

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Circular 90-40;
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 with request for comment.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules which follow it in the order listed below. The FAR Council is issuing Federal Acquisition Circular (FAC) 90-40 to amend the Federal Acquisition Regulation (FAR). A companion document, the Small Entities Compliance Guide, follows this FAC and may be located on the Internet at <http://www.gsa.gov/far/compliance>.

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

follow. Please cite FAC 90-40 and the appropriate FAR case number(s) in all correspondence related to the following documents.

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 the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-40 and specific FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-40 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR case	Analyst
I	Contingent Fee Representation	93-009	DeStefano.
II	Simplified Acquisition Threshold/Federal Acquisition Computer Network; and Micro-Purchase Procedures.	94-770 94-771	Linfield.
III	Gratuities (Interim)	96-300	DeStefano.
IV	Disaster Relief Act	93-303	Klein.
V	Responsibility Determinations	95-007	DeStefano.
VI	Task and Delivery Orders	94-711	McAndrew.
VII	Multiyear Contracting	94-712	McAndrew.
VIII	Small Business/Simplified Acquisition Threshold	94-782	Moss.
IX	Indian-Owned Economic Enterprises	91-028	DeStefano.
X	General Agreement on Tariffs and Trade Patent Authorization	95-308	O'Neill.
XI	Performance and Payment Bonds	91-027	O'Such.
XII	Employee Compensation Costs	93-005	Olson.
XIII	Agency Procurement Protests (Interim)	95-309	O'Neill.
XIV	Value Engineering	96-315	O'Such.
XV	Termination Inventory Schedules	94-003	Klein.

Item I—Contingent Fee Representation (FAR Case 93-009)

This final rule amends FAR Subpart 3.4 to remove the requirement for prospective contractors to provide certain information regarding contingent fee arrangements. Accordingly, the provision at 52.203-4, Contingent Fee Representation and Agreement, and Standard Form 119, Statement of Contingent or Other Fees, are also removed. The underlying policy pertaining to contingent fee arrangements, as set forth in Subpart 3.4, remains the same.

Item II—Simplified Acquisition Threshold/Federal Acquisition Computer Network; and Micro-Purchase Procedures (FAR Cases 94-770 and 94-771)

The interim rules published as Item II of FAC 90-24 and Item III of FAC 90-29 are amended and adopted as final. The rules implement the micro-purchase, simplified acquisition, and Federal Acquisition Computer Network (FACNET) provisions of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), and Section 4302(b) of the Federal Acquisition

Reform Act of 1996 (Public Law 104-106). The final rules differ from the interim rules in that they (1) move definitions pertaining to micro-purchases, simplified acquisition procedures, and FACNET from Parts 4 and 13 to Part 2; (2) remove the requirement for interim FACNET certification before a contracting office may use simplified acquisition procedures for contract actions exceeding \$50,000; (3) remove the clause at 52.222-40, Service Contract Act of 1965, as Amended—Contracts of \$2,500 or Less, based upon a change in Department of Labor regulations; and (4) provide a telephone number for information regarding FACNET at 4.503.

Item III—Gratuities (FAR Case 96-300)

This interim rule amends FAR 3.202 and 52.203-3 to implement Section 801 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106). Section 801 amends 10 U.S.C. 2207, generally referred to as the Gratuities Act, to exempt contracts which do not exceed the simplified acquisition threshold from application of the Act. Therefore, the clause at 52.203-3, Gratuities, is now prescribed

for inclusion in only those contracts which exceed the simplified acquisition threshold.

Item IV—Disaster Relief Act (FAR Case 93-303)

This final rule amends FAR 6.302-5, and adds FAR Subpart 26.2, to implement the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150). Section 5150 establishes a preference for local sources in the award of contracts for major disaster or emergency assistance activities.

Item V—Responsibility Determinations (FAR Case 95-007)

This final rule amends FAR Subpart 9.1 to emphasize the use of commercial sources of information for determining the responsibility of prospective contractors, and to clarify that preaward surveys normally should be requested only when information on hand or readily available is not sufficient.

Item VI—Task and Delivery Orders (FAR Case 94-711)

The interim rule published as Item III of FAC 90-33 is amended and adopted as final. The interim rule added FAR

Section 16.500 to define the scope of the multiple award preference established by Subpart 16.5 for indefinite-quantity contracts. The final rule differs from the interim rule in that it amends Section 16.500 to clarify that the multiple award preference does not apply to architect-engineer contracts subject to the procedures in Subpart 36.6. However, agencies are not precluded from making multiple awards for architect-engineer services, provided the selection of contractors and placement of orders is consistent with Subpart 36.6. The rule also amends Section 16.504 to clarify procedures for determining if multiple awards are appropriate.

Item VII—Multiyear Contracting (FAR Case 94-712)

This final rule revises FAR Subpart 17.1, removes the clause at 52.217-1, and revises the clause at 52.217-2 to implement Sections 1022 and 1072 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). Sections 1022 and 1072 provide for use of multiyear contracting in a manner that will encourage competition or promote economy in administration, performance, and operation of an agency's programs.

Item VIII—Small Business/Simplified Acquisition Threshold (FAR Case 94-782)

This final rule amends FAR Part 19 and the clauses at 52.219-6, 52.219-7, and 52.219-18 to implement Section 4004 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). Section 4004 amends Section 15(j) of the Small Business Act (15 U.S.C. 644(j)) to reserve each contract for supplies or services that has an anticipated value greater than \$2,500, but not greater than \$100,000, for exclusive participation by small business concerns, unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with regard to price, quality, and delivery. This rule also reflects a final rule published by the Small Business Administration at 13 CFR 121.406, which provides that, where the procurement of a manufactured item is processed under FAR Part 13 procedures, set aside for small business concerns, and not expected to exceed \$25,000, an offeror need not supply the end product of a small business concern

as long as the product is manufactured or produced in the United States.

Item IX—Indian-Owned Economic Enterprises (FAR Case 91-028)

The interim rule published as Item VIII of FAC 90-7 is amended and adopted as final. The rule implements 25 U.S.C. 1544, which provides for payment of incentives to prime contractors who use Indian organizations or Indian-owned economic enterprises as subcontractors. The principal difference between the interim rule and the final rule is the method of incentive payment contained in each. The interim rule permitted prime contractors to recover certain costs of subcontracting with Indian organizations and Indian-owned economic enterprises based on the difference in price between the acceptable low non-Indian subcontractor and the acceptable low Indian subcontractor, when the Indian subcontractor's price exceeded the price of the non-Indian subcontractor. The final rule instead permits an incentive payment to the prime contractor in an amount which equals 5 percent of the amount of the subcontract awarded to the Indian organization or Indian-owned economic enterprise. The applicable amendments are in Subpart 26.1 and the clause at 52.226-1.

Item X—General Agreement on Tariffs and Trade Patent Authorization (FAR Case 95-308)

This final rule adds FAR Section 27.209 to provide guidance pertaining to the use of patented technology under the General Agreement on Tariffs and Trade.

Item XI—Performance and Payment Bonds (FAR Case 91-027)

This final rule amends FAR Subpart 28.1 and the clause at 52.228-1, and adds two clauses at 52.228-15 and 52.228-16, and new SF 1418 to update, clarify, and standardize policy pertaining to bid guarantees and performance and payment bonds.

Item XII—Employee Compensation Costs (FAR Case 93-005)

This final rule amends FAR Part 31 to clarify the allowability of personal services compensation costs. The rule adds definitions at 31.001; clarifies the standard for reasonableness of labor-management compensation agreements at 31.205-6(b); revises 31.205-6(b)(1)(i) to clearly allow offsets of allowable

elements of employee compensation packages among jobs of the same grade or level; and revises 31.205-6(i) to provide a general allowability rule pertaining to corporate securities.

Item XIII—Agency Procurement Protests (FAR Case 95-309)

This interim rule revises FAR 33.103 to implement Executive Order 12979, Agency Procurement Protests. Executive Order 12979 provides for inexpensive, informal, procedurally simple, and expeditious resolution of agency protests, including, where appropriate and permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel.

Item XIV—Value Engineering (FAR Case 96-315)

This final rule amends FAR Part 48 to revise the definition of value engineering and to require agencies to establish and maintain cost-effective value engineering procedures and processes. The rule implements Section 4306 of the Federal Acquisition Reform Act of 1996 (Public Law 104-106).

Item XV—Termination Inventory Schedules (FAR Case 94-003)

This final rule amends FAR Part 49 and the clauses at 52.249-2, 52.249-3, 52.249-5, 52.249-6, and 52.249-11 to require contractors under terminated contracts to submit termination inventory schedules within 120 days from the date of termination, unless this period is extended by the contracting officer.

Dated: July 16, 1996.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

FEDERAL ACQUISITION CIRCULAR

Number 90-40

Federal Acquisition Circular (FAC) 90-40 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 90-40 are effective September 24, 1996, except for Items III, VI thru VIII, and XIII, which are effective July 26, 1996, and Items II and XIV, which are effective August 26, 1996.

Dated: July 12, 1996.
Eleanor R. Spector,
Director, Defense Procurement.

Dated: July 8, 1996.
Ida M. Ustad,
*Deputy Associate Administrator for
Acquisition Policy, General Services
Administration.*

Dated: July 15, 1996.
Tom Luedtke,
*Deputy Associate Administrator for
Procurement, National Aeronautics and
Space Administration.*
[FR Doc. 96-18497 Filed 7-25-96; 8:45 am]
BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 3, 4, 13, 31, 52, and 53

[FAC 90-40; FAR Case 93-009; Item I]

RIN 9000-AG83

Federal Acquisition Regulation; Contingent Fee Representation

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 delete the provision requiring an offeror to provide a contingent fee representation and agreement and to submit a statement of contingent or other fees. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: September 24, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-40, FAR case 93-009.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 3.404(b) requires the contracting officer to insert the provision at 52.203-4, Contingent Fee Representation and

Agreement, in all solicitations, with six exceptions. The provision requires offerors to provide a contingent fee representation as requested by the contracting officer. When the representation is answered affirmatively, the offeror must also provide a completed Standard Form (SF) 119, Statement of Contingent or Other Fees, or a signed statement indicating the SF 119 was previously submitted to the same contracting office. A proposed rule was published in the Federal Register at 60 FR 57140, November 13, 1995. This final rule revises FAR 3.404 to remove the requirement for the solicitation provision and removes the accompanying sections 3.405 through 3.408 which deal with the SF 119. FAR 3.409 and 3.410 have been renumbered.

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 there is a slight beneficial impact on small entities since offerors will no longer be required to provide contingent fee representations and agreements or to submit statements of contingent or other fees. However, the underlying policy pertaining to contingent fee arrangements has not changed.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the final rule eliminates a previously approved information collection requirement under Office of Management and Budget (OMB) number 9000-0003, Statement of Contingent or Other Fees (SF 119). Accordingly, a request for elimination of the information collection requirement is being submitted to OMB.

List of Subjects in 48 CFR Parts 1, 3, 4, 13, 31, 52, and 53

Government procurement.

Dated: July 16, 1996.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 1, 3, 4, 13, 31, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 3, 4, 13, 31, 52, and 53 continues to read as follows:

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

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Section 1.106 is amended in the list of "FAR Segments" and "OMB Control Numbers" following the introductory text by removing "52.203-4" and "9000-0003", and "SF 119" and "9000-0003".

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Section 3.404 is revised to read as follows:

3.404 Contract clause.

The contracting officer shall insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see parts 2 and 12).

3.405 through 3.408-2 [Removed]

4. Sections 3.405 through 3.408-2 are removed.

3.409 and 3.410 [Redesignated as 3.405 and 3.406]

5. Sections 3.409 and 3.410 are redesignated as 3.405 and 3.406.

6. The newly designated 3.406 is amended by revising the first sentence to read as follows:

3.406 Records.

For enforcement purposes, agencies shall preserve any specific evidence of one or more of the violations in 3.405(a), together with all other pertinent data, including a record of actions taken.

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PART 4—ADMINISTRATIVE MATTERS

7. Section 4.803 is amended by revising paragraph (a)(11) to read as follows:

4.803 Contents of contract files.

* * * * *

(a) * * *

(11) Contractor's certifications and representatives.

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PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.111 [Amended]

8. Section 13.111 is amended by removing paragraph (c) and redesignating paragraphs (d) through (j) as (c) through (i).