

TABLE 1.—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility/Address	Waste description
	(D) If the Regional Administrator or his delegate determines that the reported information does require action by the EPA's Regional Administrator or his delegate will notify the facility in writing of the actions the Regional Administrator or his delegate believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing the facility with an opportunity to present information as to why the proposed EPA action is not necessary. The facility shall have 10 days from the date of the Regional Administrator or his delegate's notice to present such information.
	(E) Following the receipt of information from the facility described in paragraph (6)(D) or (if no information is presented under paragraph (6)(D)) the initial receipt of information described in paragraphs (5), (6)(A) or (6)(B), the Regional Administrator or his delegate will issue a final written determination describing the EPA actions that are necessary to protect human health or the environment. Any required action described in the Regional Administrator or his delegate's determination shall become effective immediately, unless the Regional Administrator or his delegate provides otherwise.
	(7) Notification Requirements: OxyVinyls must do the following before transporting the delisted waste: Failure to provide this notification will result in a violation of the delisting petition and a possible revocation of the decision.
	(A) Provide a one-time written notification to any State Regulatory Agency to which or through which it will transport the delisted waste described above for disposal, 60 days before beginning such activities.
	(B) Update the one-time written notification if it ships the delisted waste into a different disposal facility.
	(C) Failure to provide this notification will result in a violation of the delisting variance and a possible revocation of the decision.
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16 and 39

[FAR Case 2003-008]

RIN 9000-AJ74

Federal Acquisition Regulation; Share-in-Savings Contracting

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

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to solicit comments to assist in the implementation of section 210 of the E-Government Act of 2002, Public Law 107-347. Section 210 authorizes Governmentwide use of Share-in-Savings (SIS) contracts for information technology (IT). SIS contracts offer an

innovative approach for encouraging industry to share creative technology solutions with the Government. Through a properly structured SIS contract, agencies may lower costs and improve service delivery without large "up front" investments by having the contractor provide the technology investment and allowing the contractor to share with the Government in the savings achieved. The Councils seek the public's comment on the challenges associated with SIS contracts, such as the establishment of quantifiable baselines and a reasonable return on investment (ROI) over the life-cycle of the investment, so that this tool can be applied effectively to improve mission performance.

DATES: Interested parties should submit comments in writing on or before October 31, 2003, to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to ANPR.2003-008@gsa.gov.

Please submit comments only and cite ANPR FAR case 2003-008 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (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 FAR case 2003-008.

SUPPLEMENTARY INFORMATION:

A. Background

Section 210 of the E-Government Act amends the Armed Services Procurement Act and the Federal Property and Administrative Services Act to authorize the use of SIS contracts for IT. Share-in-Savings is an innovative, performance-based concept that is intended to help an agency leverage its limited resources to improve or accelerate mission-related or administrative processes and lower costs for the taxpayer. Under an SIS contract, the contractor finances the work and then shares with the agency in the savings generated from contract performance. Pursuant to the authority in section 210, which sunsets at the end of fiscal year 2005, agencies are permitted to enter into SIS contracts for up to 5 years, and, with appropriate approval, up to 10 years. Agencies are obligated to pay the contractor for services performed only if savings are realized and, in such cases, only a portion of the total savings realized. The agency may retain its share of the savings, with certain exceptions.

Section 210 authorizes the Federal Government to award any number of SIS IT contracts where funds are available and sufficient to make payments with respect to the first fiscal

year of the contract and cover termination or cancellation costs. Section 210 also authorizes award of up to 10 contracts (*i.e.*, 5 for DOD, NASA, and the Coast guard, and 5 for other agencies) during fiscal years 2003, 2004, and 2005 when funds are not made specifically available for the full costs of cancellation or termination of the contract—provided that the amount of unfunded contingent liability associated with cancellation and termination does not exceed the lesser of (a) 25 percent of the estimated costs of a cancellation or termination or (b) \$5 million. In signing the E-Government Act into law, the President stated that the executive branch shall “limit authorized waivers for funding of potential termination costs to appropriate circumstances, so as to minimize the financial risk to the government” and ensure SIS contracts are operated according to sound fiscal policy.

This past winter, the General Accounting Office (GAO) released a report examining non-federal entities’ experience with SIS contracts. See *CONTRACT MANAGEMENT: Commercial Use of Share-in-Savings Contracting*, GAO–03–327 (January 2003). The GAO found that SIS contracting can be highly effective in motivating contractors to generate savings and revenues for their clients. At the same time, the GAO cautioned that contracting parties must be “specific and in agreement in their goals and objectives as well as how to achieve them.” The GAO identified several specific elements that are necessary for Share-in-Savings contracts to be successful, namely: (1) A clearly specified expected outcome, (2) defined incentives, (3) a baseline and good performance measures to gauge exactly what savings or revenues are being achieved, and (4) the commitment of senior level management. The GAO emphasized that effective planning is critical: “[Parties] need to carefully consider the potential risks and rewards of an SIS arrangement and whether the conditions that facilitate success are present—something that may not be easily achievable in Government, which is frequently unable to calculate a baseline.”

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. Solicitation of Public Comment

The Councils, along with the Office of Management and Budget (OMB), wish to

ensure the necessary guidance is in place—in the FAR and other documents as appropriate—for agencies to effectively motivate contractors and successfully capture the benefits of an SIS contract. Given the Government’s limited experience with this tool and the GAO’s cautions, the Councils are soliciting public comment for consideration in drafting implementing FAR regulations. Comments received may also be shared with Federal agencies for related guidance (regulatory or nonregulatory) that they may wish to issue to address SIS contracting. Respondents are welcome to share any insights that may assist in managing the use of SIS contracts, but are especially encouraged to comment on the following issues:

- *Proposal preparation.* What type of information or guidance will vendors need in the solicitation to adequately prepare a proposal for an SIS contract?
- *Share ratios.* What criteria should be taken into account in developing an appropriate share ratio and schedule for payment? Should ROIs be market-based? In light of the generally short life cycle of IT, can the Government’s interests be adequately protected if it does not share in savings each year?
- *Baselines.* What general factors or criteria should be considered in determining a quantifiable baseline?
- *Cancellation and termination costs.* How, if at all, should the determination of cancellation and termination costs differ from that used in connection with multi-year contracts (see FAR 17.106–1(c))?
- *Ownership rights.* Should ownership rights of hardware or property acquired under the SIS contract be addressed in the FAR (*e.g.*, in the coverage on cancellation costs or in a standard contract clause)?
- *Applicability of requirements.* What contract valuation method should be used to determine the applicability of various FAR requirements that are triggered by the dollar amount of the acquisitions?
- *Contract structure.* Should there be a preference for structuring SIS contracts as firm-fixed price or fixed-price with economic price adjustment? Under what, if any, circumstances would other contract types be appropriate?
- *Use of FAR 37.6.* Which, if any, of the policies pertaining to performance-based contracting in FAR Subpart 37.6 should not be applicable to an SIS contract, and why?
- *Potential projects.* What types of activities in the IT arena might be especially conducive to SIS contracting?

C. Regulatory Amendments Under Consideration.

The Councils are currently planning to amend FAR part 39 to establish a new subpart on SIS contracting for IT. FAR subpart 16.4, addressing incentive contracts, would also be amended to add a cross-reference both to the new subpart 39.3 as well as FAR 23.204, which provides guidance on energy-savings performance contracts, a type of Share-in-Savings contract authorized by the National Energy Conservation Policy Act, 42 U.S.C. 8287.

Although the Councils have not yet agreed upon FAR amendments, their preliminary thinking on regulatory implementation as of the publication of this notice is set forth below. The public is welcome to comment on these preliminary changes as part of their comments in response to this notice.

List of Subjects in 48 CFR Parts 16 and 39

Government procurement.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 16 and 39 as set forth below:

1. The authority citation for 48 CFR parts 16 and 39 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 16—TYPES OF CONTRACTS

16.401 [Amended]

2. Amend section 16.401 by adding paragraph (e) to read as follows:

16.401 General.

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(e) For related incentive concepts, refer to Subpart 39.3, Share-in-Savings Contracting, and 23.204, Energy-savings performance contracts.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 39.3 [Added]

3. Add subpart 39.3 consisting of sections 39.300 through 39.309, to read as follows:

Subpart 39.3—Share-in-Savings Contracting

39.300 Scope of subpart.

This subpart implements section 210 of the E-Government Act of 2002 (Public Law 107–347) by prescribing policies and procedures for Share-in-Savings contracts for information technology.

39.301 Definitions.

As used in this subpart—

Cancellation means the cancellation (within a contractually specified time) of the total requirements of all remaining program years. Cancellation results when the contracting officer—

- (i) Notifies the contractor of nonavailability of funds for contract performance for any subsequent program year; or
- (ii) Fails to notify the contractor that funds are available for performance of the succeeding program year requirement.

Savings means—

- (1) Monetary savings to an agency; or
- (2) Savings in time or other quantifiable benefits realized by the agency, including enhanced revenues (other than enhanced revenues from the collection of fees, taxes, debts, claims, or other amounts owed the Federal Government).

Share-in-Savings contract means a contract under which—

- (1) A contractor provides solutions for improving the agency's mission-related or administrative processes or for accelerating the achievement of agency missions; and

- (2) The Government pays the contractor an amount equal to a portion of the quantifiable savings derived by the agency from—

- (i) Any improvements in mission-related or administrative processes that result from implementation of the solution; or

- (ii) Acceleration of achievement of agency missions.

39.302 Authority.

The E-Government Act of 2002 (Public Law 107-347) authorizes the head of an agency to enter into a Share-in-Savings contract for information technology. This authority expires on September 30, 2005.

39.303 Applicability.

This subpart applies only to information technology projects that are appropriate for Share-in-Savings contracting techniques.

- (a) In general, use of Share-in-Savings contracts should be considered only for projects involving significant innovation or process transformation.

- (b) Agencies intending to use this subpart are encouraged to complete the "Share-in-Savings Project Screening Template" at: <http://www.gsa.gov/shareinsavings>. The information provided in this template will help the General Services Administration to assist agencies in determining the potential effectiveness of using the authority of this subpart.

- (c)(1) The capital programming requirements of OMB Circular A-11 shall apply to—

- (i) Share-in-Savings projects for which funds are not being made specifically available for the full costs of cancellation or termination; and

- (ii) Other Share-in-Savings projects that qualify as major IT investments, as provided in the Circular.

- (2) Share-in-Savings projects not covered by paragraph (c)(1) shall be the subject of a business case appropriate for the size and complexity of the project as determined by the agency and the Office of Management and Budget.

39.304 Limitations on Share-in-Savings contract period of performance.

- (a) Except as provided in paragraph (b) of this section, a Share-in-Savings contract shall be awarded for a period of not more than 5 years.

- (5) A Share-in-Savings contract may be awarded for a period greater than 5 years, but not more than 10 years, if other applicable requirements do not otherwise limit the length of the contract and the head of the agency determines in writing prior to award of the contract that—

- (1) The level of risk to be assumed and the investment to be undertaken by the contractor is likely to inhibit the Government from obtaining the needed information technology competitively at a fair and reasonable price if the contract is limited in duration to a period of 5 years or less; and

- (2) Use of the information technology to be acquired is likely to continue for a period of time sufficient to generate reasonable benefit for the Government.

39.305 Use of performance-based contracts.

Share-in-Savings contracts shall be performance-based contracts. Objective outcomes and performance standards shall be used to measure achievements and milestones that must be met before payment is made (*see* subpart 37.6).

39.306 Share-in-Savings baseline.

- (a) Share-in-Savings contracts shall include a clause containing a quantifiable baseline that is to be the basis upon which a saving share ratio is established to govern the amount of payment a contractor is to receive under a contract.

- (b) Before award of a Share-in-Savings contract, the agency senior procurement executive shall determine in writing that the terms of the baseline clause are quantifiable and will likely yield value to the Government.

39.307 Managing retained savings.

- (a) Agencies may retain savings in excess of the total amount of savings paid to the contractor under the contract, but may not retain any portion of such savings that is attributable to a decrease in the number of civilian employees of the Federal Government performing the function. Except as provided in paragraph (b) of this section, savings shall be credited to the appropriation or fund against which charges were made to carry out the contract and shall be used for information technology.

- (b) Amounts retained by the agency under this subpart shall—

- (1) Without further appropriation, remain available until expended; and

- (2) Be applied first to fund any cancellation or termination liabilities associated with Share-in-Savings procurements that are not fully funded.

39.308 Cancellation or termination.**39.308-1 Paying for cancellation or termination.**

- (a) The amount payable in the event of cancellation or termination of a Share-in-Savings contract shall be negotiated with the contractor at the time of contract award.

- (b) If funds are not made available for the continuation of a Share-in-Savings contract in a subsequent fiscal year, the contract shall be cancelled or terminated. The costs of cancellation or termination may be paid out of—

- (1) Appropriations available for the performance of the contract;

- (2) Appropriations available for acquisition of the information technology procured under the contract, and not otherwise obligated; or

- (3) Funds subsequently appropriated for payments of costs of cancellation or termination, subject to the limitations in 39.308-2.

39.308-2 Funding of cancellation or termination liability.

- (a) Except as provided in paragraph (b) of this subsection, the funds obligated for Share-in-Savings contracts must be sufficient to cover any potential cancellation and/or termination costs.

- (b)(1) The head of an agency may enter into Share-in-Savings contracts even if funds are not made specifically available for the full costs of cancellation or termination of the contract provided that—

- (i) The action is approved as provided in paragraph (b)(1)(iii) of this subsection;

- (ii) Funds are available and sufficient to make payments with respect to the first fiscal year of the contract; and

(iii) The following conditions are met regarding the funding of cancellation and termination liability:

(A) The amount of unfunded liability does not exceed the lesser of 25 percent of the estimated costs of a cancellation or termination, or \$5 million.

(B) An unfunded cancellation or termination liability in excess of \$1 million has been approved by the Director of the Office of Management and Budget.

(C) Notification has been provided to OMB in accordance with paragraph (c) of this subsection.

(2) The aggregate number of Share-in-Savings contracts that may be entered into under this paragraph may not exceed 5 in each of fiscal years 2003, 2004, and 2005 for each of the following groups of agencies:

(i) The Department of Defense, NASA, and the Coast Guard.

(ii) All other agencies.

(c) In addition to the requirements specified in paragraph (b) of this subsection, an agency planning to award a Share-in-Savings contract having an unfunded cancellation or termination liability in any amount must notify the Office of Management and Budget at least 30 days prior to solicitation issuance.

39.309 Solicitation requirements.

(a) Solicitations for Share-in-Savings contracts shall use competitive procedures to the maximum extent practicable. Each solicitation shall include provisions and evaluation criteria ensuring that—

(1) The contractor's share of savings reflects the risks involved and market conditions; and

(2) The Government will realize best value from the contract.

(b) Contracting officers should consider the use of a technology refreshment clause to ensure the information technology provided under the contract incorporates desired technological advancements throughout the entire period of contract performance. In developing such a clause, contracting officers should consider similar terms and conditions available on the commercial market.

(c) Contracting officers may include other appropriate clauses not specifically prescribed in the FAR to ensure that the goals of the Share-in-Savings contract are attained, provided that such clauses are consistent with applicable statutes and regulations.

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