

of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 6, 15, and 24

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 6, 15, and 24 are amended as set forth below:

1. The authority citation for 48 CFR Parts 6, 15, and 24 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 6—COMPETITION REQUIREMENTS

2. Section 6.305 is amended in paragraph (1) by revising the third sentence to read as follows:

6.305 Availability of the justification.

(1) * * * Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

3. Section 15.1006 is amended in paragraph (e) introductory text by revising the second sentence to read as follows:

15.1006 Postaward debriefing of offerors.

* * * * *

(e) * * * Moreover, debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act, including—

* * * * *

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

24.202 [Redesignated as 24.203]

4. Section 24.202 is redesignated as 24.203 and a new section 24.202 is added to read as follows:

24.202 Prohibitions.

(a) A proposal in the possession or control of the Government, submitted in response to a competitive solicitation, shall not be made available to any person under the Freedom of Information Act. This prohibition does not apply to a proposal, or any part of a proposal, that is—

(1) In the possession or control of NASA or the Coast Guard; or

(2) Set forth or incorporated by reference in a contract between the Government and the contractor that submitted the proposal. (See 10 U.S.C. 2305(g) and 41 U.S.C. 253b(m).)

(b) No agency shall disclose any information obtained pursuant to 15.804–5(b) that is exempt from disclosure under the Freedom of Information Act. (See 10 U.S.C. 2306a(d)(2)(C) and 41 U.S.C. 254b(d)(2)(C).)

[FR Doc. 96–33208 Filed 12–31–96; 8:45 am]

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48 CFR Parts 4, 12, 15, 16, 25, 31, 46, and 52

[FAC 90–45; FAR Case 96–306; Item V]

RIN 9000–AH16

Federal Acquisition Regulation; Exceptions to Requirements for Certified Cost or Pricing Data

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 to amend the Federal Acquisition Regulation (FAR) to implement Section 4201 of the Federal Acquisition Reform Act of 1996. 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: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501–3221 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501–4755. Please cite FAC 90–45, FAR case 96–306.

SUPPLEMENTARY INFORMATION:

A. Background

This final FAR rule implements changes to the Truth in Negotiations Act (TINA) contained in Section 4201 of the Clinger-Cohen Act of 1996 (Pub. L. 104–106) and—

Simplifies obtaining a TINA exception for commercial items by eliminating the distinction between catalog or market-priced commercial items and all other commercial items;

Eliminates the subordination of the commercial item exception to the

traditional exceptions of adequate price competition, catalog or market-priced commercial items, or prices set by law or regulation, which previously was required by the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355) (FASA);

Eliminates the criteria established by FASA for the commercial item exception (i.e., an exception could not be granted unless price reasonableness could be determined based on specific information requirements) and deletes the authority to obtain cost or pricing data for commercial item acquisitions when the criteria is not met; and

Eliminates the clause for postaward audit of information submitted to support the pricing of commercial item contracts.

The Federal Acquisition Reform Act of 1996 was subsequently named the Clinger-Cohen Act of 1996.

A proposed rule was published on August 7, 1996 (61 FR 41214). Sixteen comments were received from seven respondents. All comments were 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis and do not require the submission of cost or pricing data.

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 4, 12, 15, 16, 25, 31, 46, and 52

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 4, 12, 15, 16, 25, 31, 46, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 4, 12, 15, 16, 25, 31, 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 4—ADMINISTRATIVE MATTERS

4.702 [Amended]

2. Section 4.702 is amended by removing paragraph (a)(3).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Section 12.209 is revised to read as follows:

12.209 Determination of price reasonableness when contracting by negotiation.

When contracting by negotiation for commercial items, the policies and procedures in subpart 15.8 shall be used to establish the reasonableness of prices.

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.106 is revised to read as follows:

15.106 Contract clause.

(a) This section implements 10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133.

(b) The contracting officer shall, if contracting by negotiation, insert the clause at 52.215-2, Audit and Records—Negotiation, in solicitations and contracts except those—

(1) Not exceeding the simplified acquisition threshold;

(2) For commercial items exempted under 15.804-1; or

(3) For utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge.

(c) In facilities contracts, the contracting officer shall use the clause with its Alternate I. In cost-reimbursement contracts with educational institutions and other nonprofit organizations, the contracting officer shall use the clause with its Alternate II. If the examination of records by the Comptroller General is waived in accordance with 25.901, the contracting officer shall use the clause with its Alternate III.

15.106-1 and 15.106-2 [Removed]

5. Sections 15.106-1 and 15.106-2 are removed.

15.802 [Amended]

6. Section 15.802 is amended in the third sentence of paragraph (a) introductory text by revising “15.804-5(b)” to read “15.804-5”, and in paragraph (a)(1) by revising “15.804-5(a)(3)” to read “15.804-5(b)”.

7. Section 15.804-1 is amended by revising paragraph (a); removing (b)(2); redesignating (b)(3) through (b)(6) as (b)(2) through (b)(5), respectively, and revising newly designated (b)(3) and (b)(5); and by removing paragraphs (c) and (d). The revised text reads as follows:

15.804-1 Prohibition on obtaining cost or pricing data.

(a) *Exceptions to cost or pricing data requirements.* The contracting officer shall not, pursuant to 10 U.S.C. 2306a and 41 U.S.C. 254b, require submission of cost or pricing data (but may require information other than cost or pricing data to support a determination of price reasonableness or cost realism)—

(1) If the contracting officer determines that prices agreed upon are based on—

(i) Adequate price competition (see exception standards at paragraph (b)(1) of this subsection; or

(ii) Prices set by law or regulation (see exception standards at paragraph (b)(2) of this subsection).

(2) For acquisition of a commercial item (see exception standards at paragraph (b)(3) of this subsection).

(3) For exceptional cases where a waiver has been granted (see exception standards at paragraph (b)(4) of this subsection).

(4) For modifications to contracts or subcontracts for commercial items, if the basic contract or subcontract was awarded without the submission of cost or pricing data because the action was granted an exception from cost or pricing data requirements under paragraph (a)(1) or (a)(2) of this subsection and the modification does not change the contract or subcontract to a contract or subcontract for the acquisition of other than a commercial item (see exception standards at paragraph (b)(5) of this subsection).

(b) * * *

(3) *Commercial items.* An acquisition for an item that meets the commercial item definition in 2.101 is excepted from the requirement to obtain cost or pricing data.

(5) *Modifications.* This exception applies when the original contract or subcontract was exempt from cost or pricing data based on adequate price competition, price set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item (15.804-1(a)(1) or (a)(2)). For modifications of contracts or subcontracts for commercial items, the exception at 15.804-1(a)(4) applies if the modification does not change the item from a commercial item to a

noncommercial item. However, if the modification to a contract or a subcontract changes the nature of the work under the contract or subcontract either by a change to the commercial item or by the addition of other noncommercial work, the contracting officer is not prohibited from obtaining cost or pricing data for the changed or added work.

8. Section 15.804-2 is amended in the second sentence of paragraph (a)(1), introductory text, by removing “15.804-1 (b)(5)” and inserting “15.804-1 (b)(4)”; and in paragraph (a)(1)(ii) by removing “15.804-1(b)(5)” and inserting “15.804-1(b)(4)” in its place; and by revising paragraph (a)(2) to read as follows:

15.804-2 Requiring cost or pricing data.

(a) * * *

(2) Unless prohibited because an exception at 15.804-1 (a)(1) or (a)(2) applies, the head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain cost or pricing data for pricing actions below the pertinent threshold in paragraph (a)(1) of this subsection provided the action exceeds the simplified acquisition threshold. The head of the contracting activity shall justify the requirement for cost or pricing data. The documentation shall include a written finding that cost or pricing data are necessary to determine whether the price is fair and reasonable and the facts supporting that finding.

* * * * *

9. Section 15.804-5 is revised to read as follows:

15.804-5 Requiring information other than cost or pricing data.

(a) *General.* (1) If cost or pricing data are not required because an exception applies, or an action is at or below the cost or pricing data threshold, the contracting officer shall perform a price analysis to determine the reasonableness of the price and any need for further negotiation.

(2) The contracting officer shall require submission of information other than cost or pricing data only to the extent necessary to determine reasonableness of the price or cost realism. Unless an exception under 15.804-1(a)(1) applies, the contracting officer shall obtain, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price.

(3) The contractor's format for submitting such information shall generally be used (see 15.804-5(c)(2)).

(4) The contracting officer shall ensure that information used to support price negotiations is sufficiently current to permit negotiation of a fair and reasonable price. Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists. Such data shall not be certified in accordance with 15.804-4.

(b) *Adequate price competition.* When an acquisition is based on adequate price competition, generally no additional information is necessary to determine the reasonableness of price. However, if it is determined that additional information is necessary to determine the reasonableness of the price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. In addition, the contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches.

(c) *Limitations relating to commercial items.* (1) Requests for sales data relating to commercial items shall be limited to data for the same or similar items during a relevant time period.

(2) The contracting officer shall, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror in commercial operations.

(3) Any information relating to commercial items obtained pursuant to this paragraph (c) that is prohibited from disclosure by 24.202(a) or exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b)) (see 24.202(b)) shall not be disclosed by the Government.

10. Section 15.804-6 is amended in paragraph (a)(5) by removing the words "or postaward" and in Table 15-2 by revising the fourth paragraph of Item 1 entitled "Established Catalog or Market Prices or Prices Set by Law or Regulation or Commercial Items Not Covered By Another Exception" to read as follows:

15.804-6 Instructions for submission of cost or pricing data or information other than cost or pricing data.

* * * * *

Prices Set by Law or Regulation or Commercial Item Exception—When an exception from the requirement to submit cost or pricing data is requested, whether the item was produced by others or by the offeror, provide justification for the exception.

* * * * *

11. Section 15.812-1 is amended by revising paragraph (b) and the fourth sentence of paragraph (c) to read as follows:

15.812-1 General.

* * * * *

(b) However, the policy in paragraph (a) of this subsection does not apply to any contract or subcontract for acquisition of a commercial item.

(c) * * * The information shall not be requested for commercial items. * * *

12. Section 15.812-2 is amended by revising paragraphs (a)(3) and (a)(5); and adding (a)(6) to read as follows:

15.812-2 Contract clause.

(a) * * *

(3) Utility services under part 41;

* * * * *

(5) Acquisitions of commercial items; and

(6) Contracts for petroleum products.

* * * * *

PART 16—TYPES OF CONTRACTS

13. Section 16.203-4 is amended by revising paragraphs (a)(1)(ii) and (b)(1)(ii) to read as follows:

16.203-4 Contract clauses.

(a)(1) * * *

* * * * *

(ii) The requirement is for standard supplies that have an established catalog or market price.

* * * * *

(b)(1) * * *

* * * * *

(ii) The requirement is for semistandard supplies for which the prices can be reasonably related to the prices of nearly equivalent standard supplies that have an established catalog or market price.

* * * * *

PART 25—FOREIGN ACQUISITION

25.901 [Amended]

14. Section 25.901 is amended in the first sentence of paragraph (b) by removing "15.106-1(b)" and inserting "15.106(b)" in its place.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

15. Section 31.205-26 is amended by revising paragraph (f) to read as follows:

31.205-26 Material costs.

* * * * *

(f) When a commercial item under paragraph (e) of this subsection is transferred at a price based on a catalog or market price, the price should be adjusted to reflect the quantities being

acquired and may be adjusted to reflect the actual cost of any modifications necessary because of contract requirements.

PART 46—QUALITY ASSURANCE

46.804 [Amended]

16. Section 46.804 is amended in the second sentence by removing "(see 15.804-1(b)(2))".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.215-2 [Amended]

17. Section 52.215-2 is amended in the introductory text by removing "15.106-1(b)" and inserting "15.106(b)" in its place; in Alternates I, II and III, by revising the Alternate dates to read "(JAN 1997)" and removing "15.106-1(c)" and inserting "15.106(c)" in its place.

18. Section 52.215-26 is revised to read as follows:

52.215-26 Integrity of Unit Prices.

As prescribed in 15.812-2, insert the following clause:

INTEGRITY OF UNIT PRICES (JAN 1997)

(a) Any proposal submitted for the negotiation of prices for items of supplies shall distribute costs within contracts on a basis that ensures that unit prices are in proportion to the items' base cost (e.g., manufacturing or acquisition costs). Any method of distributing costs to line items that distorts unit prices shall not be used. For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost. Nothing in this paragraph requires submission of cost or pricing data not otherwise required by law or regulation.

(b) The Offeror/Contractor shall also identify those supplies which it will not manufacture or to which it will not contribute significant value when requested by the Contracting Officer. (End of clause)

Alternate I (JAN 1997). As prescribed in 15.812-2(b), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Offeror/Contractor shall also identify those supplies which it will not manufacture or to which it will not contribute significant value.

19. Section 52.215-41 is amended by revising the provision and Alternates II and III to read as follows:

52.215-41 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data.

* * * * *

REQUIREMENTS FOR COST OR PRICING DATA OR INFORMATION OTHER THAN COST OR PRICING DATA (JAN 1997)

(a) *Exceptions from cost or pricing data.* (1) In lieu of submitting cost or pricing data,

offerors may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) *Identification of the law or regulation establishing the price offered.* If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include—

(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(C) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. Access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

(b) *Requirements for cost or pricing data.* If the offeror is not granted an exception from the requirement to submit cost or pricing data, the following applies:

(1) The offeror shall submit cost or pricing data on Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet (Cost or Pricing Data Required), with supporting attachments prepared in accordance with Table 15-2 of FAR 15.804-6(b)(2).

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed in FAR 15.804-4.

(End of provision)

* * * * *

Alternate II (JAN 1997). As prescribed in 15.804-8(h), add the following paragraph (c) to the basic provision:

(c) When the proposal is submitted, also submit one copy each, including the SF 1411 and supporting attachments, to (1) the Administrative Contracting Officer, and (2) the Contract Auditor.

Alternate III (JAN 1997). As prescribed in 15.804-8(h), add the following paragraph (c) to the basic provision (if Alternate II is also used, redesignated as paragraph (d)):

(c) Submit the cost portion of the proposal via the following electronic media: (Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.).

* * * * *

20. Section 52.215-42 is amended by revising the clause; and revising the date and the last sentence in paragraph (b) of Alternate IV to read as follows:

52.215-42 Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data—Modifications.

* * * * *

REQUIREMENTS FOR COST OR PRICING DATA OR INFORMATION OTHER THAN COST OR PRICING DATA—MODIFICATIONS (JAN 1997)

(a) *Exceptions from cost or pricing data.* (1) In lieu of submitting cost or pricing data for modifications under this contract, for price adjustments expected to exceed the threshold set forth at FAR 15.804-2(a)(1) on the date of the agreement on price or the date of the award, whichever is later, the Contractor may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) *Identification of the law or regulation establishing the price offered.* If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Information on modifications of contracts or subcontracts for commercial items.

(A) If (1) the original contract or subcontract was granted an exception from cost or pricing data requirements because the price agreed upon was based on adequate price competition, or prices set by law or regulation, or was a contract or subcontract for the acquisition of a commercial item, and (2) the modification (to the contract or subcontract) is not exempted based on one of these exceptions, then the Contractor may provide information to establish that the modification would not change the contract or subcontract from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(B) For a commercial item exception, the Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold

that is adequate for evaluating the reasonableness of the price of the modification. Such information may include:

(1) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(2) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(3) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this clause, and the reasonableness of price. Access does not extend to cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace.

(b) *Requirements for cost or pricing data.* If the Contractor is not granted an exception from the requirement to submit cost or pricing data, the following applies:

(1) The Contractor shall submit cost or pricing data on Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet (Cost or Pricing Data Required), with supporting attachments prepared in accordance with Table 15-2 of FAR 15.804-6(b)(2).

(2) As soon as practical after agreement on price, but before award (except for unpriced actions), the Contractor shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.804-4.

(End of clause)

* * * * *

Alternate IV (JAN 1997) * * *

(b) * * * *Standard Form 1448, Proposal Cover Sheet (Cost or Pricing Data Not Required), may be used for information other than cost or pricing data.*

52.215-43 [Removed]

21. Section 52.215-43 is removed.

22. Section 52.216-2 is amended by revising the introductory paragraph, the clause date, and the third sentence in paragraph (a) to read as follows:

52.216-2 Economic Price Adjustment—Standard Supplies.

As prescribed in 16.203-4(a), insert the following clause. The clause may be modified by increasing the 10 percent limit on aggregate increases specified in subparagraph (c)(1), upon approval by the chief of the contracting office.

**ECONOMIC PRICE ADJUSTMENT—
STANDARD SUPPLIES (JAN 1997)**

(a) * * * The term "established price" means a price that (1) is an established catalog or market price for a commercial item sold in substantial quantities to the general public, and (2) is the net price after applying any standard trade discounts offered by the Contractor.

* * * * *

23. Section 52.216-3 is amended by revising the introductory paragraph, the clause date, and the second sentence of paragraph (a) to read as follows:

**52.216-3 Economic Price Adjustment—
Semistandard Supplies.**

As prescribed in 16.203-4(b), insert the following clause. The clause may be modified by increasing the 10 percent limit on aggregate increases specified in subparagraph (c)(1), upon approval by the chief of the contracting office.

**ECONOMIC PRICE ADJUSTMENT—
STANDARD SUPPLIES (JAN 1997)**

(a) * * * The term "established price" means a price that (1) is an established catalog or market price for a commercial item sold in substantial quantities to the general public, and (2) is the net price after applying any standard trade discounts offered by the Contractor. * * *

[FR Doc. 96-33209 Filed 12-31-96; 8:45 am]

BILLING CODE 6820-EP-P

**48 CFR Parts 5, 14, 15, 17, 25, 27, and
52**

[FAC 90-45; FAR Case 93-310; Item VI]

RIN 9000-AF60

**Federal Acquisition Regulation;
Implementation of the North American
Free Trade Agreement Implementation
Act**

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 on a final rule implementing the North American Free Trade Agreement (NAFTA) Implementation Act related to applications of the Buy American Act provisions to acquisition of certain Mexican and Canadian products. 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: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Paul L. 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 90-45, FAR case 93-310.

SUPPLEMENTARY INFORMATION:

A. Background

An interim rule was published in the Federal Register on January 5, 1994 (59 FR 544, FAC 90-19), FAR case 93-310, to implement NAFTA. Based on the analysis of public comments, a revised interim rule was published in the Federal Register on June 20, 1996 (61 FR 31646) (FAC 90-39). One late public comment was received and considered, but was not incorporated in the final rule. This final rule does contain revisions resulting from public comments received on FAR Case 96-312 published as Item II in this FAC. Upon consideration of those public comments, certifications eliminated under the interim rule published at 61 FR 31646 are being retained. The Government believes if the certifications were eliminated, offerors would be required to submit more detailed information regarding the origins of offered products. Without this information, enforcing a national policy grounded in vital economic and security interests would be extremely difficult. To satisfy this national policy interest, the self-policing discipline of a certification was determined to be the less burdensome alternative.

B. Regulatory Flexibility Act

This final rule is 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 waives the Buy American Act for certain Mexican and Canadian products. A Final Regulatory Flexibility Analysis (FRFA) has been prepared. A copy of the FRFA may be obtained from the FAR Secretariat. The FRFA is summarized as follows: This final rule generally applies to all businesses, large and small, that contract with Federal agencies other than the Department of Defense for supply contracts with an estimated value above \$25,000. This final rule also applies to Federal construction contracts, including those awarded by the Department of Defense, with an acquisition value of \$6,500,000 or more. Although U.S. businesses may face increased competition from Canadian or Mexican firms, they may also find an

increased market for their materials in Canada and Mexico.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies because the provision at FAR 52.225-20 requires offerors to list the line item number and the country of origin for any end product other than a domestic end product. Accordingly, a request for clearance of the information collection requirement was submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* and has been approved under OMB Control Number 9000-0130.

List of Subjects in 48 CFR Parts 5, 14, 15, 17, 25, 27, and 52

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

**Interim Rule Adopted as Final With
Changes**

Accordingly, the interim rule amending 48 CFR Parts 5, 14, 15, 17, 25, 27, and 52, which was published at 59 FR 544 on January 5, 1994, and amended by the interim rule published at 61 FR 31646 on June 20, 1996, is adopted as final with changes as set forth below:

1. The authority citation for 48 CFR Parts 5, 14, 15, 17, 25, 27, 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 25—FOREIGN ACQUISITION

25.408 [Amended]

2. Section 25.408 is amended in paragraph (a)(3) by removing the word "Provision" in the title of the provision and inserting "Certificate".

**PART 52—SOLICITATION PROVISIONS
AND CONTRACT CLAUSES**

3. Section 52.212-3 is amended by revising the date of the provision and paragraphs (g)(1)(i), (g)(1)(iii), and (g)(2) to read as follows:

**52.212-3 Offeror Representations and
Certifications—Commercial Items.**

* * * * *

**OFFEROR REPRESENTATIONS AND
CERTIFICATIONS—COMMERCIAL ITEMS
(JAN 1997)**

* * * * *

(g)(1) * * *

(i) The offeror certifies that each end product being offered, except those listed in paragraph (g)(1)(ii) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act—North American Free Trade Agreement