Item IV—Federal Computer Network (FACNET) Architecture (FAR Case 2006–015)

This final rule amends the Federal Acquisition Regulation (FAR) to remove FACNET references and provide the opportunity to recognize the evolution of alternative technologies, processes, etc. that Federal agencies are using and will use to satisfy their acquisition needs without removing the use of FACNET for Federal agencies that may use the system. Where necessary in the FAR, the term has been replaced with a more appropriate term that incorporates various electronic data interchange systems. The proposed rule published February 1, 2007 is adopted as final without change.

Item V—Exemption of Certain Service Contracts from the Service Contract Act (SCA) (2001–004) (Interim)

This interim rule amends Federal Acquisition Regulation (FAR) Parts 4, 15, 17, 22, and 52 to implement the U.S. Department of Labor's (DoL) final rule issued January 18, 2001 (66 FR 5327) amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the Service Contract Act. This rule imposes the DoL criteria and does not utilize the term ''commercial services.'' The rule incorporates slight revisions to the current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

Item VI—Local Community Recovery Act of 2006 (FAR Case 2006–014) (Interim)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a second interim rule amending the Federal Acquisition Regulation (FAR) to implement legislative amendments to the Stafford Act at 42 U.S.C. 5150.

The first rule implemented The Local Community Recovery Act of 2006, Pub.L. 109–218, which addressed set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. This local area set-aside could be done along with a small business set-aside.

After the first rule was published for comments in August, 2006, Congress further amended the same area of the Stafford Act in the Department of Homeland Security Appropriations Act, 2007, Public Law 109–295. The amended statute contains requirements for transitioning work to local firms in the geographic area affected by the disaster or emergency and for justifications for expenditures to entities outside the major disaster or emergency area. This second interim rule encompasses all of these changes.

Item VII—Labor Standards for Contracts Containing Construction Requirements-Contract Pricing Method References (FAR Case 2007–001)

This final rule amends the Federal Acquisition Regulation (FAR) to revise references to published pricing sources available to the contracting officer in FAR 22.404–12(c)(2). The rule removes the reference to ''R.S. Means Cost Estimating System'' as a commercial source for pricing data. The revision will provide greater flexibilities for contracting officers when selecting sources of pricing data.

Item VIII—Technical Amendments

Editorial changes are made at FAR 1.106, 25.003, 52.212–5, 52.219-9, 52.225–5, 52.225–17, 53.213, 53.302–347, and 53.302–348 in order to update references.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–21 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 2005–21 is effective November 7, 2007, except for Items II, III, IV, and VII which are effective December 7, 2007.

Dated: October 26, 2007.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: October 26, 2007.

Molly A. Wilkinson,

Chief Acquisition Officer, Office of Chief Acquisition Officer, General Services Administration.

Dated: October 18, 2007.

Harold V. Jefferson,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 07–5476 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

[FAC 2005–21; FAR Case 2006–023; Item I; Docket 2007–0001, Sequence 8]

RIN 9000–AK75

Federal Acquisition Regulation; FAR Case 2006–023, SAFETY Act: Implementation of DHS Regulations

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Department of Homeland Security (DHS) regulations on the SAFETY Act.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2006–023, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. To search for any document, first select under ''Step 1,'' ''Documents with an Open Comment Period'' and select under ''Optional Step 2,'' ''Federal Acquisition Regulation'' as the agency of choice. Under ''Optional Step 3,'' select ''Rules''. Under ''Optional Step 4,'' from the drop down list, select ''Document Title'' and type the FAR case number ''2006–023''. Click the ''Submit'' button. Please include your name and company name (if any) inside the document.

You may also search for any document by clicking on the ''Search for Documents'' tab at the top of the screen. Select from the agency field ''Federal Acquisition Regulation'', and type ''2006–023'' in the ''Document Title'' field. Select the ''Submit'' button.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat

(VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2006–023, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650 for clarification of content. Please cite FAC 2005–21, FAR case 2006–023. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

1. **The SAFETY Act and the Department of Homeland Security Regulations.**

As part of the Homeland Security Act of 2002, Public Law 107—296, Congress enacted liability protections for providers of certain anti-terrorism technologies. (The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444). The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of ''risk management'' and a system of ''litigation management.'' The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from developing, deploying, and commercializing technologies that could save lives.

The Department of Homeland Security (DHS) published a final rule (71 FR 33147, June 8, 2006, effective July 10, 2006), at 6 CFR Part 25. Liability limitations are conferred by DHS issuing the seller either a ''SAFETY Act designation'' or ''SAFETY Act certification'' that their technology is Qualified Anti-Terrorism Technology (QATT). Sellers must submit an application to be considered by DHS.

The DHS SAFETY Act certification of a technology as an ''approved product'' (proven to be safe and effective) confers a critical additional benefit over SAFETY Act designation. It confers a rebuttable presumption that sellers are entitled to the ''government contractor defense'' (§ 442(d)). In essence, the ''government contractor defense'' means that any seller of an ''approved product'' cannot be held liable for design defects.

The SAFETY Act applies to a broad range of technologies, including products, services, and software, or combinations thereof, as long as DHS determines that a technology merits Designation. DHS may designate a system containing many component technologies (including products and services) or may designate specific component technologies individually. Further, as the statutory criteria suggest, a QATT need not be newly developed - it may have already been employed (*e.g.*, ''prior United States government use'') or may be a new application of an existing technology.

In DHS's final rule implementing the SAFETY Act, DHS established a streamlined review procedure for providing SAFETY Act coverage for qualified sellers of certain categories of technologies. Those designations or certifications are known as ''block designations'' or ''block certifications.''

DHS also established another streamlined procedure where a contracting agency can seek a preliminary determination of SAFETY Act applicability, a ''pre-qualification designation notice,'' with respect to a technology to be procured by the Government.

2. **FAR Subpart 50.1, Extraordinary contractual actions.**

Existing Part 50 is renumbered as Subpart 50.1, with conforming changes in Parts 1, 18, 28, 32, 33, and 43. The additional coverage at 50.101–1(b) and 50.102–3(f) reflects the transfer and delegation of certain functions to, and other responsibilities vested in, the Secretary of DHS, including the DHS's SAFETY Act responsibilities, based on E.O. 13286.

3. **FAR Subpart 50.2, SAFETY Act.**

The coverage for the SAFETY Act will be new Subpart 50.2.

Policy. One of the most significant sections is new section 50.204. This section provides the overarching policy for implementing the SAFETY Act in Government acquisitions. For example, paragraph (a) provides that agencies should—

- Determine whether the technology to be procured is appropriate for SAFETY Act protections;
- Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and
- Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

SAFETY Act considerations. New section 50.205–1 ensures that SAFETY Act considerations are made an integral part of each agency's acquisition planning procedures, and that contracting officers give adequate lead time in their acquisition plans to account for DHS's review process of SAFETY Act applications. A reference to the SAFETY Act was also added at 7.105, Contents of written acquisition plan.

Block designation and block certification. In 50.205–1(a), this case includes coverage for block designations and block certifications. The requiring activity must check with DHS as to whether a block designation or block certification exists. If one does, then the requiring activity must inform the contracting officer. The contracting officer will then incorporate the block designations and block certifications, as applicable, in any solicitation or advanced public notice to inform potential offerors.

Pre-qualification designation notice. In accordance with 50.205–2, if a block designation or block certification does not exist, then the requiring activity must request DHS to issue a pre-qualification designation notice and inform the contracting officer if DHS issues the notice. The contracting officer will then incorporate the pre-qualification designation notice in any solicitation or advanced public notice to inform potential offerors of the notice.

4. **New provisions and clause.**

Provisions and a clause have been added to assist agencies and contracting officers in interfacing with DHS on SAFETY Act matters, including coverage concerning block designations and block certifications, and pre-qualification designation notices.

SAFETY Act Coverage Not Applicable. Contracting officers are required to insert FAR 52.250–2, SAFETY Act Coverage Not Applicable, if, after consultation with DHS, the agency has determined that SAFETY Act protection is not applicable for the acquisition, or DHS denies approval of a pre-qualification designation notice.

Basic Provisions. Contracting officers are required to insert 52.250–3, SAFETY Act Block Designation/ Certification, or 52.250–4, SAFETY Act Pre-qualification Designation Notice, in solicitations when DHS has issued a block designation/certification or a pre-qualification designation notice, respectively, for the solicited technologies. These provisions inform offerors of the terms of the block designation/block certification or pre-qualification designation notice. These basic provisions do not permit submission of offers contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s).

Alternate I - Contingent Offers. Alternate I of each basic provision

permits offerors to submit offers contingent on DHS issuing a SAFETY Act designation or certification. Under this first alternate, contracting officers may permit such contingent offers only if—

• DHS has issued, for offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation, or for offers contingent upon SAFETY Act certification, a block certification;

• The Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/certifications for their offered technologies before release of any solicitation; and

• Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

Offerors may also submit an alternate offer that is not contingent on obtaining SAFETY Act protections.

Alternate II - Presumption of SAFETY Act Protections After Award. Alternate II of each basic provision permits offerors to submit offers that presume that DHS will issue a SAFETY Act Designation or Certification after award. Contracting officers may only use this alternate if—

• All of the conditions for permitting contingent offers are met;

• The chief of the contracting office (or other official designated in agency procedures) approves the action; and

• The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

If DHS does not issue a SAFETY Act designation or SAFETY Act certification to the successful offeror by the time of contract award, the contracting officer is then permitted to award the contract with the clause at 52.250–5, SAFETY Act-Equitable Adjustment, which allows for an equitable adjustment in the event DHS denies the contractor's SAFETY Act application.

If DHS has issued a SAFETY Act designation or certification to the successful offeror, then the contracting officer will award the contract without the clause at 52.250–5.

5. **Public Meeting.**

A decision has not been made whether to hold a public meeting. If you would like to request a meeting, please contact Mr. Edward Loeb at (202) 501–0650, within three weeks of the publication of this interim rule.

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. 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 this rule imposes no burdens on businesses. Instead, it allows businesses to more easily take advantage of a Department of Homeland Security regulation published June 8, 2006, at 6 CFR 25. The Department of Homeland Security certified in their rule that there would be no significant impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–21, FAR case 2006–023), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 1640–0001 through 1640–0006, under applications made to OMB by the Department of Homeland Security.

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 urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the SAFETY Act was signed into law on November 25, 2002 (Pub. L. 107–296). The primary implementing regulations were promulgated by the Department of Homeland Security on June 8, 2006, effective July 10, 2006 (71 FR 33147). Unless DHS's final rule is integrated into the Federal acquisition system and the SAFETY Act's benefits are made available to contractors, the Government will not be able to procure the necessary technologies to protect the nation from acts of terrorism. These amendments to the Federal Acquisition Regulation are therefore necessary to integrate the benefits of the SAFETY Act into the Federal acquisition system and promote effective acquisition of anti-terrorism technologies and services.

However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 continues 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.602 [Amended]

■ 2. Amend section 1.602–3 by removing from paragraph (d) ''part 50'' and adding ''Subpart 50.1'' in its place.

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.105 by revising paragraph (b)(19) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(19) *Other considerations.* Discuss, as applicable:

(i) Standardization concepts;

(ii) The industrial readiness program;

(iii) The Defense Production Act;

(iv) The Occupational Safety and Health Act;

(v) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) (see Subpart 50.2);

(vi) Foreign sales implications; and

(vii) Any other matters germane to the plan not covered elsewhere.

* * * * *

PART 18—EMERGENCY ACQUISITIONS

18.121 [Amended]

■ 4. Amend section 18.121 by removing ''Part 50'' and adding ''Subpart 50.1'' in its place.

18.126 [Amended]

■ 5. Amend section 18.126 by—

■ a. Removing from the introductory text ''Part 50'' and adding ''Subpart 50.1'' in its place;

■ b. Removing from paragraph (a) ''50.302–1'' and adding ''50.103–2(a)'' in its place;

■ c. Removing from paragraph (b) ''50.302–2'' and adding ''50.103–2(b)'' in its place; and

■ d. Removing from paragraph (c) ''50.302–3'' and adding ''50.103–2(c)'' in its place.

PART 28—BONDS AND INSURANCE

28.308 [Amended]

■ 6. Amend section 28.308 by removing from paragraph (e) ''50.403'' and adding ''50.104–3'' in its place.

PART 32—CONTRACT FINANCING

32.401 [Amended]

■ 7. Amend section 32.401 by removing from paragraph (c) ''part 50 of the Federal Acquisition Regulation (FAR)'' and adding ''Subpart 50.1'' in its place.

32.402 [Amended]

■ 8. Amend section 32.402 by—

■ a. Removing from paragraph (a) ''FAR 50.203(b)(4)'' and adding ''50.102–3(b)(4)'' in its place;

■ b. Removing from paragraph (e)(1) ''50.201(b)'' and adding ''50.102–1(b)'' in its place; and

■ c. Removing from paragraph (f) ''FAR 50.307'' and adding ''50.103–7'' in its place.

32.405 [Amended]

■ 9. Amend section 32.405 by removing from paragraph (a) ''50.101(a)'' and adding ''50.101–1(a)'' in its place.

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 10. Amend section 33.205 by removing from paragraphs (a) and (c) ''part 50'' and adding ''Subpart 50.1'', each time it appears (three times), in its place.

PART 43—CONTRACT MODIFICATIONS

43.000 [Amended]

■ 11. Amend section 43.000 by removing from paragraph (b) ''part 50'' and adding ''Subpart 50.1'' in its place.

■ 12. Revise Part 50 to read as follows:

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Sec.

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

50.000 Scope of part.

This part—

(a)(1) Prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85–804 (50 U.S.C. 1431—1434) and Executive Order 10789, dated November 14, 1958. It does not cover advance payments (see Subpart 32.4); and

(2) Implements indemnification authority granted by Pub. L. 85–804 and paragraph 1A of E.O. 10789 with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology as defined in the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act); and

(b) Implements SAFETY Act liability protections to promote development and use of anti-terrorism technologies.

Subpart 50.1—Extraordinary Contractual Actions

50.100 Definitions.

As used in this part—

Approving authority means an agency official or contract adjustment board authorized to approve actions under Pub. L. 85–804 and E.O. 10789.

Secretarial level means a level at or above the level of a deputy assistant agency head, or a contract adjustment board.

50.101 General.

50.101–1 Authority.

(a) Pub. L. 85–804 empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.

(b) E.O. 10789 authorizes the heads of the following agencies to exercise the authority conferred by Pub. L. 85–804 and to delegate it to other officials within the agency: the Government Printing Office; the Department of Homeland Security; the Tennessee Valley Authority; the National Aeronautics and Space Administration; the General Services Administration; the Defense, Army, Navy, Air Force, Treasury, Interior, Agriculture, Commerce, and Transportation Departments; the Department of Energy for functions transferred to that Department from other authorized agencies; and any other agency that may be authorized by the President.

50.101–2 Policy.

(a) The authority conferred by Pub. L. 85–804 may not—

(1) Be used in a manner that encourages carelessness and laxity on the part of persons engaged in the defense effort; or

(2) Be relied upon when other adequate legal authority exists within the agency.

(b) Actions authorized under Pub. L. 85–804 shall be accomplished as expeditiously as practicable, consistent with the care, restraint, and exercise of sound judgment appropriate to the use of such extraordinary authority.

(c) Certain kinds of relief previously available only under Pub. L. 85–804; *e.g.*, rescission or reformation for mutual mistake, are now available under the

authority of the Contract Disputes Act of 1978. In accordance with paragraph (a)(2) of this subsection, Part 33 must be followed in preference to Subpart 50.1 for such relief. In case of doubt as to whether Part 33 applies, the contracting officer should seek legal advice.

50.101–3 Records.

Agencies shall maintain complete records of all actions taken under this Subpart 50.1. For each request for relief processed, these records shall include, as a minimum—

(a) The contractor's request;

(b) All relevant memorandums, correspondence, affidavits, and other pertinent documents;

(c) The Memorandum of Decision (see 50.103–6 and 50.104–2); and

(d) A copy of the contractual document implementing an approved request.

50.102 Delegation of and limitations on exercise of authority.

50.102–1 Delegation of authority.

An agency head may delegate in writing authority under Pub. L. 85–804 and E.O. 10789, subject to the following limitations:

(a) Authority delegated shall be to a level high enough to ensure uniformity of action.

(b) Authority to approve requests to obligate the Government in excess of $55,000 may not be delegated below the secretarial level.

(c) Regardless of dollar amount, authority to approve any amendment without consideration that increases the contract price or unit price may not be delegated below the secretarial level, except in extraordinary cases or classes of cases when the agency head finds that special circumstances clearly justify such delegation.

(d) Regardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, shall be exercised only by the Secretary or Administrator of the agency concerned, the Public Printer, or the Chairman of the Board of Directors of the Tennessee Valley Authority (see 50.104–3).

50.102–2 Contract adjustment boards.

An agency head may establish a contract adjustment board with authority to approve, authorize, and direct appropriate action under this Subpart 50.1 and to make all appropriate determinations and findings. The decisions of the board shall not be subject to appeal; however, the board may reconsider and modify, correct, or reverse its previous decisions. The board shall determine its own procedures and have authority to take all action necessary or appropriate to conduct its functions.

50.102–3 Limitations on exercise of authority.

(a) Pub. L. 85–804 is not authority for—

(1) Using a cost-plus-a-percentage-of-cost system of contracting;

(2) Making any contract that violates existing law limiting profit or fees;

(3) Providing for other than full and open competition for award of contracts for supplies or services; or

(4) Waiving any bid bond, payment bond, performance bond, or other bond required by law.

(b) No contract, amendment, or modification shall be made under Pub. L. 85–804's authority—

(1) Unless the approving authority finds that the action will facilitate the national defense;

(2) Unless other legal authority within the agency concerned is deemed to be lacking or inadequate;

(3) Except within the limits of the amounts appropriated and the statutory contract authorization (however, indemnification agreements authorized by an agency head (50.104–3) are not limited to amounts appropriated or to contract authorization); and

(4) That will obligate the Government for any amount over $28.5 million, unless the Senate and House Committees on Armed Services are notified in writing of the proposed obligation and 60 days of continuous session of Congress have passed since the transmittal of such notification. However, this paragraph (b)(4) does not apply to indemnification agreements authorized under 50.104–3.

(c) No contract shall be amended or modified unless the contractor submits a request before all obligations (including final payment) under the contract have been discharged. No amendment or modification shall increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder, if the contract was negotiated under 10 U.S.C. 2304(a)(15) or 41 U.S.C. 252(c)(14), or FAR 14.404–1(f).

(d) No informal commitment shall be formalized unless—

(1) The contractor submits a written request for payment within 6 months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment; and

(2) The approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures.

(e) The exercise of authority by officials below the secretarial level is subject to the following additional limitations:

(1) The action shall not—

(i) Release a contractor from performance of an obligation over $55,000;

(ii) Result in an increase in cost to the Government over $55,000;

(iii) Deal with, or directly affect, any matter that has been submitted to the Government Accountability Office; or

(iv) Involve disposal of Government surplus property.

(2) Mistakes shall not be corrected by an action obligating the Government for over $1,000, unless the contracting officer receives notice of the mistake before final payment.

(3) The correction of a contract because of a mistake in its making shall not increase the original contract price to an amount higher than the next lowest responsive offer of a responsible offeror.

(f) No executive department or agency shall exercise the indemnification authority granted under paragraph 1A of E.O. 10789 with respect to any supply or service that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology unless—

(1) For the Department of Defense, the Secretary of Defense has determined that the exercise of authority under E.O. 10789 is necessary for the timely and effective conduct of the United States military or intelligence activities, after consideration of the authority provided under the SAFETY Act (Subtitle G of title VIII of the Homeland Security Act of 2002, 6 U.S.C. 441–444); or

(2) For other departments and agencies that have authority under E.O. 10789—

(i) The Secretary of Homeland Security has advised whether the use of the authority under the SAFETY Act would be appropriate; and

(ii) The Director of the Office of Management and Budget has approved the exercise of authority under the Executive order.

50.103 Contract adjustments.

This section prescribes standards and procedures for processing contractors' requests for contract adjustment under Pub. L. 85–804 and E.O. 10789.

50.103–1 General.

The fact that losses occur under a contract is not sufficient basis for exercising the authority conferred by Pub. L. 85–804. Whether appropriate action will facilitate the national defense is a judgment to be made on the

basis of all of the facts of the case. Although it is impossible to predict or enumerate all the types of cases in which action may be appropriate, examples are included in 50.103–2. Even if all of the factors in any of the examples are present, other considerations may warrant denying a contractor's request for contract adjustment. The examples are not intended to exclude other cases in which the approving authority determines that the circumstances warrant action.

50.103–2 Types of contract adjustment.

(a) *Amendments without consideration.* (1) When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(2) When a contractor suffers a loss (not merely a decrease in anticipated profits) under a defense contract because of Government action, the character of the action will generally determine whether any adjustment in the contract will be made, and its extent. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted in the interest of fairness. Thus, when Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor, fairness may make some adjustment appropriate.

(b) *Correcting mistakes.* (1) A contract may be amended or modified to correct or mitigate the effect of a mistake. The following are examples of mistakes that may make such action appropriate:

(i) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.

(ii) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.

(iii) A mutual mistake as to a material fact.

(2) Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the contracting program and assuring contractors that mistakes will be corrected expeditiously and fairly.

(c) *Formalizing informal commitments.* Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract; for example, when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

50.103–3 Contract adjustment.

(a) *Contractor requests.* A contractor seeking a contract adjustment shall submit a request in duplicate to the contracting officer or an authorized representative. The request, normally a letter, shall state as a minimum—

(1) The precise adjustment requested;

(2) The essential facts, summarized chronologically in narrative form;

(3) The contractor's conclusions based on these facts, showing, in terms of the considerations set forth in 50.103–1 and 50.103–2, when the contractor considers itself entitled to the adjustment; and

(4) Whether or not—

(i) All obligations under the contracts involved have been discharged;

(ii) Final payment under the contracts involved has been made;

(iii) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and

(iv) The contractor has sought the same, or a similar or related, adjustment from the Government Accountability Office or any other part of the Government, or anticipates doing so.

(b) *Contractor certification.* A contractor seeking a contract adjustment that exceeds the simplified acquisition threshold shall, at the time the request is submitted, submit a certification by a person authorized to certify the request on behalf of the contractor that—

(1) The request is made in good faith; and

(2) The supporting data are accurate and complete to the best of that person's knowledge and belief.

50.103–4 Facts and evidence.

(a) *General.* When it is appropriate, the contracting officer or other agency official shall request the contractor to support any request made under 50.103–3(a) with any of the following information:

(1) A brief description of the contracts involved, the dates of execution and amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.

(2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.

(3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.

(4) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes.

(5) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose, be disposed of under the contract terms.

(6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.

(7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, as necessary to support the request's monetary elements.

(8) A list of persons connected with the contracts who have factual knowledge of the subject matter, including, when possible, their names, offices or titles, addresses, and telephone numbers.

(9) A statement and evidence of steps taken to reduce losses and claims to a minimum.

(10) Any other relevant statements or evidence that may be required.

(b) *Amendments without consideration—essentiality a factor.* When a request involves possible amendment without consideration, and essentiality to the national defense is a factor (50.103–2(a)(1)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(2) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if it is enabled to complete them, broken down between costs accrued to date and

completion costs, and between costs paid and those owed.

(3) A statement and evidence of the contractor's estimate of the final price of the contracts, taking into account all known or contemplated escalation, changes, extras, and the like.

(4) A statement of any claims known or contemplated by the contractor against the Government involving the contracts, other than those stated in response to paragraph (b)(3) of this subsection.

(5) An estimate of the contractor's total profit or loss under the contracts if it is enabled to complete them at the estimated final contract price, broken down between profit or loss to date and completion profit or loss.

(6) An estimate of the contractor's total profit or loss from other Government business and all other sources, from the date of the first contract involved to the estimated completion date of the last contract involved.

(7) A statement of the amount of any tax refunds to date, and an estimate of those anticipated, for the period from the date of the first contract involved to the estimated completion date of the last contract involved.

(8) A detailed statement of efforts the contractor has made to obtain funds from commercial sources to enable contract completion.

(9) A statement of the minimum amount the contractor needs as an amendment without consideration to enable contract completion, and the detailed basis for that amount.

(10) A estimate of the time required to complete each contract if the request is granted.

(11) A statement of the factors causing the loss under the contracts involved.

(12) A statement of the course of events anticipated if the request is denied.

(13) Balance sheets, preferably certified by a certified public accountant, (i) for the contractor's fiscal year immediately preceding the date of the first contract, (ii) for each subsequent fiscal year, (iii) as of the request date, and (iv) projected as of the completion date of all the contracts involved (assuming the contractor is enabled to complete them at the estimated final prices), together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated and broken down by affiliates. They should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or partner.

(14) A list of all salaries, bonuses, and other compensation paid or furnished to the principal officers or partners, and of all dividends and other withdrawals, and of all payments to stockholders in any form since the date of the first contract involved.

(c) *Amendments without consideration—essentiality not a factor.* When a request involves possible amendment without consideration because of Government action, and essentiality to the national defense is not a factor (50.103–2(a)(2)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A clear statement of the precise Government action that the contractor considers to have caused a loss under the contract, with evidence to support each essential fact.

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(3) The estimated total loss under the contract, with detailed supporting analysis.

(4) The estimated loss resulting specifically from the Government action, with detailed supporting analysis.

(d) *Correcting mistakes.* When a request involves possible correction of a mistake (50.103–2(b)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the precise error made, ambiguity existing, or misunderstanding arising, showing what it consists of, how it occurred, and the intention of the parties.

(2) A statement explaining when the mistake was discovered, when the contracting officer was given notice of it, and whether this notice was given before completion of work under, or the effective termination date of, the contract.

(3) An estimate of profit or loss under the contract, with detailed supporting analysis.

(4) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

(e) *Formalizing informal commitments.* When a request involves possible formalizing of an informal commitment (50.103–2(c)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) Copies of any written instructions or assurances (or a sworn statement of any oral instructions or assurances) given the contractor, and identification of the Government official who gave them.

(2) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.

(3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.

(4) Evidence that, when performing the work, the contractor expected to be compensated directly for it by the Government and did not anticipate recovering the costs in some other way.

(5) A cost breakdown supporting the amount claimed as fair compensation for the work performed.

(6) A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed.

50.103–5 Processing cases.

(a) In response to a contractor request made in accordance with 50.103–3(a), the contracting officer or an authorized representative shall make a thorough investigation to establish the facts necessary to decide a given case. Facts and evidence, including signed statements of material facts within the knowledge of individuals when documentary evidence is lacking, and audits if considered necessary to establish financial or cost facts, shall be obtained from contractor and Government personnel.

(b) When a case involves matters of interest to more than one Government agency, the interested agencies should maintain liaison with each other to determine whether joint action should be taken.

(c) When additional funds are required from another agency, the contracting agency may not approve adjustment requests before receiving advice that the funds will be available. The request for this advice shall give the contractor's name, the contract number, the amount of proposed relief, a brief description of the contract, and the accounting classification or fund citation. If the other agency makes additional funds available, the agency considering the adjustment request shall be solely responsible for any action taken on the request.

(d) When essentiality to the national defense is an issue (50.103–2(a)(1)), agencies considering requests for amendment without consideration

involving another agency shall obtain advice on the issue from the other agency before making the final decision. When this advice is received, the agency considering the request for amendment without consideration shall be responsible for taking whatever action is appropriate.

50.103–6 Disposition.

When approving or denying a contractor's request made in accordance with 50.103–3(a), the approving authority shall sign and date a Memorandum of Decision containing—

(a) The contractor's name and address, the contract identification, and the nature of the request;

(b) A concise description of the supplies or services involved;

(c) The decision reached and the actual cost or estimated potential cost involved, if any;

(d) A statement of the circumstances justifying the decision;

(e) Identification of any of the foregoing information classified ''Confidential'' or higher (instead of being included in the memorandum, such information may be set forth in a separate classified document referenced in the memorandum); and

(f) If some adjustment is approved, a statement in substantially the following form: ''I find that the action authorized herein will facilitate the national defense.'' The case files supporting this statement will show the derivation and rationale for the dollar amount of the award. When the dollar amount exceeds the amounts supported by audit or other independent reviews, the approving authority will further document the rationale for deviating from the recommendation.

50.103–7 Contract requirements.

(a) Pub. L. 85–804 and E.O. 10789 require that every contract entered into, amended, or modified under this Subpart 50.1 shall contain—

(1) A citation of Pub. L. 85–804 and E.O. 10789;

(2) A brief statement of the circumstances justifying the action; and

(3) A recital of the finding that the action will facilitate the national defense.

(b) The authority in 50.101–1(a) shall not be used to omit from contracts, when otherwise required, the clauses at 52.203–5, Covenant Against Contingent Fees; 52.215–2, Audit and Records—Negotiation; 52.222–4, Contract Work Hours and Safety Standards Act—Overtime Compensation; 52.222–6, Davis-Bacon Act; 52.222–10, Compliance With Copeland Act Requirements; 52.222–20, Walsh-Healey Public Contracts Act; 52.222–26, Equal Opportunity; and 52.232–23, Assignment of Claims.

50.104 Residual powers.

This section prescribes standards and procedures for exercising residual powers under Pub. L. 85–804. The term ''residual powers'' includes all authority under Pub. L. 85–804 except—

(a) That covered by section 50.103; and

(b) The authority to make advance payments (see Subpart 32.4).

50.104–1 Standards for use.

Subject to the limitations in 50.102–3, residual powers may be used in accordance with the policies in 50.101–2 when necessary and appropriate, all circumstances considered. In authorizing the inclusion of the clause at 52.250–1, Indemnification Under Public Law 85–804, in a contract or subcontract, an agency head may require the indemnified contractor to provide and maintain financial protection of the type and amount determined appropriate. In deciding whether to approve use of the indemnification clause, and in determining the type and amount of financial protection the indemnified contractor is to provide and maintain, an agency head shall consider such factors as self-insurance, other proof of financial responsibility, workers' compensation insurance, and the availability, cost, and terms of private insurance. The approval and determination shall be final.

50.104–2 General.

(a) When approving or denying a proposal for the exercise of residual powers, the approving authority shall sign and date a Memorandum of Decision containing substantially the same information called for by 50.103–6.

(b) Every contract entered into, amended, or modified under residual powers shall comply with the requirements of 50.103–7.

50.104–3 Special procedures for unusually hazardous or nuclear risks.

(a) *Indemnification requests.* (1) Contractor requests for the indemnification clause to cover unusually hazardous or nuclear risks should be submitted to the contracting officer and shall include the following information:

(i) Identification of the contract for which the indemnification clause is requested.

(ii) Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested, with a statement indicating how the contractor would be exposed to them.

(iii) A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including—

(A) Names of insurance companies, policy numbers, and expiration dates;

(B) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both;

(C) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage;

(D) Deductibles, if any, applicable to losses under the policies;

(E) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and

(F) Applicable workers' compensation insurance coverage.

(iv) The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection.

(v) Whether the contractor's insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Government program, and, if so, a brief description of any limitations.

(vi) If the contractor is a division or subsidiary of a parent corporation—

(A) A statement of any insurance coverage of the parent corporation that bears on the risks for which the contractor seeks indemnification; and

(B) A description of the precise legal relationship between parent and subsidiary or division.

(2) If the dollar value of the contractor's insurance coverage varies by 10 percent or more from that stated in an indemnification request submitted in accordance with paragraph (a)(1) of this subsection, or if other significant changes in insurance coverage occur after submission and before approval, the contractor shall immediately submit to the contracting officer a brief description of the changes.

(b) *Action on indemnification requests.* (1) The contracting officer, with assistance from legal counsel and cognizant program office personnel, shall review the indemnification request

and ascertain whether it contains all required information. If the contracting officer, after considering the facts and evidence, denies the request, the contracting officer shall notify the contractor promptly of the denial and of the reasons for it. If recommending approval, the contracting officer shall forward the request (as modified, if necessary, by negotiation) through channels to the appropriate official specified in 50.102–1(d). The contracting officer's submission shall include all information submitted by the contractor and—

(i) All pertinent information regarding the proposed contract or program, including the period of performance, locations, and facilities involved;

(ii) A definition of the unusually hazardous or nuclear risks involved in the proposed contract or program, with a statement that the parties have agreed to it;

(iii) A statement by responsible authority that the indemnification action would facilitate the national defense;

(iv) A statement that the contract will involve unusually hazardous or nuclear risks that could impose liability upon the contractor in excess of financial protection reasonably available;

(v) A statement that the contractor is complying with applicable Government safety requirements;

(vi) A statement of whether the indemnification should be extended to subcontractors; and

(vii) A description of any significant changes in the contractor's insurance coverage (see 50.104–3(a)(2)) occurring since submission of the indemnification request.

(2) Approval of a request to include the indemnification clause in a contract shall be by a Memorandum of Decision executed by the appropriate official specified in 50.102–1(d).

(3) When use of the indemnification clause is approved under paragraph (b)(2) of this subsection, the definition of unusually hazardous or nuclear risks (see paragraph (b)(1)(ii) of this subsection) shall be incorporated into the contract, along with the clause.

(4) When approval is—

(i) Authorized in the Memorandum of Decision; and

(ii) Justified by the circumstances, the contracting officer may approve the contractor's written request to provide for indemnification of subcontractors, using the same procedures as those required for contractors.

50.104–4 Contract clause.

The contracting officer shall insert the clause at 52.250–1, Indemnification Under Public Law 85–804, in contracts whenever the approving official determines that the contractor shall be indemnified against unusually hazardous or nuclear risks (also see 50.104–3(b)(3)). In cost-reimbursement contracts, the contracting officer shall use the clause with its Alternate I.

Subpart 50.2—Support Anti-terrorism by Fostering Effective Technologies Act of 2002

50.200 Scope of subpart.

This subpart implements the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) liability protections to promote development and use of anti-terrorism technologies.

50.201 Definitions.

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.8 and 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

50.202 Authorities.

The following authorities apply:

(a) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444.

(b) Executive Order 13286 of February 28, 2003, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security.

(c) Executive Order 10789 of November 14, 1958, Contracting Authority of Government Agencies in Connection with National Defense Functions.

(d) 6 CFR Part 25.

50.203 General.

(a) As part of the Homeland Security Act of 2002, Pub. L. 107–296, Congress enacted the SAFETY Act to—

(1) Encourage the development and use of anti-terrorism technologies that will enhance the protection of the nation; and

(2) Provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain.

(b) The SAFETY Act's liability protections are complementary to the Terrorism Risk Insurance Act of 2002.

(c) Questions concerning the SAFETY Act may be directed to DHS Office of

SAFETY Act Implementation (OSAI). Additional information about the SAFETY Act may be found at *http://www.SAFETYAct.gov*.

50.204 Policy.

(a) Agencies should—

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections;

(2) Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and

(3) Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

(b) Agencies shall not solicit offers contingent upon SAFETY Act designation or certification before contract award unless authorized in accordance with 50.205–3.

(c) Agencies shall not solicit offers or award contracts presuming DHS will issue a SAFETY Act designation or certification after contract award unless authorized in accordance with 50.205–4.

(d) The DHS determination to extend SAFETY Act protections for a particular technology is not a determination that the technology meets, or fails to meet, the requirements of a solicitation.

50.205 Procedures.

50.205–1 SAFETY Act Considerations.

(a) *SAFETY Act applicability.* Requiring activities shall review requirements to identify potential technologies that prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might cause, and may be appropriate for SAFETY Act protections. In questionable cases, the agency shall consult with DHS. For acquisitions involving such technologies, the requiring activity should address through preliminary discussions with DHS whether a block designation or block certification exists for the technology being acquired.

(1) If one does exist, the requiring activity shall inform the contracting officer to notify offerors.

(2) If one does not exist, see 50.205–2, Pre-qualification designation notice.

(b) *Early consideration of the SAFETY Act.* Acquisition officials shall consider SAFETY Act issues as early in the acquisition cycle as possible. Normally, this would be at the point where the required capabilities or performance characteristics are addressed. This is important because the processing times for issuing determinations on all types of SAFETY Act applications vary depending on many factors, including the influx of applications to DHS and the technical complexity of individual applications.

(c) *Industry outreach.* When applicable, acquisition officials should include SAFETY Act considerations in all industry outreach efforts including, but not limited to, requests for information, draft requests for proposal, and industry conferences.

(d) *Reciprocal waiver of claims.* For purposes of 6 CFR 25.5(e), the Government is not a customer from which a contractor must request a reciprocal waiver of claims.

50.205–2 Pre-qualification designation notice.

(a) *Requiring activity responsibilities.* (1) If the requiring activity determines that the technology to be acquired may qualify for SAFETY Act protection, the requiring activity is responsible for requesting a pre-qualification designation notice from DHS. DHS will then determine whether the technology identified in the request either affirmatively or presumptively satisfies the technical criteria for SAFETY Act designation. An affirmative determination means the technology described in the pre-qualification designation notice satisfies the technical criteria for SAFETY Act designation as a QATT. A presumptive determination means that the technology is a good candidate for SAFETY Act designation as a QATT. In either case, the notice will authorize offerors to—

(i) Submit a streamlined application for SAFETY Act designation; and

(ii) Receive expedited review of their application for SAFETY Act designation.

(2) The requiring activity shall make requests using the procurement pre-qualification request form available at *http://www.SAFETYAct.gov*. The website includes instructions for completing and submitting the form.

(3) The requiring activity shall provide a copy of the request, as well as a copy of the resulting pre-qualification designation notice or DHS denial, to the contracting officer.

(b) *Contracting officer responsibilities.* Upon receipt of the documentation specified in paragraph (a)(3) of this subsection, the contracting officer shall—

(1) Include in any pre-solicitation notice (Subpart 5.2) that a pre-qualification designation notice has been—

(i) Requested and is under review by DHS;

(ii) Denied by DHS; or

(iii) Issued and a copy will be included with the solicitation; and

(2) Incorporate the pre-qualification designation notice into the solicitation.

50.205–3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.

(a) Contracting officers may authorize such contingent offers, only if—

(1) DHS has issued—

(i) For offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation; or

(ii) For offers contingent upon SAFETY Act certification, a block certification;

(2) To the contracting officer's knowledge, the Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/ certifications for their offered technologies before release of any solicitation; and

(3) Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

(b) Contracting officers shall not authorize offers contingent upon obtaining a SAFETY Act certification (as opposed to a SAFETY Act designation), unless a block certification applies to the solicitation.

50.205–4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.

(a) When necessary to award a contract prior to DHS issuing SAFETY Act protections, contracting officers may award contracts presuming that DHS will issue a SAFETY Act designation/ certification to the contractor after contract award only if—

(1) The criteria of 50.205–3(a) are met;

(2) The chief of the contracting office (or other official designated in agency procedures) approves the action; and

(3) The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

(b) Contracting officers shall not authorize offers presuming that SAFETY Act certification will be obtained (as opposed to a SAFETY Act designation), unless a block certification applies to the solicitation.

50.206 Solicitation provisions and contract clause.

(a) Insert the provision at 52.250–2, SAFETY Act Coverage Not Applicable, in solicitations if—

(1) The agency consulted with DHS on a questionable case of SAFETY Act

applicability to an acquisition in accordance with 50.205–1(a), and after the consultation, the agency has determined that SAFETY Act protection is not applicable for the acquisition; or

(2) DHS has denied approval of a pre-qualification designation notice.

(b)(1) Insert the provision at 52.250–3, SAFETY Act Block Designation/Certification, in a solicitation when DHS has issued a block designation/certification for the solicited technologies.

(2) Use the provision at 52.250–3 with its Alternate I when contingent offers are authorized in accordance with 50.205–3.

(3) Use the provision at 52.250–3 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205–4. If this alternate is used, the contracting officer may alter the number of days within which offerors must submit their SAFETY Act designation or certification application.

(c)(1) Insert the provision at 52.250–4, SAFETY Act Pre-qualification Designation Notice, in a solicitation for which DHS has issued a pre-qualification designation notice.

(2) Use the provision at 52.250–4 with its Alternate I when contingent offers are authorized in accordance with 50.205–3.

(3) Use the provision at 52.250–4 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205–4. If this alternate is used, the contracting officer may alter the number of days within which offerors must submit their SAFETY Act designation or certification application.

(d) Insert the clause at 52.250–5, SAFETY Act—Equitable Adjustment—

(1) In the solicitation, if the provision at 52.250–3 or 52.250–4 is used with its Alternate II; and

(2) In any resultant contract, if DHS has not issued SAFETY Act designation or certification to the successful offeror before contract award.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 52.250–1 by revising the introductory paragraph to read as follows:

52.250–1 Indemnification Under Public Law 85–804.

As prescribed in 50.104–4, insert the following clause:

* * * * *

■ 14. Add sections 52.250–2 through 52.250–5 to read as follows:

52.250–2 SAFETY Act Coverage Not Applicable.

As prescribed in 50.206(a), insert the following provision:

SAFETY ACT COVERAGE NOT APPLICABLE (Nov 2007)

The Government has determined that the product(s) or service(s) being acquired by this action is not an anti-terrorism technology as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See FAR Subpart 50.2.

(End of provision)

52.250–3 SAFETY Act Block Designation/Certification.

As prescribed in 50.206(b)(1), insert the following provision:

SAFETY ACT BLOCK DESIGNATION/CERTIFICATION (Nov 2007)

(a) *Definitions.* As used in this provision—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria. For some classes of technologies, DHS may issue a block designation/certification in order to lessen the burdens for filing for SAFETY Act designation or SAFETY Act certifications by not requiring applicants to provide certain information otherwise required and in order to offer expedited review of any application submitted pursuant to a block designation/certification. Block designations/certifications will be issued only for technologies that rely on established performance standards or defined technical characteristics.

(c)(1) DHS has issued a block designation or block certification for the technology to be acquired under this solicitation.

(2) This block designation or block certification is attached to this solicitation and contains essential information, including—

(i) A detailed description of and specification for the technology covered by the block designation or block certification;

(ii) A listing of those portions of the SAFETY Act application kit that must be completed and submitted by applicants;

(iii) The date of its expiration; and

(iv) Any other terms and conditions.

(3) Offerors should read this block designation or block certification carefully to make sure they comply with its terms if they plan to take advantage of SAFETY Act coverage for their technology(ies).

(d) A determination by DHS to issue a SAFETY Act designation or SAFETY Act certification based on this block designation/certification is not a determination that the technology meets, or fails to meet, the requirements of this solicitation. All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act and this block designation/certification may be found at the SAFETY Act website at *http://www.SAFETYAct.gov* or requests may be mailed to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or SAFETY Act certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (Nov 2007). As prescribed in 50.206(b)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation (or SAFETY Act certification, if a block certification exists) before award. When an offer is made contingent upon SAFETY Act designation or certification, the offeror also may submit an alternate offer without the contingency.

(2) The Government may award a contract based on a contingent offer only if the offeror demonstrates that DHS has issued a SAFETY Act designation (or SAFETY Act certification, if a block certification exists) for the offeror's proposed technology prior to contract award.

(3) The Government reserves the right to award the contract prior to DHS resolution of the offeror's application for SAFETY Act designation (or SAFETY Act certification, if a block certification exists).

Alternate II (Nov 2007). As prescribed in 50.206(b)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit offers presuming that SAFETY Act designation (or SAFETY Act certification, if a block certification exists) will be obtained before or after award.

(2) An offeror is eligible for award only if the offeror—

(i) Files a SAFETY Act designation (or SAFETY Act certification) application, limited to the scope of the applicable block designation (or block certification), within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation (or SAFETY Act certification) application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(3) If DHS has not issued a SAFETY Act designation (or SAFETY Act certification) to the successful offeror before contract award, the contracting officer will include the clause at 52.250–5 in the resulting contract.

52.250–4 SAFETY Act Pre-qualification Designation Notice.

As prescribed in 50.206(c)(1), insert the following provision:

SAFETY ACT PRE-QUALIFICATION DESIGNATION NOTICE (Nov 2007)

(a) *Definitions.* As used in this provision—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, i.e., it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria.

(c)(1) DHS has issued a SAFETY Act pre-qualification designation notice for the technology to be acquired under this solicitation.

(2) This notice is attached to this solicitation and contains essential information, including—

(i) A detailed description of and specification for the technology covered by the notice;

(ii) A statement that the technology described and specified in the notice satisfies the technical criteria to be deemed a QATT and the offeror's proposed technology either may presumptively or will qualify for the issuance of a designation provided the offeror complies with terms and conditions in the notice and its application is approved;

(iii) The period of time within which DHS will take action upon submission of a SAFETY Act application submitted pursuant to the notice;

(iv) A listing of those portions of the application that must be completed and submitted by selected awardees and the time periods for such submissions;

(v) The date of expiration of the notice; and

(vi) Any other terms and conditions concerning the notice.

(3) Offerors should read this notice carefully to make sure they comply with the terms of the notice if they plan on taking advantage of SAFETY Act coverage for their technologies.

(d) A determination by DHS to designate, or not designate, a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of this solicitation. All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act may be found at the SAFETY Act website at *http://www.SAFETYAct.gov*.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (Nov 2007). As prescribed in 50.206(c)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation before award. When an offer is made contingent upon SAFETY Act designation, the offeror also may submit an alternate offer without the contingency.

(2) The Government may award a contract based on a contingent offer only if the offeror demonstrates that DHS has issued a SAFETY Act designation for the offeror's proposed technology prior to contract award.

(3) The Government reserves the right to award the contract prior to DHS resolution of the offeror's application for SAFETY Act designation.

Alternate II (Nov 2007). As prescribed in 50.206(c)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals presuming SAFETY Act designation before or after award.

(2) An offeror is eligible for award only if the offeror—

(i) Files a SAFETY Act designation application, limited to the scope of the applicable prequalification designation notice, within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing any SAFETY Act designation.

(3) If DHS has not issued a SAFETY Act designation to the successful offeror before contract award, the contracting officer will include the clause at 52.250–5 in the resulting contract.

52.250–5 SAFETY Act—Equitable Adjustment.

As prescribed in 50.206(d), insert the following clause:

SAFETY ACT—EQUITABLE ADJUSTMENT (Nov 2007)

(a) *Definitions.* As used in this clause—

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. ''Block certification'' refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. ''Block designation'' refers to a technology class that DHS has determined to be a QATT.

(b) Prices for the items covered by the pre-qualification designation notice, block designation, or block certification in the contract were established presuming DHS will issue a SAFETY Act designation (or SAFETY Act certification) for those items.

(c) In order to qualify for an equitable adjustment in accordance with paragraph (d) of this clause the Contractor shall in good faith pursue obtaining—

(1) SAFETY Act designation (or SAFETY Act certification); and

(2) The amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(d)(1) If DHS denies the Contractor's SAFETY Act designation (or certification) application, the Contractor may submit a request for an equitable adjustment within 30 days of DHS's notification of denial.

(2) The Contracting Officer shall either—

(i) Make an equitable adjustment to the contract price based on evidence of the resulting increase or decrease in the Contractor's costs and/or an equitable adjustment to other terms and

conditions based on lack of SAFETY Act designation (or certification); or

(ii) At the sole option of the Government, terminate this contract for the convenience of the Government in place of an equitable adjustment.

(3) A failure of the parties to agree on the equitable adjustment will be considered to be a dispute in accordance with the ''Disputes'' clause of this contract.

(4) Unless first terminated, the Contractor shall continue contract performance during establishment of any equitable adjustment.

(End of clause)

[FR Doc. 07–5477 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52

[FAC 2005–21; FAR Case 2004–032; Item II; Docket 2006–020; Sequence 13]

RIN 9000–AK65

Federal Acquisition Regulation; FAR Case 2004–032, Biobased Products Preference Program

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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement 7 U.S.C. 8102, as enacted by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Pub. L. 107–171), and amended by sections 205 and 943 of the Energy Policy Act of 2005 (Pub. L. 109–58). Entitled ''Federal Procurement of Biobased Products,'' 7 U.S.C. 8102 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture.

DATES: *Effective Date*: December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219–1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 2004–032.

SUPPLEMENTARY INFORMATION:

A. Background

The United States Department of Agriculture (USDA) published regulations at 7 CFR 2902: 70 FR 1792, January 11, 2005; 71 FR 13686, March 16, 2006; 71 FR 42572, July 27, 2006; and 71 FR 67031, November 20, 2006.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 77360, December 26, 2006. The comment period closed on February 26, 2007. Six respondents submitted comments on the proposed rule. The comments are available at *http://www.regulations.gov*. A discussion of the comments and the changes made to the rule are provided below.

Public Comments

Provide coverage for products that use biobased products.

Comment: One respondent recommends that the FAR should include a preference for products that use biobased products. The example proffered was diesel engine generator sets that perform with biobased fuels.

Response: Extending coverage as suggested would exceed the congressional mandate, codified at 7 U.S.C. 8102, to procure designated biobased items. The comment is therefore beyond the scope of this case. It applies to the scope of the biobased product program, which was established by Congress.

Interface between the proposed contract clause and the order of precedence clause.

Comment: One respondent expresses concern with the interface between the contract clause and the order of precedence clause (FAR 52.215–8). The subject proposed rule includes a requirement to use a contract clause, specifically FAR 52.223–XX (now FAR 52.223–2), to make maximum use of biobased products in contracts for services, rather than the normal needs analysis and specification process embodied in Part 11, Describing Agency Needs. The subject clause is proposed to go into all service contracts (as well as construction), unless the contract will not involve the use of USDA-designated items. The respondent believes this unusual approach to describing contractual requirements is inappropriate in contracts for services because it creates a potential ambiguity. The respondent is concerned that in the order of precedence clause, contract clauses take precedence over specifications. As stated by the respondent, ''It is not clear that the exemption in the clause regarding 'meeting contract performance requirements' in paragraph (a)(2) applies to named products such as those on qualified product lists (QPLs), because of the order of precedence clause, 52.215–8, that already goes into all negotiated contracts. '' The respondent is concerned that, according to this rule of interpretation, the clause requirement to use a designated biobased hydraulic fluid or lubricant, for example, might be required over a QPL or other contractually specified product. This is a matter of concern to the respondent when acquiring services in support of complex systems, engineering services, and other contracts for services when multi-tiered subcontracting is involved.

The respondent suggests two alternatives—

- Include the requirement for biobased products in FAR Part 11 rather than in a contract clause; or
- Exempt products on QPLs.

Response: Review of the proposed contract clause and FAR 52.215–8 reveals that the two clauses can be harmonized in a manner that furthers the Congressional objective when read together. In accordance with the proposed contract clause and the provisions of 7 U.S.C. 8102, any entity contracting with any Federal agency is required to use designated biobased items (absent one of the statutory exemptions) in performance of the contract. As mandated in 7 U.S.C. 8102(d), Federal agencies have one year after designation of a product to modify specifications which they have the responsibility for drafting or reviewing, in order to ensure that such specifications require the use of biobased products unless an exemption applies. The proposed alternatives are addressed as follows:

- *Put the requirement in Part 11.* Regardless of where the requirement is incorporated into the FAR, the requirement must be incorporated into the contract to bind a contractor. The statute mandates: ''Except as provided in subsection (c), each procuring agency shall comply with the requirements set forth in this section and any regulations issued under this section…'' (7 U.S.C. 8102(a)). ''Procuring agency'' is defined in 7 U.S.C. 8101(4) as—

—Any Federal agency that is using Federal funds for procurement; or

—Any person contracting with any Federal agency with respect to work performed under the contract.

To implement 7 U.S.C. 8102, a contract clause is required. Absent a contract clause, the contractor is not bound to follow the mandates of 7