

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 23 and 52**

[FAC 2001-15; FAR Case 2000-005; Item V]

RIN 9000-AJ44

**Federal Acquisition Regulation;
Leadership in Environmental
Management (E.O. 13148)**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

DATES: *Effective Date:* August 25, 2003.

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. Craig R. Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001-15, FAR case 2000-005.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 55670, August 29, 2002, with a request for comments. Two respondents submitted public comments. A discussion of the comments is provided below. Differences between the proposed and the final rule are discussed in paragraph 1 below.

1. *Comment:* One respondent recommended the following changes to FAR 23.1005:

a. Insert "or plans to implement" between "implemented" and "an EMS" at FAR 23.1005(b)(1) and (b)(2)(i);

b. Change "contractors" to "the contractor" at 23.1005(c)(1); and

c. Remove "FCA" and insert "facility compliance audit or an environmental management system audit" at FAR 23.1005(c)(2).

Councils' Response:

a. *Concur.* As proposed, FAR 23.1005 requires the use of FAR clause 52.223-5 at facilities with an environmental management system (EMS). The clarification expands the prescription for the use of the clause to include situations where an EMS is contemplated.

b. *Partially concur.* The Councils agree that there is a grammatical error, but corrected the error by substituting the term "contractor activities" for "contractors to conduct activities."

c. *Concur.* The inclusion of the phrase "or an environmental management system audit" acknowledges an agency's option to conduct an EMS audit in lieu of a facility compliance audit (FCA) as provided in section 402(b) of Executive Order 13148.

2. *Comment:* The respondent recommended that the FAR rule be reviewed to ensure that, wherever practicable, the FAR actively supports implementation of EMS at Federal facilities including, where the facility or agency deems appropriate, participation in the EMS by contracting entities, including suppliers. The FAR change requires more than the mere provision of information for implementation of an EMS, as the proposed rule now states, to instead include active participation in the EMS, where the facility or agency deems it necessary. At a minimum, the language should state that vendors, contractors, and/or subcontractors are required to be consistent with agency/bureau and/or facility EMS policies.

Councils' Response: Section 305(c) of E.O. 13148 states: "The Federal Acquisition Regulation (FAR) Council shall develop acquisition policies and procedures for contractors to supply agencies with all information necessary for compliance with this order." The Councils believe that the rule satisfies this requirement.

Per section 306 of E.O. 13148, an Interagency Environmental Leadership Workgroup "shall develop policies and guidance required by this order and member agencies shall facilitate implementation of the requirements of this order in their respective agencies." While the Councils recognize and fully appreciate the need for EMS policy and standards, these agency/bureau and/or facility EMS policies will vary among agencies/bureaus and will likely evolve as well. Additionally, the level of participation required by contractors/subcontractors will be contract-specific. Therefore, requirements for EMS participation by contractors/subcontractors would have to be identified in the contract itself. The recommended language does not serve

this purpose and would lead to contractual ambiguities.

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

B. Regulatory Flexibility Act

The 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 as required by E.O. 13148, this rule does not change the current policies and procedures in FAR Subparts 23.8, 23.9, and 23.10. The final rule provides a means for agencies to obtain contractor information for the implementation of EMSs and the completion of FCAs at certain Federal facilities. Agencies will determine which facilities are appropriate for EMS implementation. Federal facilities include Government-owned, contractor-operated facilities, and Government-owned facilities on which multiple contractors perform services. The criteria for performing EMSs indicate that large, rather than small, Federal facilities are more likely to be included in EMSs, and these large Federal facilities are more likely to be operated by large businesses. If, on the other hand, several contractors are performing services on a Government-owned facility, many of the services performed by small businesses fall within the category of administrative support services considered "environmentally clean" and not included in EMSs. For similar reasons, the requirement pertaining to FCAs is not expected to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the final rule contains information collection requirements. These changes to the FAR will increase the information collection requirement currently approved under Office of Management and Budget Control Number 9000-0147, since the rule requires contractors to provide information needed by a Federal facility to implement an EMS (Alternate I of FAR 52.223-5) and to complete an FCA (Alternate II of FAR 52.223-5). Accordingly, the FAR Secretariat has forwarded a request for approval of the

increased information collection requirement concerning Leadership in Environmental Management (E.O. 13148) to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Interested parties may obtain copies of the form and supporting documents increasing the burden hours from the FAR Secretariat by requesting OMB Control Number 9000-0147, Leadership in Environmental Management (E.O. 13148).

List of Subjects in 48 CFR Parts 23 and 52

Government procurement.

Dated: July 16, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 23 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 23 and 52 is revised to read as follows:

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

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 2. Add section 23.001 to read as follows:

23.001 Definition.

Toxic chemical, as used in this part, means a chemical or chemical category listed in 40 CFR 372.65.

■ 3. Amend section 23.702 by revising paragraph (d) to read as follows:

23.702 Authorities.

* * * * *

(d) Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

* * * * *

■ 4. Amend section 23.801 by revising paragraph (b) to read as follows:

23.801 Authorities.

* * * * *

(b) Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

* * * * *

23.803 [Amended]

■ 5. Amend section 23.803 in the introductory text of paragraph (b) by removing “ensure that acquisitions”; and in paragraph (b)(1) by removing

“Executive Order 12843” and adding “Executive Order 13148” in its place.

Subpart 23.9—Contractor Compliance With Toxic Chemical Release Reporting

■ 6. Revise the heading of Subpart 23.9 as set forth above.

■ 7. Revise section 23.901 to read as follows:

23.901 Purpose.

This subpart implements the requirements of Executive Order (E.O.) 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

■ 8. In section 23.902, add a sentence to the end of paragraph (b) to read as follows:

23.902 General.

* * * * *

(b) * * * See EPA’s Web site at <http://www.epa.gov/tri> for guidance.

23.903 [Amended]

■ 9. In section 23.903, amend paragraph (a) by removing “(including all options)”;

23.904 [Removed]

23.905 through 23.907 [Redesignated as 23.904 through 23.906]

■ 10. Remove section 23.904 and redesignate sections 23.905, 23.906, and 23.907 as 23.904, 23.905, and 23.906, respectively;

■ 11. In the newly designated section 23.905, revise paragraphs (a) introductory text and (a) (2) (iv), and amend paragraph (d) by removing “E.O. 12969” and adding “E.O. 13148” in its place. The revised text reads as follows:

23.905 Requirements.

(a) E.O. 13148 requires that solicitations for competitive contracts expected to exceed \$100,000 include, to the maximum extent practicable, as an award eligibility criterion, a certification by an offeror that, if awarded a contract, either—

* * * * *

(2) * * *

(iv) Do not fall within the following Standard Industrial Classification (SIC) codes or their corresponding North American Industry Classification System sectors:

(A) Major group code 10 (except 1011, 1081, and 1094.

(B) Major group code 12 (except 1241).

(C) Major group codes 20 through 39.

(D) Industry code 4911, 4931, or 4939 (limited to facilities that combust coal

and/or oil for the purpose of generating power for distribution in commerce).

(E) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, *et seq.*), or 5169, or 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

* * * * *

■ 12. In the newly designated section 23.906, revise paragraph (a), and amend paragraph (b) by removing “(including all options)”. The revised text reads as follows:

23.906 Solicitation provision and contract clause.

* * * * *

(a) Insert the provision at 52.223-13, Certification of Toxic Chemical Release Reporting, in all solicitations for competitive contracts expected to exceed \$100,000 and competitive 8(a) contracts, unless it has been determined in accordance with 23.905(b) that to do so is not practicable; and

* * * * *

■ 13. Revise Subpart 23.10, consisting of sections 23.1000 through 23.1005, to read as follows:

Subpart 23.10—Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements

23.1000 Scope.

This subpart prescribes policies and procedures for obtaining information needed for Government—

(a) Compliance with right-to-know laws and pollution prevention requirements;

(b) Implementation of an environmental management system (EMS) at a Federal facility; and

(c) Completion of facility compliance audits (FCAs) at a Federal facility.

23.1001 Authorities.

(a) Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001-11050 (EPCRA).

(b) Pollution Prevention Act of 1990, 42 U.S.C. 13101-13109 (PPA).

(c) Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

23.1002 Applicability.

The requirements of this subpart apply to facilities owned or operated by an agency in the customs territory of the United States.

23.1003 Definitions.

As used in this subpart—

Federal agency means an executive agency (see 2.101).

Priority chemical means a chemical identified by the Interagency Environmental Leadership Workgroup or, alternatively, by an agency pursuant to section 503 of Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

23.1004 Requirements.

(a) E.O. 13148 requires Federal facilities to comply with the provisions of EPCRA and PPA.

(b) Pursuant to E.O. 13148, and any agency implementing procedures, every new contract that provides for performance on a Federal facility shall require the contractor to provide information necessary for the Federal agency to comply with the—

(1) Emergency planning and toxic release reporting requirements in EPCRA, PPA, and E.O. 13148;

(2) Toxic chemical, priority chemical, and hazardous substance release and use reduction goals of sections 502 and 503 of Executive Order 13148; and

(3) Requirements for EMSs and FCAs if the place of performance is at a Federal facility designated by the agency.

23.1005 Contract clause.

(a) Insert the clause at 52.223-5, Pollution Prevention and Right-to-Know Information, in solicitations and contracts that provide for performance, in whole or in part, on a Federal facility.

(b) Use the clause with its Alternate I if the contract provides for contractor—

(1) Operation or maintenance of a Federal facility at which the agency has implemented or plans to implement an EMS; or

(2) Activities and operations—

(i) To be performed at a Government-operated Federal facility that has implemented or plans to implement an EMS; and

(ii) That the agency has determined are covered within the EMS.

(c) Use the clause with its Alternate II if—

(1) The contract provides for contractor activities on a Federal facility; and

(2) The agency has determined that the contractor activities should be included within the FCA or an environmental management system audit.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

14. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(1)(vii) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other than Commercial Items) (Aug 2003)

* * * * *

(b) * * *

(1) * * *

(vii) 52.223-5, Pollution Prevention and Right-to-Know Information (Aug 2003) (E.O. 13148) (Applies to services performed on Federal facilities).

* * * * *

15. Revise section 52.223-5 to read as follows:

52.223-5 Pollution Prevention and Right-to-Know Information.

As prescribed in 23.1005, insert the following clause:

Pollution Prevention and Right-to-Know Information (Aug 2003)

(a) Definitions. As used in this clause— Priority chemical means a chemical identified by the Interagency Environmental Leadership Workgroup or, alternatively, by an agency pursuant to section 503 of Executive Order 13148 of April 21, 2000, Greening the Government through Leadership in Environmental Management.

Toxic chemical means a chemical or chemical category listed in 40 CFR 372.65.

(b) Executive Order 13148 requires Federal facilities to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101-13109).

(c) The Contractor shall provide all information needed by the Federal facility to comply with the following:

(1) The emergency planning reporting requirements of section 302 of EPCRA.

(2) The emergency notice requirements of section 304 of EPCRA.

(3) The list of Material Safety Data Sheets, required by section 311 of EPCRA.

(4) The emergency and hazardous chemical inventory forms of section 312 of EPCRA.

(5) The toxic chemical release inventory of section 313 of EPCRA, which includes the reduction and recycling information required by section 6607 of PPA.

(6) The toxic chemical, priority chemical, and hazardous substance release and use reduction goals of sections 502 and 503 of Executive Order 13148.

(End of clause)

Alternate I (Aug 2003). As prescribed in 23.1005(b), add the following paragraph (c)(7) to the basic clause:

(c)(7) The environmental management system as described in section 401 of E.O. 13148.

Alternate II (Aug 2003). As prescribed in 23.1005(c), add the following paragraph (c)(7) to the basic clause. If Alternate I is also prescribed, renumber paragraph (c)(7) as paragraph (c)(8).

(c)(7) The facility compliance audits as described in section 402 of E.O. 13148.

16. Amend section 52.223-13 by revising the introductory text, the date of the provision, and paragraphs (a), (b)(2)(i) and (b)(2)(iv) to read as follows:

52.223-13 Certification of Toxic Chemical Release Reporting.

As prescribed in 23.906(a), insert the following provision:

Certification of Toxic Chemical Release Reporting (Aug 2003)

(a) Executive Order 13148, of April 21, 2000, Greening the Government through Leadership in Environmental Management, requires submission of this certification as a prerequisite for contract award.

(b) * * *

(2) * * *

[] (i) The facility does not manufacture, process, or otherwise use any toxic chemicals listed in 40 CFR 372.65;

* * * * *

[] (iv) The facility does not fall within the following Standard Industrial Classification (SIC) codes or their corresponding North American Industry Classification System sectors:

(A) Major group code 10 (except 1011, 1081, and 1094.

(B) Major group code 12 (except 1241).

(C) Major group codes 20 through 39.

(D) Industry code 4911, 4931, or 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce).

(E) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, et seq.), 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

* * * * *

17. Amend section 52.223-14 by revising the introductory text, the date of the clause, and paragraphs (b)(1) and (b)(4) to read as follows:

52.223-14 Toxic Chemical Release Reporting.

As prescribed in 23.906(b), insert the following clause:

Toxic Chemical Release Reporting (Aug 2003)

* * * * *

(b) * * *

(1) The facility does not manufacture, process, or otherwise use any toxic chemicals listed in 40 CFR 372.65;

* * * * *

(4) The facility does not fall within the following Standard Industrial Classification (SIC) codes or their corresponding North American Industry Classification System sectors:

(i) Major group code 10 (except 1011, 1081, and 1094.

(ii) Major group code 12 (except 1241).

(iii) Major group codes 20 through 39.

(iv) Industry code 4911, 4931, or 4939 (limited to facilities that combust coal and/

or oil for the purpose of generating power for distribution in commerce).

(v) Industry code 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act, Subtitle C (42 U.S.C. 6921, *et seq.*)), 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); or

* * * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2001-15; FAR Case 2001-024; Item VI]

RIN 9000-AJ42

Federal Acquisition Regulation; Selling Cost Principle

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) "selling costs" cost principle by restructuring the paragraphs and removing unnecessary and duplicative language to increase clarity.

DATES: *Effective Date:* August 25, 2003.

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. Edward Loeb at (202) 501-0650. Please cite FAC 2001-15, FAR case 2001-024.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 55682, August 29, 2002, with request for comments. One respondent submitted comments; a discussion of the comments is provided below. Differences between the proposed rule and final rule are discussed in paragraph B.2. below.

B. Public Comments

Clarity of the Cost Principle

1. *Comment:* Revise proposed FAR 31.205-38(a). The cost principle's readability and clarity can be improved by changing the second sentence of the proposed paragraph (a) from "The cost of any selling efforts other than those addressed in this cost principle are unallowable" to "The costs of selling efforts are allowable unless expressly identified as unallowable in this or any other cost principle." The proposed wording will be difficult to apply in the field. The respondent is unaware of any selling costs that are not already included in the cost principle.

Councils' response: Nonconcur. The sentence in question was simply moved from the current paragraph (d) to the beginning of the cost principle. The sentence is not new; it was originally included to comply with the provisions of section 911 of the Defense Procurement Improvement Act of 1985 (codified at 10 U.S.C. 2324 (f)(1)(J)), which required that the allowability of selling and marketing costs be clarified. At that time, Congress and the General Accounting Office (GAO) were concerned about potential negotiation of 50/50 splits of the costs in this area due to unclear wording of the cost principle. The intent was to ensure that any gray areas of selling costs would be disallowed, particularly the costs of broadly targeted selling and marketing. The current wording continues this intent.

Cost Principle Consistency

2. *Comment:* Delete portion of proposed FAR 31.205-38(a). The last sentence in the proposed paragraph (a) is not needed as it reiterates what is already included in 31.204(c) (Application of principles and procedures).

Councils' response: Partially concur. Do not agree that the intent of the sentence in question is adequately covered by 31.204(c). However, the Councils concluded that the objective of this sentence is already adequately achieved by the operation of the proposed paragraph (b) which directs the reader to other specific cost principles governing the allowability of the identified categories of costs, and the second sentence of the proposed paragraph (a) which makes any selling efforts other than those addressed in the cost principle unallowable. Therefore, the last sentence of paragraph (a) is deleted.

Cost Principle Elimination

3. *Comment:* Delete proposed FAR 31.205-38. With the exception of its last paragraph, the proposed cost principle defines selling costs and expressly states they are allowable or refers the reader to other cost principles for the determination of allowability of related costs. Therefore, consideration should be given to completely eliminating the cost principle, after moving the proposed paragraph (c) to another cost principle, possibly 31.205-33(f) (Professional and consultant service costs).

Councils' response: Nonconcur. This cost principle has disallowed and should continue to disallow all selling costs not made specifically allowable by it or the other cited cost principles. In addition, this cost principle clarifying the allowability of selling and marketing costs is statutorily required by 10 U.S.C. 2324(f)(1)(J) and 41 U.S.C. 256(f)(1)(J).

General Reformatting of FAR Part 31.205

4. *Comment:* The respondent also recommended that the Councils consider a general reformatting of FAR Part 31, Contract Cost Principles and Procedures. Specifically, consideration should be given to establishing a uniform structure for the selected costs detailed in FAR Subpart 31.205, which the respondent believes will increase the clarity and understanding of the cost principles and thereby reduce misinterpretation.

Councils' response: Nonconcur. The Councils are unaware of any significant clarity problems with the current FAR cost principles and see no benefit in this recommendation. While it is true that the cost principles do not all share an identical format, it does not follow that this makes them difficult to understand. Moreover, such a comprehensive revision of the cost principles could actually increase disputes by substituting new wording for longstanding, court-tested language.

Of the 48 current FAR cost principles, 16 are only one paragraph long, and 11 more are only two or three paragraphs long. The Councils question the need to "force-fit" such short cost principles into a uniform format, particularly in the absence of any significant clarity problems. Not only would the recommended general reformatting of the cost principles be difficult to accomplish, but it would also offer no obvious benefit to either industry or the Government.

The Councils recommend instead that industry continue to identify those individual cost principles which it