

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

[FAC 90-34; FAR Case 95-305]

RIN 9000-AG68

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

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

ACTION: Interim rule with request for comment.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to an interim rule amending the Federal Acquisition Regulation (FAR) Parts 23 and 52 to implement Executive Order 12969. The Executive Order establishes the policy that contracting agencies contract with companies that report in a public manner on toxic chemicals released to the environment. The interim rule provides a solicitation provision which requires certification of compliance with the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) (EPCRA) and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) (PPA), and a contract clause which incorporates the reporting requirements of EPCRA and PPA into Federal Government contracts.

This regulatory action is subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Effective Date:* October 30, 1995.

Comment Date: Comments on the interim rule should be submitted in writing to the FAR Secretariat at the address shown below on or before December 29, 1995, to be considered in the formulation of a final rule.

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

Please cite FAC 90-34, FAR case 95-305 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph De Stefano at (202) 501-1758 in reference to this FAR case. For

general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-34, FAR case 95-305.

SUPPLEMENTARY INFORMATION:**A. Background**

The addition of FAR Subpart 23.9 and its associated solicitation provision and contract clause implement the requirements of Executive Order (E.O.) 12969 of August 8, 1995 (60 FR 40989, August 10, 1995), "Federal Acquisition and Community Right-to-Know," and the Environmental Protection Agency's "Guidance Implementing Executive Order 12969; Federal Acquisition; Community Right-to-Know; Toxic Chemical Release Reporting" (60 FR 50738, September 29, 1995). This interim rule requires offerors in competitive acquisitions over \$100,000 (including options) to certify that they will comply with applicable toxic chemical release reporting requirements of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109). This rule does not apply to acquisitions of commercial items under FAR Part 12 or contractor facilities located outside the United States. This rule does not apply to subcontractors beyond the first tier.

B. Regulatory Flexibility Act

The 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 only applies to competitive acquisitions exceeding \$100,000 (including options) in value, and will only impact those companies that do not comply with existing laws regarding reporting of toxic chemical release. Also, the rule does not apply to acquisitions of commercial items under FAR Part 12 or contractor facilities located outside the United States. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAC 90-34, FAR Case 95-305), in correspondence.

C. Paperwork Reduction Act

Under the emergency processing provisions of the Paperwork Reduction Act of 1995 (Public Law 104-13), the Federal Acquisition Regulation (FAR) Secretariat has requested and obtained

approval (OMS Control No. 9000-0139) from the Office of Management and Budget (OMB) for a new collection of information requirement under Executive Order (O.E.) 12969 of August 8, 1995, Federal Acquisition and Community Right-to-Know.

DATES: Comments may be submitted on or before December 29, 1995.

ADDRESSES: Send comments to Mr. Peter Weiss, FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the FAR Secretariat at the address listed below for comments on the information collection requirement.

Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to General Services Administration, FAR Secretariat, 18th and F Streets, NW., Room 4037, Washington, DC 20405, and to the FAR Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

The annual reporting burden is estimated to be \$3,517,248 as a result of the following estimated number of hours of labor for compliance: Respondents, 167,487; responses per respondent, 1; total annual responses, 167,487; preparation hours per response, 0.50; and total response burden hours, 83,744.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because Executive Order 12969 requires incorporation of its policies into the FAR by November 6, 1995. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 23 and 52

Government procurement.

Dated: October 26, 1995.

Ida M. Ustad,
Associate Administrator, Office of
Acquisition Policy.

Federal Acquisition Circular

Number 90-34

Federal Acquisition Circular (FAC) 90-34 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 90-34 is effective October 30, 1995.

Dated: October 25, 1995.

Eleanor R. Spector,
Director, Defense Procurement.

Dated: October 26, 1995.

Ida M. Ustad,
Associate Administrator, Office of
Acquisition Policy.

Dated: October 25, 1995.

Deidre Lee,
Associate Administrator for Procurement,
NASA.

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

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

1. The authority citation for 48 CFR parts 23 and 52 continued 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. Subpart 23.9, consisting of sections 23.901 through 23.907, is added to read as follows:

Subpart 23.9—Toxic Chemical Release Reporting

Sec.	
23.901	Purpose.
23.902	General.
23.903	Applicability.
23.904	Definition.
23.905	Policy.
23.906	Requirements.
23.907	Solicitation provision and contract clause.

23.901 Purpose.

This subpart implements the requirements of Executive Order (E.O.) 12969 of August 8, 1995, Federal Acquisition and Community Right-to-Know.

23.902 General.

The Emergency Planning and Community Right-to-Know Act of 1986

(EPCRA) and the Pollution Prevention Act of 1990 (PPA) established programs to protect public health and the environment by providing the public with important information on the toxic chemicals being released by manufacturing facilities into the air, land and water in its communities.

Under the EPCRA, section 313 (42 U.S.C. 11023), and the PPA, section 6607 (42 U.S.C. 13106), manufacturers are required to submit annual reports on toxic chemical releases and waste management activities to the Environmental Protection Agency (EPA) and the States.

23.903 Applicability.

(a) This subpart applies to all competitive contracts expected to exceed \$100,000 (including all options) and competitive 8(a) contracts.

(b) This subpart does not apply to—
(1) Acquisitions of commercial items under FAR part 12; or

(2) Contractor facilities located outside the United States. (*The United States*, as used in this subpart, includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, and any other territory or possession over which the United States has jurisdiction.)

23.904 Definition.

Toxic chemicals means reportable chemicals currently listed and added pursuant to EPCRA sections 313 (c), (d), and (e), except for those chemicals deleted by EPA using the statutory criteria of EPCRA, sections 313 (d) and (e).

23.905 Policy.

(a) It is the policy of the Government to purchase supplies and services that have been produced with a minimum adverse impact on community health and the environment.

(b) Federal agencies, to the greatest extent practicable, shall contract with companies that report in a public manner on toxic chemicals released to the environment.

23.906 Requirements.

(a) E.O. 12969 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 the offeror that either—

(1) If awarded a contract, facilities it owns or operates to be used in the performance of the contract will file, and will continue to file throughout the

life of the contract, a Toxic Chemical Release Inventory Form (Form R) as described in EPCRA sections 313 (a) and (g) and the PPA section 6607; or

(2) Such facilities are otherwise exempt from the filing and reporting requirements.

(b) A determination that it is not practicable to include the solicitation provision at FAR 52.223-13, Certification of Toxic Chemical Release Reporting, in a solicitation or class of solicitations shall be approved by a procurement official at a level no lower than the head of the contracting activity. Prior to making such a determination for a solicitation or class of solicitations with an estimated value in excess of \$500,000 (including all options), the agency shall consult with EPA.

(c) Award shall not be made to offerors who do not certify in accordance with paragraph (a) of this section when the provision at FAR 52.223-13, Certification of Toxic Chemical Release Reporting, is included in the solicitation.

(d) The contracting officer shall cooperate with EPA representatives and provide such advice and assistance as may be required to aid EPA in the performance of its responsibilities under E.O. 12969.

(e) EPA, upon determining that a contractor is not filing the necessary forms or is filing incomplete information, may recommend to the head of the contracting activity that the contract be terminated for convenience. The head of the contracting activity shall consider the EPA recommendation and determine if termination or some other action is appropriate.

23.907 Solicitation provision and contract clause.

Except for acquisitions of commercial items made under part 12, the contracting officer shall:

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

(b) When the solicitation contains the provision at 52.223-13, Certification of Toxic Chemical Release Reporting, insert the clause at 52.223-14, Toxic Chemical Release Reporting, in the resulting contract, if the contract is expected to exceed \$100,000 (including all options).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Sections 52.223-13 and 52.223-14 are added to read as follows:

52.223-13 Certification of Toxic Chemical Release Reporting.

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

CERTIFICATION OF TOXIC CHEMICAL RELEASE REPORTING (OCT 1995)

(a) The offeror, by signing this offer, certifies that—

(Note: The offeror must check the appropriate box(es).)

(1) To the best of its knowledge and belief, it is not subject to the filing and reporting requirements described in Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) sections 313(a) and (g) and Pollution Prevention Act of 1990 (PPA) section 6607 because none of its owned or operated facilities to be used in the performance of this contract currently—

(i) Manufacture, process or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c).

(ii) Have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A).

(iii) Meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) (including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been filed with EPA).

(iv) Fall within Standard Industrial Classification Code (SIC) designations 20 through 39 as set forth in FAR section 19.102.

(2) If awarded a contract resulting from this solicitation, its owned or operated facilities to be used in the performance of this contract, unless otherwise exempt, will file and continue to file for the life of the

contract the Toxic Chemical Release Inventory Form (Form R) as described in EPCRA sections 313(a) and (g) and PPA section 6607 (42 U.S.C. 13106).

(b) Submission of this certification is a prerequisite for making or entering into this contract imposed by Executive Order 12969, August 8, 1995 (60 FR 40989-40992).

(End of provision)

52.223-14 Toxic Chemical Release Reporting.

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

TOXIC CHEMICAL RELEASE REPORTING (OCT 1995)

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

(b) A Contractor is exempt from the requirement to file an annual Form R if none of the Contractor owned or operated facilities used in the performance of this contract—

(1) Manufacture, process or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

(2) Have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRA, 42 U.S.C. 11023(b)(1)(A);

(3) Meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA (including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been filed with EPA); or

(4) Fall within Standard Industrial Classification Code (SIC) designations 20 through 39 as set forth in FAR 19.102.

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

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

(2) The Contractor owned and operated facilities used in the performance of this contract, unless otherwise exempt, shall (i) submit a Toxic Chemical Release Inventory Form (Form R) on or before July 1 for the prior calendar year during which the Contractor becomes eligible; and (ii) continue to file the annual Form R for the life of the contract.

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

(e) Except for acquisitions of commercial items, as defined in FAR Part 12, the Contractor shall—

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

(2) Include in any resultant subcontract exceeding \$100,000 (including all options), with subcontractors having SIC designations of major groups 20 through 39 as set forth in FAR 19.102, the substance of this clause, except this paragraph (e).

(End of clause)

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