procedure Act (5 U.S.C. 701, *et seq.*).

To obtain public input and assist in the development of these regulations, the DoL invited comment through a notice of proposed rulemaking in the **Federal Register** on July 18, 1995 (60 FR 36756). The final DoL rule was published in the **Federal Register** on May 22, 1997 (62 FR 28175). This FAR interim rule implements the DoL rule.

Regarding certification requirements of this interim rule, the certification requirement in paragraph (e) of the clause at 52.222-50 is considered identical to the certification requirement in paragraph (n) of the clause at 52.222-41. Therefore, for the purposes of Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), this rule does not impose a new certification requirement.

B. Regulatory Flexibility Act

The General Services Administration, Department of Defense, and National Aeronautics and Space Administration certify that this interim rule will not have a significant economic impact on a substantial number of small entities because the Executive Order mandates a practice that is already followed in most cases. This rule implements the requirements of the Executive Order, as implemented by the DoL in its final rule of May 22, 1997 (62 FR 28175). The DoL certified that its final rule will not have a significant economic impact on a substantial number of small entities. In those cases where the practice was not followed before the Executive Order, the impact would be a result of the Executive Order and the DoL regulation; it would not be a result of the FAR implementation.

C. Paperwork Reduction Act

This interim rule will not impose any additional paperwork burdens beyond

the information collection and recordkeeping requirements required under sections 9.6(c), 9.9(b) and 9.11 of the Department of Labor Regulations, 29 CFR Part 9, and approved under DoL Office of Management and Budget Control No. 1215-0190.

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 urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Executive Order 12933 of October 20, 1994, Nondisplacement of Qualified Workers Under Certain Contracts, and the corresponding Department of Labor regulations that became effective on July 21, 1997. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating the final rule.

List of Subjects in 48 CFR Parts 22 and 52

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 22 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 22 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 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

2. Subpart 22.12, consisting of sections 22.1200 through 22.1208, is added to read as follows:

Subpart 22.12—Nondisplacement of Qualified Workers Under Certain Contracts

Sec.

- 22.1200 Scope of subpart.
- 22.1201 Statement of policy.
- 22.1202 Definitions.
- 22.1203 Applicability.
- 22.1203-1 General.
- 22.1203-2 Exclusions.
- 22.1204 Seniority lists.
- 22.1205 Notice to employees.
- 22.1206 Complaint procedures.
- 22.1207 Withholding of contract payments.
- 22.1208 Contract clause.

Subpart 22.12—Nondisplacement of Qualified Workers Under Certain Contracts

22.1200 Scope of subpart.

This subpart prescribes policies and procedures for implementing Executive Order 12933 of October 20, 1994, Nondisplacement of Qualified Workers Under Certain Contracts, and Department of Labor regulations at 29 CFR part 9.

22.1201 Statement of policy.

It is the policy of the Federal Government that contracts for building services at public buildings shall require the contractor under a successor contract for performance of similar services at the same public building, to offer those employees (other than managerial or supervisory employees) under the predecessor contract, whose employment will be terminated as a result of the award of the successor contract, a right of first refusal to employment under the contract in positions for which they are qualified. Executive Order 12933 states that there shall be no employment openings under the contract until such right of first refusal has been provided.

22.1202 Definitions.

Building service contract, as used in this subpart, means a contract for recurring services related to the maintenance of a public building. Recurring services are services that are required to be performed regularly or periodically throughout the course of a contract, and throughout the course of the succeeding or follow-on contract(s), at one or more of the same public buildings. Executive Order 12933 lists examples of building service contracts as including, but not limited to, contracts for the recurring provision of custodial or janitorial services; window washing; laundry; food services; guard or other protective services; landscaping and groundskeeping services; and inspection, maintenance, and repair of fixed equipment such as elevators, air conditioning, and heating systems. Building service contracts do not include—

(1) Contracts that provide maintenance services only on a non-recurring or irregular basis. For example, a contract to provide servicing of fixed equipment once a year, or to mulch a garden on a one-time or annual basis, is a non-recurring maintenance contract that is not covered by this subpart;

(2) Contracts for day-care services in a Federal office building; or

(3) Concessions for sales of goods or services other than food services or laundry services.

Public building, as used in this subpart, means any building owned by the United States that is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, its grounds, approaches, and appurtenances.

(1) Public buildings do not include any building on the public domain. The public domain includes only (i) those public lands owned by the United States and administered by the Department of the Interior, Bureau of Land Management, and (ii) the National Forest System administered by the Department of Agriculture, U.S. Forest Service. The public domain does not include Federal buildings, such as office buildings in cities or towns, that are occupied by the Bureau of Land Management or U.S. Forest Service where such buildings are not on lands administered by those agencies.

(2) Buildings on the following are not public buildings:

(i) Properties of the United States in foreign countries;

(ii) Native American and Native Eskimo properties held in trust by the United States;

(iii) Lands used in connection with Federal programs for agricultural, recreational, and conservation purposes, including research in connection therewith;

(iv) Lands used in connection with river, harbor, flood control, reclamation, or power projects; or for chemical manufacturing or development projects; or for nuclear production, research, or development projects;

(v) Land used in connection with housing and residential projects;

(vi) Properties of the United States Postal Service;

(vii) Military installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any similar facility of the Department of Defense, but not including the Pentagon);

(viii) Installations of the National Aeronautics and Space Administration, except regular office buildings; and

(ix) Department of Veterans Affairs installations used for hospital or domiciliary purposes.

(3) Buildings leased to the Government are not public buildings unless the building is leased pursuant to a lease-purchase contract.

Service employee, as used in this subpart, means any person engaged in the performance of recurring building services other than a person in a *bona fide* executive, administrative, or professional capacity, as those terms are

defined in 29 CFR part 541, and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor and such person.

22.1203 Applicability.

22.1203-1 General.

(a) This subpart applies to building service contracts where the contract is entered into by the Government in an amount equal to or greater than the simplified acquisition threshold and the contract succeeds a contract for similar work at one or more of the same public buildings.

(b)(1) Except as provided in paragraph (b)(2) of this subsection, a contract that includes a requirement for recurring building services is subject to this subpart even if the contract also contains other non-covered services or non-service requirements, such as construction or supplies, and even if the contract is not subject to the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351, *et seq.* However, the requirements of this subpart apply only to the building services portion of the contract, and only to those public buildings for which services were provided under a predecessor contract.

(2) This subpart does not apply to building services that are only incidental to a contract for another purpose, such as incidental maintenance under a contract to operate a day-care center. Building service requirements will not be considered incidental, and, therefore, will be subject to this subpart where (i) the contract contains specific requirements for a substantial amount of building services or it is ascertainable that a substantial amount of building services will be necessary to the performance of the contract (the word "substantial" relates to the type and quantity of building services to be performed and not merely to the total value of such work, whether in absolute dollars or cost percentages as compared to the total value of the contract); and (ii) the building services work is physically or functionally separate, and as a practical matter is capable of being performed on a segregated basis, from the other work called for by the contract. Building services performed on a building being leased to the Government pursuant to a lease-purchase contract are not covered unless the services are being performed under a contract directly with the Government.

22.1203-2 Exclusions.

(a) This subpart does not apply to—

(1) Contracts under the simplified acquisition threshold;

(2) Contracts for commodities or services produced or provided by the blind or severely handicapped, awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48a, and any future enacted law creating an employment preference for some group of workers under building service contracts;

(3) Guard, elevator operator, messenger, or custodial services provided to the Government under contracts with sheltered workshops employing the severely handicapped as outlined in the Edgar Amendment, section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329; or

(4) Agreements for vending facilities operated by the blind, entered into under the preference provisions of the Randolph-Sheppard Act, 20 U.S.C. 107.

(b) A successor contractor is not required to offer a right of first refusal for employment when a majority of its employees, who will perform the particular service under the contract, will work both at the public building and at other locations under contracts not subject to Executive Order 12933. Examples include, but are not limited to, pest control or trash removal services where the employees periodically visit various Government and non-Government sites, and make service calls to repair equipment at various Government and non-Government buildings. This exclusion does not apply (i) where the service employees' work on non-covered contracts is not performed as a part of the same job as their work on the Federal contract in question, or where they separately apply for work on the non-Federal contracts; or (ii) where the employees are deployed in a manner that is designed to avoid the purposes of Executive Order 12933. In making this determination, all the facts and circumstances are examined, including particularly the manner in which the predecessor contractor deployed its work force to perform the services, the manner in which the work force is typically deployed to perform such services, and the manner in which the contract is structured.

22.1204 Seniority lists.

(a) Not less than 60 days before completion of its contract, the predecessor contractor must furnish the contracting officer with a certified list of the names of all service employees engaged in the performance of building services, working for the contractor at the Federal facility at the time the list is submitted, together with their anniversary dates of employment. The

contracting officer in turn shall provide the list to the successor contractor and, if requested, to employees of the predecessor contractor or their representatives.

(b) The list provided pursuant to paragraph (a) of this section satisfies the requirements of paragraph (n) of the clause at 52.222-41, Service Contract Act of 1965, as Amended.

22.1205 Notice to employees.

(a) Where the successor contract is a contract subject to this subpart, the contracting officer will provide written notice to service employees of the predecessor contractor, who are engaged in building services, of their possible right to an offer of employment. Such notice either may be posted in a conspicuous place at the work site or may be delivered to the employees individually.

(b) Contracting officers may use either the following suggested notice format or another format with the same information.

Notice to Building Service Contract Employees

The contract for [type of service] services currently performed by [predecessor contractor] has been awarded to a new contractor. [Successor contractor] will begin performance on [date successor contract begins].

As a condition of the new contract [successor contractor] is required to offer employment to the employees of [predecessor contractor] working at [the contract work site or work sites] except in the following situations:

- Managerial or supervisory employees on the current contract are not entitled to an offer of employment.

- [Successor contractor] may reduce the size of the current work force. Therefore, only a portion of the existing work force may receive employment offers. However, [successor contractor] must offer employment to the employees of [predecessor contractor] if any vacancies occur in the first 3 months of the new contract.

- [Successor contractor] may employ a current employee on the new contract before offering employment to [predecessor contractor's] employees only if the current employee has worked for [successor contractor] for at least 3 months immediately preceding the commencement of the new contract and would face layoff or discharge if not employed under the new contract.

- Where [successor contractor] has reason to believe, based on credible information from a knowledgeable source, that an employee's performance has been unsuitable on the current contract, the employee is not entitled to employment with the new contractor.

If you are offered employment on the new contract, you will have at least 10 days to accept the offer.

If you are an employee of [predecessor contractor] and believe that you are entitled to an offer of employment with [successor contractor], but have not received an offer, you may file a complaint with [contracting officer or representative], the contracting officer handling this contract at: [address and telephone number of contracting officer]. If the contracting officer is unable to resolve your complaint, the contracting officer will forward a report to the U.S. Department of Labor, Wage and Hour Division. You also may file your complaint directly with [address of the nearest District Office of the Wage and Hour Division].

If you have any questions about your right to employment on the new contract, contact: [Name, address, and telephone number of the contracting officer.]

22.1206 Complaint procedures.

(a) Any employee of the predecessor contractor, who believes that he or she was not offered employment by the successor contractor as required by this subpart, may file a complaint with the contracting officer.

(b) Upon receipt of the complaint, the contracting officer shall provide information to the employee(s) and the successor contractor about their rights and responsibilities under this subpart. If the matter is not resolved through such actions, the contracting officer shall, within 30 days from receipt of the complaint, obtain statements of the positions of the parties and forward the complaint and statements, together with a summary of the issues and any relevant facts known to the contracting officer, to the nearest District Office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, with copies to the contractor and the complaining employee.

(c) If the contracting officer has not forwarded the complaint to the Wage and Hour Division within 30 days of receipt of the complaint, as required by paragraph (b) of this section, the complainant may refile the complaint directly with the nearest District Office of the Wage and Hour Division.

2.1207 Withholding of contract payments.

(a) The Secretary of Labor has the authority to issue orders prescribing appropriate remedies, including, but not limited to, requiring employment of the predecessor contractor's employees and payment of wages lost.

(b) After an investigation and a determination by the Administrator, Wage and Hour Division, Department of Labor, that lost wages or other monetary relief is due, the Administrator may direct that so much of the accrued payments due on either the contract or any other contract between the contractor and the Government shall be

withheld in a deposit fund as is necessary to pay the moneys due. Upon the final order of the Secretary of Labor that such moneys are due, the Administrator may direct that such withheld funds be transferred to the Department of Labor for disbursement.

(c) If the contracting officer or the Secretary of Labor finds that the predecessor contractor has failed to provide a list of the names of employees working under the contract in accordance with the requirements of the predecessor's contract, the contracting officer may take such action as may be necessary to cause the suspension of the payment of funds until such time as the list is provided to the contracting officer.

22.1208 Contract clause.

The contracting officer shall insert the clause at 52.222-50, Nondisplacement of Qualified Workers, in solicitations and contracts for building services that succeed contracts for performance of similar work at the same public building and that are not excluded by 22.1203.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.222-50 is added to read as follows:

52.222-50 Nondisplacement of Qualified Workers.

As prescribed in 22.1208, insert the following clause:

Nondisplacement of Qualified Workers (Aug 1997)

(a) *Definition. Service employee*, as used in this clause, means any person engaged in the performance of recurring building services other than a person employed in a *bona fide* executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor and such person.

(b) Consistent with the efficient performance of this contract, the Contractor shall, except as otherwise provided herein, in good faith offer those employees engaged in the performance of building services (other than managerial and supervisory employees) under the predecessor contract, whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal to employment under the contract in positions for which the employees are qualified. The Contractor shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Where the Contractor offers a right of first refusal to fewer employees than were employed by the predecessor contractor, its

obligation under the contract to the predecessor's employees to fill vacancies created by increased staffing levels or by employee termination, either voluntarily or for cause, continues for 3 months after commencement of the contract. Except as provided in paragraph (c) of this clause, the Contractor shall not offer employment under the contract to any person prior to having complied fully with this obligation.

(c) Notwithstanding the Contractor's obligation under paragraph (b) of this clause, the Contractor (1) may employ on the contract any employee who has worked for the Contractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face layoff or discharge, (2) is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees, and (3) is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who the Contractor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job. Examples of permissible sources for this determination include evidence of disciplinary action based on poor performance or evidence from the contracting agency that the particular employee did not perform suitably. Offers of employment are governed by the following:

(i) The offer shall state the time within which the employee must accept such offer, but in no case shall the period for acceptance be less than 10 days.

(ii) The offer may be made by separate written notice to each employee, or orally at a meeting attended by a group of the predecessor contractor's employees.

(iii) An offer need not be to a position similar to that which the employee previously held, but the employee must be qualified for the position.

(iv) An offer to a position providing lower pay or benefits than the employee held with the predecessor contractor will be considered *bona fide* if the Contractor shows valid business reasons.

(v) To ensure that an offer is effectively communicated, the Contractor should take reasonable efforts to make the offer in a language that each worker understands; for example, by having a co-worker or other person fluent in the worker's language at the meeting to translate or otherwise assist an employee who is not fluent in English.

(d) For a period of 1 year, the Contractor shall maintain copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any employee meeting(s) at which the offers were extended, a summary of each meeting, a copy of any written notice that may have been distributed, and the names of the predecessor's employees to whom an offer was made. Copies of such documentation shall be provided upon request to any authorized representative of the contracting agency or the Department of Labor.

(e) The Contractor shall, no less than 60 days before completion of this contract, furnish the Contracting Officer with a

certified list of the names of all service employees engaged in the performance of building services, working for the Contractor at the Federal facility at the time the list is submitted. The list also shall contain anniversary dates of employment on the contract either with the current or predecessor contractors of each service employee, as appropriate. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided upon request to employees or their representatives. Submission of this list will satisfy the requirements of paragraph (n) of the clause at 52.222-41, Service Contract Act of 1965, as Amended.

(f) The requirements of this clause do not apply to services where a majority of the Contractor's employees performing the particular services under the contract work at the public building and at other locations under contracts not subject to Executive Order 12933, *provided* that the employees are not deployed in a manner that is designed to avoid the purposes of the Executive Order.

(g) If it is determined, pursuant to regulations issued by the Secretary of Labor, that the Contractor is not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the Contractor, as provided in Executive Order 12933, the regulations of the Secretary of Labor at 29 CFR part 9, and relevant orders of the Secretary of Labor, or as otherwise provided by law.

(h) The Contractor is advised that the Contracting Officer shall withhold or cause to be withheld from the Contractor, under this or any other Government contract with the Contractor, such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator of the Wage and Hour Division, the Administrative Law Judge, or the Administrative Review Board, that the Contractor failed to comply with the terms of this clause, and that wages lost as a result of the violations are due to employees or that other monetary relief is appropriate.

(i) The Contractor shall cooperate in any investigation by the contracting agency or the Department of Labor into possible violations of the provisions of this clause and shall make records requested by such official(s) available for inspection, copying, or transcription upon request.

(j) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with applicable law and the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes concerning the requirements of this clause include disputes between or among any of the following: The Contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract.

(End of clause)

[FR Doc. 97-21497 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 25

[FAC 97-01; FAR Case 97-019; Item XIII]

RIN 9000-AH68

Federal Acquisition Regulation; Designation of Hong Kong

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 amending the Federal Acquisition Regulation (FAR) to add Hong Kong as a designated country under the Trade Agreements Act of 1979, as directed by the United States Trade Representative. 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.

DATE: *Effective* August 22, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Paul Linfield, Procurement Analyst, at (202) 501-1757. Please cite FAC 97-01, FAR case 97-019.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 25.401 to add Hong Kong as a designated country under the Trade Agreements Act of 1979, as directed by the United States Trade Representative. The accession of Hong Kong to the World Trade Organization Agreement on Government Procurement became effective on June 19, 1997.

B. Regulatory Flexibility Act

This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comment is not required. Therefore, the Regulatory Flexibility Act does not apply. However, 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.* (FAC 97-01, FAR case 97-019), 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 the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 25

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 25 is amended as set forth below:

PART 25—FOREIGN ACQUISITION

1. The authority citation for 48 CFR Part 25 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).

25.401 [Amended]

2. Section 25.401 is amended in the definition of "Designated country" by adding, in alphabetical order, "Hong Kong".

[FR Doc. 97-21498 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 97-01; FAR Case 96-012; Item XIV]

RIN 9000-AH43

Federal Acquisition Regulation; Foreign Differential Pay

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to convert the interim rule published as Item VI of Federal Acquisition Circular 90-44 on

December 31, 1996, to a final rule without change. The rule amends the Federal Acquisition Regulation (FAR) to remove the prohibition on the calculation of foreign differential pay based directly on an employee's specific increase in income taxes resulting from assignment overseas. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATE: *Effective* October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, Procurement Analyst, at (202) 501-3221. Please cite FAC 97-01, FAR case 96-012.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published on December 31, 1996 (61 FR 69294). The interim rule revised the cost principle at FAR 31.205-6, Compensation for personal services, to permit contractors to calculate any increased compensation for foreign overseas differential pay on the basis of an employee's specific increase in taxes resulting from foreign assignment. The interim rule is converted to a final rule with no change.

Public comments were received from one source. The comments were considered in developing the final 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require application of the cost principle contained in this 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 Part 31

Government procurement.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Part 31 which was published at 61 FR 69294, December 31, 1996, is adopted as a final rule without change.

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

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

[FR Doc. 97-21499 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 97-01; FAR Case 96-003; Item XV]

RIN 9000-AH35

Federal Acquisition Regulation; Local Government Lobbying Costs

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to convert the interim rule published as Item XI of Federal Acquisition Circular 90-43 on December 20, 1996, to a final rule without change. The rule amends the Federal Acquisition Regulation (FAR) to make allowable the costs of any lobbying activities to influence local legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract. 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* October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms.

Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 97-01, FAR case 96-003.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published on December 20, 1996 (61 FR 67424). The interim rule revised the cost principle at FAR 31.205-22, Lobbying and political activity costs, to provide an additional exemption from the provisions which make lobbying costs unallowable. This exemption makes allowable the costs of any lobbying activities to influence local legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract. The interim rule is converted to a final rule without change.

Public comments were received from one source. The comments were considered in developing the final 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis, and do not require application of the cost principle contained in this 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 Part 31

Government procurement.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Part 31, which was published at 61 FR 67424, December 20, 1996, is hereby adopted as final without change.

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

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

[FR Doc. 97-21500 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 36

[FAC 97-01; FAR Case 97-005; Item XVI]

RIN 9000-AH63

Federal Acquisition Regulation; Independent Government Estimates-Construction

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 amending the Federal Acquisition Regulation (FAR) to increase the threshold for a mandatory independent Government estimate of construction costs and architect-engineer costs from \$25,000 to \$100,000. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAC 97-01, FAR case 97-005.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 36.203(a) and 36.605(a) to raise the threshold for a mandatory independent Government estimate of construction costs and architect-engineer costs from \$25,000 to \$100,000. The benefits of an

independent Government estimate do not warrant the high cost of such effort to cover the small risk associated with modifications under \$100,000. The change will reduce costs and streamline the acquisition procedures, permitting improved utilization of resources.

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comment is not required. However, 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.* (FAC 97-01, FAR case 97-005), 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 the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 36

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 36 is amended as set forth below:

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

1. The authority citation for 48 CFR Part 36 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).

36.203 [Amended]

2. Section 36.203 is amended in paragraph (a) by removing "\$25,000" and inserting "\$100,000" in its place each time it appears.

36.605 [Amended]

3. Section 36.605 is amended in paragraph (a) by removing "\$25,000" and inserting "\$100,000" in its place.

[FR Doc. 97-21501 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-U

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 39 and 52

[FAC 97-01; FAR Case 96-607; Item XVII]

RIN 9000-AG90

Federal Acquisition Regulation; Year
2000 Compliance

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

ACTION: Interim rule adopted as final with changes.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt as final, with changes, the interim rule published as Item XIV of Federal Acquisition Circular 90-45. The rule amends the Federal Acquisition Regulation (FAR) to increase awareness of Year 2000 procurement issues and to ensure that solicitations and contracts address Year 2000 issues. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 97-01, FAR case 96-607.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published on January 2, 1997 (61 FR 273). The interim rule is converted to a final rule with revisions. Revisions were made to the definition, "Year 2000 compliant", at FAR 39.002 to better convey the intent of the definition.

Twenty comments from five respondents were received during the public comment period. All comments were considered in the development of the final rule.

The final rule will provide needed coverage to ensure that information technology products to be acquired and used by Federal agencies after December 31, 1999, will be able to process date

related data into the next century. Solicitations and contracts should require Year 2000 compliant technology, or require that non-compliant information technology be upgraded to be compliant in a timely manner. The rule also recommends that agency solicitations describe existing information technology that will be used with the information technology to be acquired and identify whether the existing information technology is Year 2000 compliant. If proper date/time data is provided, the Year 2000 compliant information technology must be able to process the data accurately. If it cannot process proper date/time data accurately, its failure will not be excused because of the noncompliance of another information technology product. Agencies are expected to test for Year 2000 compliance. However, lack of testing does not excuse failure of the information technology to be Year 2000 compliant.

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 this rule merely provides internal Government guidance regarding the development of contract requirements for the acquisition of information technology.

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 39 and
52

Government procurement.

Dated: August 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final With
Changes

Accordingly, the interim rule amending 48 CFR Parts 39 and 52, which was published at 61 FR 273, January 2, 1997, is hereby adopted as final with the following change:

PART 39—ACQUISITION OF
INFORMATION TECHNOLOGY

1. The authority citation for 48 CFR Part 39 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 39.002 is amended by revising the definition of "Year 2000 compliant" to read as follows:

39.002 Definitions.

* * * * *

Year 2000 compliant, as used in this part, means, with respect to information technology, that the information technology accurately processes date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date/time data with it.

[FR Doc. 97-21502 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-U

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Part 43

[FAC 97-01; FAR Case 96-606; Item XVIII]

RIN 9000-AH44

Federal Acquisition Regulation;
Modification of Existing Contracts
Under FASA and FARA

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt as final, the interim rule published as Item VIII of Federal Acquisition Circular 90-44 on December 31, 1996. The rule amends the Federal Acquisition Regulation (FAR) to implement subsection 10002(e) of the Federal Acquisition Streamlining Act of 1994 and subsections 4402 (d) and (e) of the Clinger-Cohen Act of 1996. The rule authorizes, but does not require, contracting officers, if requested by the contractor, to modify existing

contracts without requiring consideration to incorporate changes authorized by the Acts. 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 October 21, 1997.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-01, FAR case 96-606.

SUPPLEMENTARY INFORMATION:

A. Background

Subsection 10002(e) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) (FASA) and subsection 4402(d) of the Clinger-Cohen Act of 1996 (Public Law 104-106) (Clinger-Cohen) allow regulations implementing the Acts to provide for modification of an existing contract without consideration upon the request of the contractor. Subsection 10002(e) of FASA and subsection 4402(e) of Clinger-Cohen provide that, except as specifically provided in these Acts, nothing in the Acts shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of the Acts. The rule adopts the policy of encouraging, but not requiring, appropriate modifications without consideration, upon the request of the contractor. If the contracting officer determines that modification of an existing contract is appropriate to incorporate changes authorized by these Acts, the modification should insert the current version of the applicable FAR clauses into the contract.

No comments were received in response to the FASA interim rule published in the **Federal Register** at 61 FR 18915, April 29, 1996, and the Clinger-Cohen interim rule published in the **Federal Register** at 61 FR 69297, December 31, 1996.

B. Regulatory Flexibility Act

The final rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility

Act, 5 U.S.C. 601 *et seq.*, because it enables industry and the Government to gain significant benefits, including the potential reduction of contract costs, by authorizing the incorporation into existing contracts any of the Federal Acquisition Streamlining Act and/or Clinger-Cohen Act changes that will benefit the contracting parties. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The FRFA is summarized as follows:

There were no public comments received in response to the Initial Regulatory Flexibility Analysis. The rule will apply to all large and small entities that currently have a Government contract. Most likely, contractors will not request modification of contracts under \$25,000, because the usually short period of performance under these contracts will discourage modification. The number of active contracts over \$25,000 held by small entities at any point in time or the total in any one fiscal year is not readily available from the *Federal Procurement Report, Fiscal Year 1996 through Fourth Quarter*. However, in fiscal year 1996, small entities were awarded approximately 37,192 contracts over \$25,000. The number of contract modifications requested by small entities to incorporate Federal Acquisition Streamlining Act and/or the Clinger-Cohen Act changes depends on whether they determine that modifications to their specific contracts will be advantageous. The rule imposes no new reporting, recordkeeping, or other compliance requirements. This rule is the only practical alternative to implement subsection 10002(e) of the Federal Acquisition Streamlining Act and subsections 4402 (d) and (e) of the Clinger-Cohen Act.

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 43

Government procurement.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Part 43, which was

published at 61 FR 69297, December 31, 1996, is hereby adopted as final without change.

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

Dated: August 14, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.
[FR Doc. 97-22075 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter I

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) 97-01 which amend the FAR. The rules marked with an asterisk (*) are those for which a final regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Further information regarding these rules may be obtained by referring to FAC 97-01 which precedes this notice. This document may be obtained from the Internet.

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

LIST OF RULES IN FAC 97-01

Item	Subject	FAR case	Analyst
I	Business Process Innovation	97-006	De Stefano.
II	FASA and the Walsh-Healey Public Contracts Act	96-601	O'Neill.

LIST OF RULES IN FAC 97-01—Continued

Item	Subject	FAR case	Analyst
III	* Irrevocable Letters of Credit and Alternatives to Miller Act Bonds	95-301	O'Neill.
IV	Automatic Data Processing Equipment Leasing Costs	96-010	Olson.
V	* Environmentally Sound Products	92-054A	De Stefano.
VI	New FAR Certifications	96-329	De Stefano.
VII	* Service Contracting	95-311	O'Neill.
VIII	ADP/Telecommunications Federal Supply Schedules	96-602	Nelson.
IX	Certificate of Competency (Interim)	96-002	Moss.
X	Economically Disadvantaged Individuals	97-008	Moss.
XI	Minority Small Business and Capital Ownership	95-028	Moss.
XII	Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts (Interim).	94-610	O'Neill.
XIII	Designation of Hong Kong	97-019	Linfield.
XIV	Foreign Differential Pay	96-012	Olson.
XV	Local Government Lobbying Costs	96-003	Nelson.
XVI	Independent Government Estimates—Construction	97-005	O'Neill.
XVII	Year 2000 Compliance	96-607	Nelson.
XVIII	* Modification of Existing Contracts under FASA and FARA	96-606	De Stefano.

Item I—Business Process Innovation (FAR Case 97-006)

This final rule amends FAR 1.102-4(e) to encourage contracting officers, in their role as members of the Government acquisition team, to take the lead in encouraging business process innovations and ensuring that business decisions are sound.

Item II—FASA and the Walsh-Healey Public Contracts Act (FAR Case 96-601)

The interim rule published as Item I of Federal Acquisition Circular 90-43 is converted to a final rule without change. The rule amends the FAR to eliminate the requirement that covered contractors under the Walsh-Healey Public Contracts Act must be either the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

Item III—Irrevocable Letters of Credit and Alternatives to Miller Act Bonds (FAR Case 95-301)

The interim rule published as Item XVII of FAC 90-39 is revised and finalized. The rule amends FAR Parts 28 and 52 to provide for use of Irrevocable Letters of Credit as substitutes for corporate or individual surety on Miller Act bonds, and to provide alternatives to Miller Act payment bonds for construction contracts valued at \$25,000 to \$100,000, which are no longer subject to the Miller Act, in accordance with Section 4104(b)(1) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).

Item IV—Automatic Data Processing Equipment Leasing Costs (FAR Case 96-010)

The interim rule published as Item I of FAC 90-44 is converted to a final rule

without change. The rule amends FAR Part 31 to remove the automatic data processing equipment leasing cost principle.

Item V—Environmentally Sound Products (FAR Case 92-054A)

The interim rule published as Item II of FAC 90-27 is revised and finalized. The rule amends FAR Parts 1, 7, 10, 11, 13, 15, 23, 36, 42, and 52 to incorporate policies for the acquisition of environmentally preferable and energy-efficient products and services. The final rule differs from the interim rule in that it clarifies the acceptability of used, reconditioned, or remanufactured supplies, or former Government surplus property, proposed for use under a contract; revises the clause at 52.211-5 regarding acceptability of such material and limits its use in solicitations and contracts for commercial items; eliminates the provisions at 52.211-6 and 52.223-8 and the clause at 52.211-7; revises the clause at 52.223-9 to streamline reporting requirements regarding the recovered material content of EPA-designated items; and eliminates references to agency designation of items requiring minimum recovered material content.

Item VI—New FAR Certifications (FAR Case 96-329)

This final rule adds a new section at FAR 1.107 to reflect the provisions of Section 4301(b)(2) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). Section 4301(b)(2) prohibits the inclusion of a new certification requirement in the FAR for contractors or offerors unless the certification requirement is specifically imposed by statute, or unless a written justification for such certification requirement is provided to the Administrator for Federal

Procurement Policy by the FAR Council and the Administrator approves in writing the inclusion of the certification.

Item VII—Service Contracting (FAR Case 95-311)

This final rule amends FAR Parts 7, 16, 37, 42, 46, and 52 to implement Office of Federal Procurement Policy (OFPP) Policy Letter 91-2, Service Contracting. The OFPP policy letter prescribes policies and procedures for use of performance-based contracting methods.

Item VIII—ADP/Telecommunications Federal Supply Schedules (FAR Case 96-602)

This final rule amends FAR Subpart 8.4 to clarify procedures for placing orders and obtaining price reductions under GSA Federal supply schedule contracts, and to add information regarding the "GSA Advantage!" on-line shopping service. Related amendments are made at FAR 13.202(a)(4) and 51.103.

Item IX—Certificate of Competency (FAR Case 96-002)

This interim rule amends FAR Parts 9 and 19 to implement revisions made to the Small Business Administration's (SBA) procurement assistance programs contained in 13 CFR Part 125. The rule notably (1) increases the threshold over which contracting officers may appeal the award of a Certificate of Competency (COC) from \$25,000 to \$100,000; (2) updates the names of SBA offices involved in processing COC's; and (3) implements the requirement that compliance with the limitations on subcontracting be considered an element of responsibility. In addition, this interim rule removes language implementing Section 15(c) of the Small

Business Act (15 U.S.C. 644(c)) as amended by Section 305 of Pub. L. 103-403, Small Business Administration Reauthorization and Amendments Act of 1994. Section 305, which authorized public and private organizations for the handicapped to participate in acquisitions set aside for small businesses, has expired.

Item X—Economically Disadvantaged Individuals (FAR Case 97-008)

This final rule amends the definition of “small disadvantaged business concern” at FAR 19.001 to update the categories of individuals considered to be socially and economically disadvantaged. In accordance with the Small Business Administration’s regulations at 13 CFR 124.105, the Maldives Islands has been added to the category of “Subcontinent Asian Americans”; and Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, and Nauru have been added to the category of “Asian Pacific Americans.”

Item XI—Minority Small Business and Capital Ownership (FAR Case 95-028)

The interim rule published as Item VII of FAC 90-43 is revised and finalized. The rule amends the FAR to reflect changes to the Small Business Administration’s (SBA) regulations at 13 CFR Parts 121 and 124, which address the Minority Small Business and Capital Ownership Development Program. The rule clarifies eligibility and procedural requirements for procurements under the 8(a) program. The final rule differs from the interim rule in that it amends FAR 19.804-2 to reflect changes that the SBA is making in its processing of 8(a) requirements.

Item XII—Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts (FAR Case 94-610)

This interim rule adds a new FAR Subpart 22.12 implementing Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts, of October 20, 1994. The Executive Order and the interim rule require that workers on certain building service contracts be given the right of first refusal for employment with the successor contractor, if they would otherwise lose their jobs as a result of the award of the successor contract.

Item XIII—Designation of Hong Kong (FAR Case 97-019)

This final rule amends FAR 25.401 to add Hong Kong as a designated country under the Trade Agreements Act of 1979, as directed by the United States Trade Representative.

Item XIV—Foreign Differential Pay (FAR Case 96-012)

The interim rule published as Item VI of FAC 90-44 is converted to a final rule without change. The rule amends FAR 31.205-6 to remove the prohibition on the calculation of foreign differential pay based directly on an employee’s specific increase in income taxes resulting from assignment overseas.

Item XV—Local Government Lobbying Costs (FAR Case 96-003)

The interim rule published as Item XI of FAC 90-43 is converted to a final rule without change. The rule amends FAR 31.205-22 to make allowable the costs of any lobbying activities to influence local legislation in order to directly reduce contract costs, or to avoid material impairment of the contractor’s authority to perform the contract.

Item XVI—Independent Government Estimates—Construction (FAR Case 97-005)

This final rule amends FAR 36.203(a) and 36.605(a) to raise the threshold for a mandatory independent Government estimate of construction costs and architect-engineer costs from \$25,000 to \$100,000.

Item XVII—Year 2000 Compliance (FAR Case 96-607)

The interim rule published as Item XIV of FAC 90-45 is revised and finalized. The rule provides guidance regarding the acquisition of information technology that is Year 2000 compliant. The final rule differs from the interim rule in that it makes clarifying revisions to the definition of “Year 2000 compliant” at FAR 39.002.

Item XVIII—Modification of Existing Contracts Under FASA and FARA (FAR Case 96-606)

The interim rule published as Item VIII of FAC 90-44 is converted to a final rule without change. The rule amends FAR 43.102 to implement subsection 10002(e) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) and subsections 4402 (d) and (e) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). The rule authorizes, but does not require, contracting officers, if requested by the contractor, to modify existing contracts without requiring consideration, to incorporate changes authorized by the Act.

Dated: August 14, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.
[FR Doc. 97-22076 Filed 8-21-97; 8:45 am]

BILLING CODE 6820-EP-P