

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 90-46; 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 FAR Council in this Federal Acquisition Circular (FAC) 90-46. 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 at <http://www.gsa.gov/far/SECG>.

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 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-46 and specific FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-46 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR Case	Analyst
I	Gratuities	96-300	Linfield.
II	Electronic Contracting	91-104	DeStefano.
III	Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting	94-008	O'Neill.
IV	Performance Incentives for Fixed-Price Contracts	93-603	DeStefano.
V	Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements (Interim)	92-054B	Linfield.
VI	Buy American Act—Construction (Grimberg Decision)	91-119	Linfield.
VII	Collection of Historically Black Colleges and Universities/Minority Institutions Award Data	95-306	Klein.
VIII	Allowability of Foreign Selling Costs	95-021	DeStefano.
IX	Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements	95-024	Olson.
X	Prompt Payment	91-091	Olson.
XI	Attorneys' Fees in GAO Protests	96-016	O'Neill.
XII	Contractors' Purchasing Systems Reviews	94-605	Klein.
XIII	Performance-Based Payments	96-005	Olson.
XIV	Technical Corrections		

Item I—Gratuities (FAR Case 96-300)

The interim rule published as Item III of Federal Acquisition Circular (FAC) 90-40 is converted to a final rule without change. The rule amended FAR 3.202 and 52.203-3 to exempt solicitations and contracts which do not exceed the simplified acquisition threshold from the prescribed use of the "Gratuities" clause.

Item II—Electronic Contracting (FAR Case 91-104)

The interim rule published as Item II of FAC 90-29 is converted to a final rule with amendments in Parts 5, 14, 15, and 52. The rule facilitates the use of electronic data interchange in Government contracting and complements the rule published as Item II of FAC 90-40 pertaining to the Federal Acquisition Computer Network.

Item III—Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting (FAR Case 94-008)

This final rule amends FAR 37.000 and 37.102, and adds a new Subpart 37.5, to implement OFPP Policy Letter 93-1, Management Oversight of Service Contracting. The policy letter provides

Governmentwide guiding principles which are intended to improve the acquisition, management, and administration of service contracts. This rule also amends FAR 9.505-3 and 35.017-2 to remove references to OMB Circular A-120, Guidelines for the Use of Advisory and Assistance Services, which was rescinded by OMB on November 19, 1993.

Item IV—Performance Incentives for Fixed-Price Contracts (FAR Case 93-603)

This final rule amends FAR Parts 16 and 52 to permit the use of award-fee provisions as performance incentives in fixed-price contracts.

Item V—Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements (FAR Case 92-054B)

This interim rule adds a new FAR Subpart 23.10, and a new clause at 52.223-5 to implement Executive Order (E.O.) 12856 of August 3, 1993, Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements. The E.O. requires that a contract performed on a Federal facility shall provide that the contractor supply information on its use of certain

hazardous or toxic substances in the performance of the contract. This information is required to enable Federal facilities to comply with the reporting and emergency planning requirements of the Pollution Prevention Act of 1990 and the Emergency Planning and Community Right-To-Know Act of 1986.

Item VI—Buy American Act—Construction (Grimberg Decision) (FAR Case 91-119)

This final rule amends FAR Subpart 25.2 and the associated clauses at 52.225-5 and 52.225-15 to add guidance on exceptions to the Buy American Act, both pre-award and post-award. The rule adds two new solicitation provisions at 52.225-12 and 52.225-13 for use in solicitations for construction in the United States. These solicitation provisions set forth procedures by which offerors may request determinations regarding the inapplicability of the Buy American Act. The rule also adds a new section at 25.206, which provides guidance regarding instances of noncompliance with the Buy American Act.

Item VII—Collection of Historically Black Colleges and Universities/ Minority Institutions Award Data (FAR Case 95-306)

This final rule adds a new FAR Subpart 26.3 and a new solicitation provision at 52.226-2 to implement Executive Order 12928, which requires agencies to provide periodic reporting on the progress made in award of contracts to Historically Black Colleges and Universities and Minority Institutions.

Item VIII—Allowability of Foreign Selling Costs (FAR Case 95-021)

This final rule revises FAR 31.205-38(c)(2) by removing the ceiling on allowable foreign selling costs. The rule also amends 31.205-1, Public relations and advertising costs, by deleting reference to the ceiling limitation, and further revises 31.205-38(c)(2) by deleting obsolete language.

Item IX—Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements (FAR Case 95-024)

This final rule amends the cost principle at FAR 31.205-18, Independent research and development (IR&D) and bid and proposal costs, by removing from paragraph (e) the prohibition against treatment of contractor IR&D contributions under NASA cooperative arrangements as allowable indirect costs.

Item X—Prompt Payment (FAR Case 91-091)

This final rule amends FAR 32.102, Subpart 32.9, and related clauses at 52.212-4, 52.232-5, 52.232-8, 52.232-25, 52.232-26, and 52.232-27 in order to implement changes made in OMB Circular A-125 (Revised), dated December 12, 1989, to comply with the Prompt Payment Act Amendments of 1988 (Public Law 100-496). The rule also contains amendments to clarify and simplify the FAR text and clauses.

Item XI—Attorneys' Fees in GAO Protests (FAR Case 96-016)

This final rule amends FAR 33.104 to clarify that the \$150 hourly cap on attorneys' fees applies only to those protests filed on or after October 1, 1995. Protests filed with the General Accounting Office prior to October 1, 1995, are not subject to the hourly cap on attorneys' fees, in accordance with Sections 10001 and 10002 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).

Item XII—Contractors' Purchasing Systems Reviews (FAR Case 94-605)

This final rule amends FAR 44.302 to (1) add a requirement for the cognizant contract administration agency to determine the need for a contractor purchasing system review (CPSR) based on, but not limited to, the past performance of the contractor and volume, complexity, and dollar value of the contractor's subcontracting activity; and (2) delete the requirement for a CPSR to be performed initially and at least every 3 years thereafter, for contractors exceeding a certain sales level. Also, FAR sections 44.303 through 44.307 are amended to conform to amendments at 44.302.

Item XIII—Performance-Based Payments (FAR Case 96-005)

This final rule amends FAR 52.232-32, Performance-Based Payments, by adding paragraphs (f)(6) and (7) to address title to residual material and liability for Government-furnished property, for consistency with paragraphs (d)(6) and (7) of FAR 52.232-16, Progress Payments.

Item XIV—Technical Corrections

Corrections have been made to Federal Acquisition Circular 90-44, which appeared in the Federal Register at 61 FR 69286, December 31, 1996, to correct clause dates to correspond with the effective dates of the rules, and Federal Acquisition Circular 90-45, published in the Federal Register at 62 FR 224, January 2, 1997, to replace a reference inadvertently omitted in the original document.

Dated: March 7, 1997.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

[FAC 90-46; FAR Case 96-300; Item I]

RIN 9000-AH06

Federal Acquisition Regulation; Gratuities

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 on a final rule amending the Federal Acquisition Regulation (FAR) to exempt solicitations and contracts which do not exceed the simplified acquisition threshold from the prescribed use of the clause relating to gratuities. 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 May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Linfield at (202) 501-1757 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 90-46, FAR case 96-300.

SUPPLEMENTARY INFORMATION:

A. Background

The interim rule published as Item III of Federal Acquisition Circular 90-40 in the Federal Register at 61 FR 39199, July 26, 1996, is adopted as final without change. The interim rule implemented Section 801 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106). Section 801 amended 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 Gratuities Act. Therefore, the clause at 52.203-3, Gratuities, is prescribed for inclusion in only those contracts which exceed the simplified acquisition threshold.

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 only a small number of Federal contractors have been subject to action under the Gratuities clause.

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