[Approved by the Office of Management and Budget under control number 2060-0915]

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

23. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

Subpart A—Requirements for Final Authorization

24. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1. REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	Federal Register reference	Effective date
*	* *	*	*
[Insert date of publication].	Process Vent and Equipment Leak Organic Air Emission Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities.	[Insert FR reference on date of publication].	[Insert effective date.]

[FR Doc. 90-14260 Filed 6-20-90; 8:45 am]

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federal register

Thursday
June 21, 1990

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 1 et al
Federal Acquisition Regulation (FAR); Miscellaneous Amendments; Interim and Final Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 3, 5, 6, 7, 8, 9, 13, 14, 15, 19, 25, 28, 31, 32, 36, 45, 52, and 53

[Federal Acquisition Circular 84-58]

RIN 9000-AD33, 9000-AD39, 9000-AD42, 9000-AB73, 9000-AD67, 9000-AD25, 9000-AD64, 9000-AC79, 9000-AD10, 9000-AD80, 9000-AD62, 9000-AD06, 9000-AD75, 9000-AC95, 9000-AD68, 9000-AD69, 9000-AD74, 9000-AC71, 9000-AD22, 9000-AD07

Federal Acquisition Regulation (FAR); Miscellaneous Amendments

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

ACTION: Interim rule with request for comments, and final rules.

SUMMARY: Federal Acquisition Circular (FAC) 84-58 amends the Federal Acquisition Regulation (FAR) with respect to the following: Women-Owned Business Subcontract Reporting (SF 295); Certification of Commercial Pricing; Independent Price Determination Certificate Outside the United States; Small Business Act Notice Thresholds and Small Business—Small Purchase Set-Aside; Timely Completion of Justifications; Technical Corrections to FAR subpart 7.3; Vehicle Leasing Certification; First Article Test Pricing; Price Reasonableness Threshold; Thresholds—part 14; Size Standards; Microprocessor Chips; Revaluation of Assets; Independent Research and Development and Bid and Proposal Cost (IR&D/B&P); Advance Payments—Alternate Provision; Special Tooling/Special Test Equipment (ST/STE), Eliminate Remarking; Return of Inventory to Suppliers; Interpretation of Overtime Policy; Revision of Preaward Survey Forms; Standard Forms 294 and 295; Editorial Corrections; Nonmanufacturers Rule; Commerce Patent Regulation, Pub. L. 98-620; and FAR Index Revision through FAC 84-58.

DATES: *Effective Date:* July 23, 1990, except for (the interim rule, Item I) 53.219(b) and the related Standard Form (SF) 295 in 53.301-295 that are effective June 21, 1990.

Comment Date: Comments on the interim rule, Item I, should be submitted to the FAR Secretariat at the address shown below on or before August 20, 1990, to be considered in the formulation of a final rule.

ADDRESS: Interested parties should submit written comments to:

General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4041, Washington, DC 20405.

Please cite FAC 84-58, Item I, in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 84-58.

SUPPLEMENTARY INFORMATION:

A. Determination to Issue an Interim Rule

FAC 84-58, Item I. A determination has been made under authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) to issue the regulations in Item I of FAC 84-58 as an interim rule. It is determined that compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. However, pursuant to Pub. L. 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating the final rule.

B. Background

FAC 84-58, Item II. On November 18, 1988 (53 FR 46792), Certification of Commercial Pricing, was published as a proposed rule implementing Pub. Laws 98-577 (applicable to civilian agencies), and 98-525 and 98-591 (applicable to DoD, NASA, and the Coast Guard) requiring that acquisitions of commercial items be subject to a certification regarding the lowest price charged the public for items.

This final rule revises the interim rule currently in the FAR and published as Item III in FAC 84-10, in the **Federal Register** on July 3, 1985 (50 FR 27560).

FAC 84-58, Item X. Part 14 contains a $10,000 threshold for the inclusion of several provisions and clauses in construction contracts. Given the extremely narrow class of construction contracts that fall under $10,000, this threshold is no longer justified. This rule deletes this threshold in FAR parts 14 and 52.

Additionally, the requirement in 14.201-6(d) and the provision at 52.214-8 are satisfied by the rule found at 4.904 and the provision at 52.204-3. Consequently, this rule deletes 14.201-6(d) and the clause at 52.214-8 in their entireties.

FAC 84-58, Item XIV. Section 203 of Pub. L. 91-441, as amended by section 208 of Pub. L. 96-342, authorizes periodic adjustment of the threshold amounts at which advance agreements must be negotiated covering independent research and development and bid and proposal costs. Effective October 1, 1989, the Department of Defense has raised these thresholds to $5,400,000 for companies and $675,000 for profit centers. This change is being incorporated into 31.205-18.

FAC 84-58, Item XV. FAR 32.409-3(e) currently permits contracting officers to omit the requirement for deposit of advance payments in a special bank account in connection with advance payment agreements with instrumentalities of the Government, a State, a local government, or agencies or instrumentalities of State or local governments, if the official approving the advance payment determines that adequate security exists to protect the Government. Special bank accounts are also not required in connection with advance payments by letters of credit (see FAR 32.409-3(g)). FAR 32.412(f) authorizes contracting officers to omit the terms pertaining to a special bank account if the requirement for a special bank account is eliminated in accordance with 32.409-3(e) or (g), but places the burden on contracting officers to delete the related language from the clause at 52.232-12.

Since the deletion of language pertaining to special bank accounts is a complex task, this rule establishes an alternate clause with pertinent language deleted to facilitate use of the option provided by 32.409-3 (e) and (g). No change in existing requirements is intended or made in this final rule.

FAC 84-58, Item XVI. FAR 45.506(c) requires contractors to mark Government-owned special tooling and special test equipment with a serial number and the identity of the agency owning the property. When property is transferred to contracts awarded by another agency, re-marking is required.

This rule requires marking to identify a serial number and an indication of Government ownership, as opposed to agency ownership, which is consistent with the requirement for marking plant equipment in 45.506(d).

FAC 84-58, item XVII. FAR 45.605-2 states that Plant Clearance Officers shall encourage contractors to return allocable quantities of excess Government-owned, contractor-acquired property for appropriate credit. FAR 45.606-3(b) states that Plant Clearance Officers shall verify that contractors have endeavored to effect such returns.

The terms "encourage" and "verify" have led to some confusion regarding the Government's responsibilities in this area.

The most practical way to determine whether contractors are attempting to return inventories to suppliers, where appropriate, is during property control system surveys. Thus, compliance is reviewed on a system basis rather than by individual transactions.

FAC 84–58, Item XVIII. A question has been raised concerning whether or not during the FAR preparation a substantive change was intended with respect to the overtime policy in the clause at 52.222–2, Payment for Overtime Premiums. Recent interpretations of the policy appear to impose a two-part requirement for the legitimacy of all overtime. Not only must the overtime be covered by a dollar amount, as specified in paragraph (a) of the clause, it must also only be of the type described under subparagraphs (a)(1) through (a)(4) of the clauses. Clarification of the policy had been requested.

C. Regulatory Flexibility Act

FAC 84–58, Items I, II, III, IV, IX, XIII, XV, and XX. DoD, GSA, and NASA certify that these final rules in FAC 84–58 will not have a significant economic impact on a substantial number of small entities under the Regulatoy Flexibility Act (5 U.S.C. 601, et seq.) because—

Item I. Small businesses are exempt from the requirement to submit the report form.

Item II. Information required should be readily available to small businesses since they are less likely to have decentralized sales records and the large volume of sales transactions normally associated with larger businesses. No public comments were received from small entities that addressed the Initial Regulatory Flexibility Analysis published with the proposed rule. A Final regulatory Flexibility Analysis has been prepared and will be submitted to the Chief Counsel for Advocacy of the Small Business Administration.

Item III. There is no cost or administrative impact on U.S. contractors or offerors. It affects only contractors and offerors outside the United States, its possessions, and Puerto Rico.

Item IV. The final rule implements statutory direction by amending the FAR to increase the small business, small purchase set-aside threshold from $10,000 to $25,000. This revision will result in an increase in the number of procurement actions reserved for small business participation, thereby benefiting such firms. The threshold increase for Commerce Business Daily (CBD) notices of pending procurement actions may affect those small businesses which rely exclusively upon the CBD for their information about pending procurements. However, our experience indicates that a preponderance of small purchase awards are made to firms which have responded to solicitations issued pursuant to bidders' mailing lists or which have learned of pending procurements through local posting of the requirements.

Item IX. Existing regulations address the establishment of a special category of set-asides, for acquisitions of supplies or services that have an anticipated dollar value of $25,000 or less. This rule does not affect those set-asides. It merely reduces the Government's administrative costs for low dollar value set-asides.

Item XIII. Most contracts awarded to small entities are awarded on a competitive fixed-price basis and the cost principles do not apply.

Item XV. No changes to existing rules are being made. An alternate contract clause is being added to the FAR to facilitate use of a clause which current rules require contracting officers to modify on a case-by-case basis.

Item XX. Small businesses are exempt from the requirement to submit the report forms.

Therefore, the Regulatory Flexibility Act does not apply.

FAC 84–58, Items V, VI, VII, X, XI, XII, XIV, XVI, XVII, XVIII, and XIX. The Regulatory Flexibility Act (Pub. L. 96–354) does not apply because each revision is not a "significant revision" as defined in FAR 1.501–1; i.e., it does not alter the substantive meaning of any coverage in the FAR having a significant cost or administrative impact on contractors or offerors, or have a significant effect beyond the internal operating procedures of the issuing agencies. Accordingly, and consistent with section 1212 of Pub. L. 98–525 and section 302 of Pub. L. 98–577 pertaining to publication of proposed regulations (as implemented in FAR subpart 1.5, Agency and Public Participation), solicitation of agency and public views on the revisions is not required. Since such solicitation is not required, the Regulatory Flexibility Act does not apply.

However, comments from small entities concerning the affected FAR sections will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 90–610 in correspondence pertaining to the appropriate item in FAC 84–58.

FAC 84–58, Item VIII. It is expected that this final rule will have a significant impact on a number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.). A final Regulatory Flexibility Analysis has been prepared and will be submitted to the Chief Counsel for Advocacy of the Small Business Administration.

D. Paperwork Reduction Act

FAC 84–58, Item I. The information collection requirements in this rule, pertaining to Standard Form (SF) 295, have been approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501, et seq. under OMB Control Number 9000–0007.

FAC 84–58, Item II. The information collection requirements in this rule, pertaining to Certification of Commercial Pricing, have been approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501, et seq. under OMB Control Number 9000–0105.

FAC 84–58, Items III through XIX. The Paperwork Reduction Act (Pub. L. 96–511) does not apply because these final rules do not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

FAC 84–58, Item XX. The information collection requirements in this rule, pertaining to Standard Form (SF) 294, have been approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501, et seq. under OMB Control Number 9000–0006.

E. Public Comments

FAC 84–58, Items II, III, IV, VI, VIII, IX, XIII, XV, and XX. The comments that were received were considered by the Councils in the development of the following final rules:

Item II. On July 3, 1985, an interim rule (FAC 84–10, Item III) was published in the **Federal Register** (50 FR 27560) and on November 18, 1988, a proposed rule was published in the **Federal Register** (53 FR 46792).

Item III. On January 4, 1988, a proposed rule was published in the **Federal Register** (53 FR 100).

Item IV. On July 9, 1987, an interim rule (FAC 84–28), Item I) was published in the **Federal Register** (52 FR 21884).

Item VI. On July 13, 1989, a proposed rule was published in the **Federal Register** (54 FR 25214).

Item VIII. On January 27, 1989, a proposed rule was published in the **Federal Register** (54 FR 4230).

Item IX. On May 4, 1989, a proposed rule was published in the **Federal Register** (54 FR 19339).

Item XIII. On May 1, 1989, proposed rule was published in the **Federal Register** (54 FR 18634).

Item XV. On March 23, a proposed rule was published in the **Federal Register** (54 FR 12126).

Item XX. On November 30, 1988, a proposed rule was published in the **Federal Register** (53 FR 48495).

List of Subjects in 48 CFR Parts 1, 3, 5, 6, 7, 8, 9, 13, 14, 15, 19, 25, 28, 31, 32, 36, 45, 52, and 53

Government procurement.

Dated: June 15, 1990.

Albert A. Vicchiolla,

Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular

[Number 84–58]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84–58is effective July 23, 1990, except for (the interim rule, Item I) 53.219(b) and the related Standard Form (SF) 295 in 53.301–295 that are effective June 21, 1990.

Eleanor Spector,

Deputy Assistant Secretary of Defense for Procurement.

Richard H. Hopf,

Associate Administrator for Acquisition Policy, GSA.

S. J. Evans,

Assistant Administrator for Procurement, NASA.

Federal Acquisition Circular (FAC) 84–58 amends the Federal Acquisition Regulation as specified below:

Item I—Women-Owned Business Subcontract Reporting (SF 295)

Section 503, Public Law 100–656, the Business Opportunity Development Act of 1988, requires agencies to report subcontracts awarded to women-owned small businesses, effective October 1989. In order to collect this information, the Standard Form (SF) 295 is revised to add a block for reporting of subcontract dollars awarded to women-owned small business concerns.

Item II—Certification of Commercial Pricing

FAR 1.105, 15.813, 15.813–1, 15.813–2, 15.813–3, 15.813–4, 15.813–5, 15.813–6, 15.813–7, and the clause at 52.215–32 are revised, and 14.214 and the clause at 52.215–37 are added to implement the requirements of Public Laws 98–525, 98–577, and 99–591 pertaining to commercial pricing certificates.

Item III—Independent Price Determination Certificate Outside the United States

FAR 3.103–1(b) is removed and 3.103–2(b)(1) is revised to make the Independent Price Determination Certificate applicable to solicitations for work to be performed outside the United States. FAR 3.303(e) is added to permit contracting officers to refer suspected collusive offers from foreign contractors to authorities of the foreign government.

Item IV—Small Business Act Notice Thresholds and Small Business—Small Purchase Set-Aside

FAR 5.205(d)(2) is revised to require posting of notices of all architect-engineer solicitations which are not synopsized; this rule makes final Item I of FAC 84–28 published in the **Federal Register** on June 9, 1987 (52 FR 21884).

Pub. L. 99–500 amended the Small Business Act and the Office of Federal Procurement Policy Act to raise the threshold for publicizing proposed acquisitions in the Commerce Business Daily from $10,000 to $25,000 but retained the $10,000 synopsis threshold for acquisitions if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors.

Item V—Timely Completion of Justifications

FAR 6.303–1(e) is revised to require that justifications for other than full and open competition based on the urgency exception that are prepared after contract award be prepared and approved within a reasonable time after award.

Item VI—Technical Corrections to FAR Subpart 7.3

FAR 7.300(b), 7.302, 7.303(b)(1), 7.304(b)(1), 7.306(a)(2), 7.306(a)(3), 7.306(b)(3), 7.307(a), and the clauses at 52.207–1 and 52.207–2 are revised to include technical corrections needed to comply with recent changes made to OMB Circular A–76.

Item VII—Vehicle Leasing Certification

FAR 8.1102 is revised to delete the requirement for the contracting officer to obtain certifications of fuel efficiency and availability from the requiring activity before leasing motor vehicles for less than 60 days. This change conforms the FAR with the Motor Vehicle Information and Cost Savings Act and the regulations implementing that law.

Item VIII—First Article Test Pricing

FAR 9.306(j), 14.404–2(f), 14.404–2(g), 14.407–2(b) and 15.814 are added, and the clauses at 52.214–10, 52.215–16, and 52.217–5 are revised to provide notice to offerors and guidance to contracting personnel concerning unbalanced bids and proposals.

Item IX—Price Reasonableness Threshold

FAR 13.106 is revised to increase from $1,000 to "ten percent of the small purchase limitation" the threshold above which price reasonableness must be based on competitive quotations and under which purchases may be made without securing competitive quotations, if the contracting officer considers the prices to be reasonable.

Item X—Thresholds—Part 14

FAR 1.105, 14.201–6(c), 14.201–6(1), 14.201–6(m), 52.214–6 are revised, 14.201–6(d) is removed, and the provision at 52.214–8 is removed and reserved to eliminate separate thresholds for provisions prescribed by Part 14 when the invitations for bids are for construction and to eliminate the provision "Parent Company and Identifying Data," the requirements of which are satisfied by the provision at 52.204–3, Taxpayer Identification.

Item XI—Small Business Size Standards

FAR 19.102(f)(5) is revised to add a list of Product and Service Codes for which a nonmanufacturer is not required to provide the product of a small business concern in order to qualify for small business set-asides. The Small Business Administration has determined that there are no small business manufacturers for these product and service codes.

Item XII—Microprocessor chips

FAR 25.108(d)(1) is revised to add an item, microprocessor chips (brought onto the Government construction site for incorporation into building systems during construction or repair and alteration of real property), to the Buy American List of Exempt Items which is published in the FAR for information only.

Item XIII—Revaluation of Assets

FAR 31.205–10, 31.205–11, 31.205–16 are revised, and 31.205–52 is added to assure that the Government does not recognize depreciation, amortization, or the cost of money expense flowing from asset write-ups that result from the "purchase method" of accounting for business combinations.

Item XIV—Independent Research and Development and Bid and Proposal Cost (IR&D/B&P)

FAR 31.205–18(c)(1) is being revised to adjust thresholds to $5,400,000 for companies and $675,000 for profit centers. Pursuant to section 208 of Pub. L. 96–342, the Department of Defense adjusted the IR&D/B&P threshold amounts, effective October 1, 1989.

Item XV—Advance Payments—Alternate Provision

FAR 32.412(f) is revised, and Alternate V is added to the clause at 52.232–12 to provide an alternate contract clause for use when advance payments are authorized, but a special bank account is not required.

Item XVI—Special Tooling/Special Test Equipment (ST/STE), Eliminate Marking

FAR 45.506(c) is revised to require contractors to mark Government-owned special tooling and special test equipment in their possession with a serial number and an indication of Government ownership, as opposed to agency ownership.

Item XVII—Return of Inventory to Suppliers

FAR 45.605–2 and 45.606–3(b) are revised to require contractors' property control systems to include procedures to ensure property is returned to the supplier for appropriate credit whenever feasible. Additionally, the reference to verification that contractors have endeavored to return excess property to suppliers has been deleted from FAR 45.606–3(b).

Item XVIII—Interpretation of Overtime Policy

FAR 52.222–2 is revised to clarify current policy concerning payment of overtime premiums.

Item XIX—Revision of Preaward Survey Forms

FAR 53.209–1 and 53.301–1403 through 1408 (Standard Forms 1403 through 1408) are revised to illustrate new editions of the preaward survey forms prescribed by the FAR.

Item XX—Standard Forms 294 and 295

The requirement for agencies to collect subcontracting data from prime contractors originated in October 1978 with the enactment of Public Law 95–507. This public law requires that all contractors, with the exception of small businesses, who receive a Federal prime contract or subcontract over $500,000 ($1 million for construction) that has subcontracting opportunities, include a plan for subcontracting with small and small disadvantaged businesses. Following the enactment of Public Law 95–507, Standard Form 294, Subcontracting Report for Individual Contracts, and Standard Form 295, Summary Subcontract Report, were developed to serve as the standard Government-wide data collection forms to monitor a contractor's subcontracting program.

Several changes to the forms were issued as a proposed rule on November 30, 1988 (53 FR 48495). Based on the comments received in response to the proposed rule and on new statutory requirements, an additional change to the SF 295 has been made.

Item XXI—Editorial Corrections

FAR 14.201–8(c) to conform with revisions made at 52.214–22 and 52.215–34 in FAC 84–56, Item XIII.

FAR 15.402(i) to correct FAC 84–53 and revise the reference to read "15.407(j)."

FAR 19.508 (b), (c), and (d) to correct FAC 84–48 and add a prescription to each Alternate I of the clauses at 52.219–5, 52.219–6, and 52.219–7.

FAR 19.811–3(d)(3) to correct FAC 84–52 and add a prescription to Alternate III of the clause at 52.219–18.

FAR 19.812(d) to correct FAC 84–56 and revise in the first sentence the referenced Pub. L. to read "100–656".

FAR 28.201(a)(2) to correct FAC 84–53 and revise the reference to read "28.204."

FAR 32.902 to correct FAC 84–45 in the definition "Receiving report," and revise the reference to read "32.905(f)."

FAR 36.520 is reserved to correct FAC 84–53 and to be consistent with the clause reserved at 52.236–20. FAR 36.521 is added to correct FAC 84–53 and to be consistent with the clause at 52.236–21.

FAR 52.209–3 to correct FAC 84–51 and revise in the introductory text the reference to read "9.308–1."

FAR 52.215–18 to correct FAC 84–53 and revise in the introductory text the reference to read "15.407(j)."

FAR 52.219–18 to correct FAC 84–52 and revise reference in Alternate III to read "19.502–2(b)."

FAR 52.227–15(b) to correct, in the first sentence, "this clause" to read "this provision." Date of clause is not changed; revision is editorial only.

FAR 52.227–17 to correct FAC 84–51, in the introductory text, the reference to read "27.409(i)."

FAR 52.227–20 to correct the reference "paragraph (g)" to read "paragraph (f)."

FAR 52.243–7 to correct the reference to the prescription to read "43.107."

FAR 53.228 is revised, and 53.301–24, 53.301–25, 53.301–25–A, 53.301–28, 53.301–34, 53.301–35, 53.301–1416, 53.302–90, and 53.302–91 illustrate the final version of the forms pertaining to Individual Sureties.

Item XXIII—FAR Index Revision Through FAC 84–58

The FAR Index has been—

Updated to reflect the current FAR contents, and reformatted to facilitate its use and its subsequent maintenance.

The revised Index provides an alphabetical listing of selected key words, showing each key word in its context. The key words are sufficient to permit a reader to locate almost any subject area that is in the FAR.

The key words used in the revised Index have been chosen from the following documents:

Structure of the FAR to the Subpart Level.

Table of Contents to part 31, Contract Cost Principles.

Table of Contents to part 52, Solicitation Provisions and Contract Clauses.

Selected elements of the Tables of Contents not listed above. Since the FAR Index is not a regulatory document, the revised Index is being published in looseleaf form, but not in the Federal Register.

Therefore, 48 CFR parts 1, 3, 5, 6, 7, 8, 9, 13, 14, 15, 19, 25, 27, 28, 31, 32, 36, 45, 52, and 53 are amended as set fdorth below:

The interim rules in FAC 84–48, published in the **Federal Register** on July 12, 1989 (54 FR 25060), amending sections 19.102, 19.502–2, and the clauses at 52.219–5, 52.219–6, and 52.219–7 pertaining to FAC 84–48, Item II, Nonmanufacturers rule, and amending section 1.105, subpart 27.3, and the clauses at 52.227–11, 52.227–12, and 52.227–13 pertaining to FAC 84–48, Item V, Commerce Patent Regulation, are hereby adopted as final rules without change.

1. The authority citation for 48 CFR parts 1, 3, 5, 6, 7, 8, 9, 13, 14, 15, 19, 25, 28, 31, 32, 36, 45 52, and 53 continues to read as follows:

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

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.105 is amended by removing FAR segment "52.214–8" and corresponding OMB Control Number "9000–0018"; by adding in numerical order, a FAR segment and corresponding OMB Control Number; and by removing FAR Segment "SF 25–B" and corresponding OMB Control Number "9000–0045", to read as follows:

1.105 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB Control Number
* * * * *	
52.215-32	9000-0105
* * * * *	

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3.103-1 [Amended]

3. Section 3.103-1 is amended by removing and reserving paragraph (b).

4. Section 3.103-2 is amended by revising paragraph (b)(1) to read as follows:

3.103-2 Evaluating the certification.

* * * * *

(b) * * *

(1) *Rejection of offers suspected of being collusive.* If the offeror deleted or modified subparagraph (a)(1) or (a)(3) or paragraph (b) of the certificate, the contracting officer shall reject the offeror's bid or proposal.

* * * * *

5. Section 3.303 is amended by redesignating the existing paragraphs (e) and (f) as (f) and (g), and by adding new paragraph (e) to read as follows:

3.303 Reporting suspected antitrust violations.

* * * * *

(e) For offers from foreign contractors for contracts to be performed outside the United States, contracting officers may refer suspected collusive offers to the authorities of the foreign government concerned for appropriate action.

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

6. Section 5.205 is amended by revising paragraph (d)(2) to read as follows:

5.205 Special situations.

* * * * *

(d) * * *

(2) When the total fee is expected to exceed $10,000 ($5,000 for Defense activities), but not exceed $25,000, the contracting officer shall comply with 5.101(a)(2). When the contract action is not required to be synopsized under subparagraph (d)(1) of this section, the contracting officer shall display a notice of the solicitation or a copy of the solicitation in a public place at the contracting office. Other optional publicizing methods are authorized in accordance with 5.101(b).

* * * * *

PART 6—COMPETITION REQUIREMENTS

7. Section 6.303-1 is amended by revising paragraph (e) to read as follows:

6.303-1 Requirements.

* * * * *

(e) The justifications for contracts awarded under the authority cited in 6.302-2 may be prepared and approved within a reasonable time after contract award when preparation and approval prior to award would unreasonably delay the acquisitions.

PART 7—ACQUISITION PLANNING

8. Section 7.300 is amended by revising paragraph (b) to read as follows:

7.300 Scope of subpart.

* * * * *

(b) The Supplement to OMB Circular No. A-76

7.302 [Amended]

9. Section 7.302 is amended by removing in the introductory text and in paragraph (c) the word "Handbook" and inserting in both places the word "Supplement".

10. Section 7.303 is amended by revising paragraph (b) to read as follows:

7.303 Determining availability of private commercial sources.

* * * * *

(b) In making all reasonable efforts to identify such sources, the contracting officer shall assist in—

(1) Synopsizing the requirement in the Commercial Business Daily until a reasonable number of potential sources are identified. If necessary, synopsis shall be submitted at least three times in a 90-day period with a minimum of 30 days between notices, (but, when necessary to meet an urgent requirement, this notification may be limited to a total of two notices in a 30-day period with a minimum of 15 days between them). If sufficient sources are not identified through synopses or from subparagraph (b)(2) of this section, a finding that no commercial source is available may be made and the cost comparison canceled; and

(2) Requesting assistance from the Small Business Administration, the Department of Commerce, and the General Services Administration.

11. Section 7.304 is amended by removing in the first sentence of paragraph (a) the words "performance-oriented" and inserting in their place the word "performance"; and by revising paragraph (b)(1) to read as follows:

7.304 Procedures.

* * * * *

(b) * * *

(1) Enter on a cost-comparison form (see Part IV of the Supplement) the cost estimate and the other elements required to accomplish a cost comparison;

* * * * *

12. Section 7.306 is amended by removing in paragraph (a)(1)(iii) within the parentheses the words "(see Cost Comparison Handbook, Exhibit 1)" and inserting in their place the words "(see Supplement, Part IV, Illustration 1)"; by removing in paragraph (a)(1)(iv) within the parentheses the figures "5" and "15 working days" and inserting in their place "15" and "30 working days" respectively; and by revising paragraphs (a)(2), (a)(3), and the third sentence in (b)(3) to read as follows:

7.306 Evaluation.

* * * * *

(a) * * *

(2) After evaluation of bids (see subpart 14.4) and determinations of responsibility, the contracting officer shall provide the price of the low responsive, responsible bidder to the preparer of the cost estimate for Government performance, for final Government review of the cost-comparison form.

(3) Upon completion of the review process, including resolution of any request under 7.307, the responsible agency official shall make the final determination for performance by the Government or under contract and provide written notification to the contracting officer, who shall either award a contract or cancel the solicitation as required.

(b) * * *

(3) * * * Upon completion of the public review period and resolution of any questions raised under 7.307, the responsible agency official shall provide the contracting officer written notification of the final cost comparison decision. * * *

* * * * *

13. Section 7.307 is amended by revising the third sentence in paragraph (a) to read as follows:

7.307 Appeals.

(a) * * * This review must be completed within 30 days after the deciding official receives a request under paragraph (b) of this section.

* * *

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

14. Section 8.1102 is amended by revising in paragraph (a) the introductory text; by redesignating existing paragraph (b) as (c); and by adding new paragraph (b) to read as follows:

8.1102 Presolicitation requirements.

(a) Except as specified in 8.1102(b), before preparing solicitations for leasing of motor vehicles, contracting officers shall obtain from the requiring activity a written certification that—

* * * * *

(b) With respect to requirements for leasing motor vehicles for a period of less than 60 days, the contracting officer need not obtain the certification specified in 8.1102(a)—

(1) If the requirement is for type 1A, 1B, or II vehicles, which are by definition fuel efficient; or

(2) If the requirement is for passenger vehicles larger than 1A, 1B, or II, and the agency has established procedures for advance approval, on a case-by-case basis, of such requirements.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

15. Section 9.306 is amended by adding paragraph (j) to read as follows:

9.306 Solicitation requirements.

* * * * *

(j) Inform offerors that the prices for first articles and first article tests in relation to production quantities shall not be materially unbalanced (see 15.814) if first article test items or tests are to be separately priced.

PART 13—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

13.106 [Amended]

16. Section 13.106 is amended by removing in paragraph (a) heading, in (a)(4), and in paragraphs (b) and (c) headings, the figure "$1,000" and inserting in each place "10 percent of the small purchase limitation".

PART 14—SEALED BIDDING

17. Section 14.201–6 is amended by revising the introductory text of paragraph (c); by removing and reserving paragraph (d); by revising paragraph (l); and in paragraph (m) by removing the words "that is estimated to exceed $10,000" to read as follows:

14.201–6 Solicitation provisions.

* * * * *

(c) The contracting officer shall insert the following provisions in invitations for bids:

* * * * *

(l) The contracting officer shall insert the provision at 52.214–18, Preparation of Bids—Construction, in invitations for bids for construction work.

* * * * *

14.201–8 [Amended]

18. Section 14.201–8 is amended in the second sentence of paragraph (c) by removing the figure "$250" and inserting in its place "$500".

19. Section 14.214 is added to read as follows:

14.214 Commercial pricing certificates.

Sealed bid acquisitions of parts or components as defined in 15.813–2 are subject to the requirements of 15.813, Commercial pricing certificates, including the solicitation provision and contract clause prescription in 15.813–7, when conditions specified therein are applicable.

20. Section 14.404–2 is amended by revising paragraph (f); by redesignating existing paragraphs (g) through (k) as (h) through (l); and by adding a new paragraph (g) to read as follows:

14.404–2 Rejection of individual bids.

* * * * *

(f) Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but the prices for individual line items as well.

(g) Any bid may be rejected if the prices for any line items or subline items are materially unbalanced (see 15.814).

* * * * *

14.405 [Amended]

21. Section 14.405 is amended in paragraph (e) by removing the words "52.214–8, Parent Company and Identifying Data, and".

22. Section 14.407–2 is amended by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

14.407–2 Responsible bidder—reasonableness of price.

* * * * *

(b) The price analysis shall consider whether bids are materially unbalanced (see 15.814).

PART 15—CONTRACTING BY NEGOTIATION

15.402 [Amended]

23. Section 15.402 is amended in the first sentence of paragraph (i) by removing the reference "15.407(i)" and inserting in its place "15.407(j)".

24. Sections 15.813 through 15.813–7 are revised to read as follows:

Sec.

15.813 Commercial pricing certificates.

15.813–1 Scope and applicability.

This section prescribes policies and procedures for obtaining certificates from contractors relating to prices offered for parts or components as defined in 15.813–2. It implements the statutory provisions in 41 U.S.C. 253e for civilian agencies and in 10 U.S.C. 2323 for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard.

15.813–2 Definitions.

Lowest commercial price, as used in this section, means the lowest price at which a sale was made to the general public of a particular part or component. The term does not include the price at which a sale was made to—

(a) Any agency of the United States;

(b) Customers located outside the United States;

(c) A subsidiary, affiliate, or parent business organization of the contractor or any other branch of the same business entity; and

(d) For contracts awarded by the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, such term also does not include the sale to any customer—

(1) For resale after such customer performs a service or function in connection with such part or component that increases the cost of the part or component unless the agency procuring the part or component can demonstrate that the agency is procuring the part or component before such service or

function has been performed by any such customer (see 15.813–6(c)); or

(2) At a price that, for the purpose of making a donation, has been substantially discounted below the fair market value or regular price of such part or component.

Part or component, as used in this section, means—

(a) For acquisitions of the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, any individual piece, part, subassembly, or component which is furnished for the logistic support or repair of an end item and not as an end item itself; or

(b) For acquisitions of civilian agencies other than the National Aeronautics and Space Administration and the Coast Guard, any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of a part or component.

15.813–3 Policy.

Contracts entered into using other than full and open competition may not result in prices for parts or components (as defined in 15.813–2) offered for sale to the general public that exceed the contractor's lowest commercial prices for such parts or components unless the price difference is clearly justified by the seller or the contracting officer has determined to exempt the contractor from the requirement under 15.813–5(d). To this end, 41 U.S.C. 253e and 10 U.S.C. 2323 require offerors to certify that prices offered for parts or components are not more than their lowest commercial prices, or to submit a written statement specifying the amount of the difference between their lowest commercial prices for the parts or components and the prices offered, and providing justification for those differences. Because the forces of the competitive marketplace usually ensure that the Government does not pay an unreasonable price for commercial parts or components, commercial pricing certificates are necessary only when these forces are not present in a particular contract action.

15.813–4 Requirements for submission of commercial pricing certificates.

Unless a contract is exempt from the requirement pursuant to 15.813–5, commercial pricing certificates are required to be submitted with any offer/proposal that—

(a) Includes any parts or components that are offered for sale to the general public; and

(b) Is submitted in connection with any of the following:

(1) Offers/proposals in connection with contracts to be awarded with other than full and open competition.

(2) Contract modifications, including contract modifications for additional parts or components, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause (but see subparagraph (b)(5) of this subsection), or funding and other administrative modifications.

(3) Orders under the provisioning line item of a contract, a basic ordering agreement, or similar arrangement if the order is being placed with other than full and open competition.

(4) Definitization of price on a letter contract, unpriced order, or other contract, modification, or order awarded without a definitive price. (The commercial pricing certificate is not required before the initial award, but rather shall be submitted with the proposal to definitize.)

(5) Any modification issued pursuant to the Changes clause that results in the providing of new or different parts or components.

15.813–5 Exemption from the requirement to submit commercial pricing certificates.

A contract is exempt from the requirement that a commercial pricing certificate be submitted if—

(a) The simplified small purchase procedures of part 13 are used;

(b) An acquisition is being made under the procedures established by the General Services Administration for its multiple award schedule program; or

(c) An order is placed under an indefinite delivery type contract. (However, a certificate is required in connection with the award with other than full and open competition of an indefinite delivery type contract.); or

(d) The contracting officer determines that obtaining the commercial pricing certificate is not appropriate because of—

(1) National security considerations; or

(2) Significant differences between the terms of the commercial sales of the parts or components to be acquired under the contract and the terms of the contract, including differences in quantity, quality, delivery requirements, or other terms and conditions.

§ 15.813–6 Procedures.

(a) If a commercial pricing certificate is required in accordance with 15.813–4, the contracting officer shall ensure that the certificate set forth in paragraph (b) of the clause at 52.215–32, Certification of Commercial Pricing for Parts or Components, is submitted with each offer/proposal. Notice of the requirement and requests for submission of a certificate in the solicitation are accomplished through use of the solicitation provision of 52.215–37. Contracting officers are encouraged to enter into advance agreements with contractors to consolidate submission requirements when detailed repetitive certifications and justifications would otherwise be required.

(b) When requested pursuant to paragraph (a) of this subsection, offerors/contractors are required to submit the commercial pricing certificate with their proposals unless the contracting officer determines to grant an exemption pursuant to 15.813–5(d). Exemptions from the requirement to submit a commercial pricing certificate should not be granted pursuant to 15.813–5(d)(2) unless the contracting officer has sufficient information to verify that the contractor's lowest commercial price for parts or components offered for sale to the general public are subject to such substantial differences (in quantity, quality, delivery, or other terms and conditions) from Government contract terms so as to warrant the exemption. If the contracting officer determines that use of the lowest commercial price for a part or component is not appropriate for a contract under 15.813–5(d), this determination should be communicated to the offeror/contractor in writing. Contracting officers may accept information supporting possible exemptions from offerors/contractors at any time prior to agreement on price. Exemptions relieve the offerors/contractors from the statutory and contractual submission requirement.

(c) For the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, a contracting officer may make a determination that the definition of "Lowest Commercial Price" in the clause of 52.215–32 shall include the price at which a sale was made to any person or corporation for resale by the person or corporation. In making this determination, the contracting officer must be able to demonstrate that the parts or components are being procured by the contracting officer under the same terms and conditions at which a

sale was made to the person or corporation for resale.

(d) The contracting officer shall request submission of a new certificate when the validity of the certificate originally submitted with an offer/proposal becomes doubtful before award because of submission of a new or revised proposal or as a result of discussions.

(e) If, after award, the contracting officer learns or suspects that a certificate was inaccurate, incomplete, or misleading, the contracting officer shall request an audit under the authority of paragraph (c) of the clause of 52.215-32. If the contracting officer determines that a certificate is inaccurate, incomplete, or misleading, the Government is entitled to a price adjustment for any overcharge (see paragraph (d) of the clause at 52.215-32).

(f) Individual or class determinations made under 15.813-5(d) (1) or (2), and advance agreements made under paragraph (a) of this subsection, shall be documented in the contract file.

(g) Possession of a commercial pricing certificate is not a substitute for examining a contractor's proposal and determining that the prices offered are fair and reasonable. The certificate represents a tool to assist the contracting officer in the determination. The contracting officer shall obtain sufficient information with regard to commercial parts or components to permit an understanding of the contractor's commercial pricing structure and where within that structure the acquisition fits. (See 15.804-3(h) and data obtained on the Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data.)

15.813-7 Solicitation provision and contract clause.

(a)(1) The contracting officer shall insert the clause at 52.215-32, Certification of Commercial Pricing for Parts or Components, in solicitations and contracts if a commercial pricing certificate is required by 15.813-4.

(2) The contracting officer shall insert the clause with its Alternate I in solicitations and contracts for sealed bids or negotiated acquisitions involving the furnishing of parts or components using full and open competition.

(b) The contracting officer shall insert the provision at 52.215-37, Commercial Pricing Certificate—Notice, in solicitations if a commercial pricing certificate is required by 15.813-4.

25. Section 15.814 is added to read as follows:

15.814 Unbalanced offers.

(a) Offers shall also be analyzed to determine whether they are unbalanced with respect to prices or separately priced line items. This is particularly important when evaluating the relationship of the price for first article tests or test items to the price for the production units, and in evaluating the prices for options in relationship to the prices for the basic requirement.

(b) An offer is mathematically unbalanced if it is based on prices which are significantly less than cost for some contract line items and significantly overstated in relation to cost for others. An offer is materially unbalanced if it is mathematically unbalanced, and if—

(1) There is a reasonable doubt that the offer would result in the lowest overall cost to the Government, even though it is the lowest evaluated offer; or

(2) The offer is so grossly unbalanced that its acceptance would be tantamount to allowing an advance payment.

(c) Offers that are materially unbalanced may be rejected.

(d) Depending on the nature of the acquisition, contracting officers shall use either price analysis or cost analysis techniques, or a combination of the two techniques, to determine if offers are materially unbalanced. The following are examples of techniques that can be used to determine if an offer is unbalanced. Although these examples specifically relate to first article testing, they may also be used for other procurements where unbalanced offers may be of concern.

(1) Compare all offers to determine if the offerors have significantly higher prices for the first articles than for the production units. The comparison should consider whether the Government or the contractor will perform the first article test.

(2) For an individual offer, compare the relationship of first article prices to prices for production items. The cost to the offeror for first articles may be estimated (i) By comparing the total price offered, including the first article to an alternate proposal by the same offeror which does not include first article testing (see 9.306(d)); or (ii) if cost data has been submitted, by reviewing certain elements of cost to determine, for instance, whether manufacturing and special tooling, and test equipment costs, are prorated among the first articles and the production units, or are only applied to the first articles. If cost data are not available, it may be necessary for contracting officers to estimate contractor cost.

PART 19—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

26. Section 19.102 is amended in paragraph (f)(5) at the end of the second sentence by removing the word "None" and inserting in its place the list of Product and Service Codes (PSC) to read as follows:

19.102 Size standards.

* * * * *

(f) * * *

(5) * * *

Backhoes (PSC 3805)
Graders, Road (Construction Machinery) (PSC 3805)
Scrapers, Construction (PCS 3805)
Cranes, Construction (PSC 3810)

* * * * *

27. Section 19.508 is amended in paragraphs (b), (c), and (d) by adding a sentence to read as follows:

19.508 Solicitation provisions and contract clauses.

* * * * *

(b) * * * The clause at 52.219-5 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration hs determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

(c) * * * The clause at 52.219-6 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

(d) * * * The clause at 52.219-7 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

* * * * *

28. Section 19.811-3 is amended by adding paragraph (d)(3) to read as follows:

19.811-3 Contract clauses.

* * * * *

(d) * * *

(3) The clause at 52.219-18 with its Alternate III will be used when the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business

manufacturers in the Federal market in accordance with 19.502–2(b).

* * * * *

19.812 [Amended]

29. Section 19.812 is amended in the first sentence of paragraph (d) by removing the reference "Pub. L. 100–646" and inserting in its place "Pub. L. 100–656".

PART 25—FOREIGN ACQUISITION

25.108 [Amended]

30. Section 25.108 is amended in paragraph (d)(1) by alphabetically adding an item, "Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property)."

PART 28—BONDS AND INSURANCE

31. Section 28.201 is amended in paragraph (a)(2) by removing the reference "28.203" and inserting in its place "28.204".

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

32. Section 31.205–10 is amended by removing "and" at the end of paragraph (a)(2)(ii); by adding "; and" at the end of (a)(2)(iii); by adding (a)(2)(iv); by revising (a)(5); by removing "and" at the end of (b)(2)(i)(B); by adding "; and" at the end of (b)(2)(i)(C); and by adding paragraph (b)(2)(i)(D) to read as follows:

31.205–10 Cost of money.

* * * * *

(a) * * *

(2) * * *

(iv) The requirements of 31.205–52, which limit the allowability of facilities capital cost of money, are observed.

* * * * *

(5) The cost of money resulting from including asset valuations resulting from business combinations in the facilities capital employed base is unallowable (see 31.205–52).

(b) * * *

(2) * * *

(i) * * *

(D) The requirements of 31.205–52, which limit the allowability of cost of money for capital assets under construction, fabrication, or development, are observed.

33. Section 31.205–11 is amended by adding paragraph (n) to read as follows:

31.205–11 Depreciation.

* * * * *

(n) Whether or not the contract is otherwise subject to CAS, the requirements of 31.205–52, which limit the allowability of depreciation, shall be observed.

34. Section 31.205–16 is amended by revising paragraphs (a) and (e) to read as follows:

31.205–16 Gains and losses on disposition of depreciable property or other capital assets.

(a) Gains and losses from the sale, retirement, or other disposition (but see 31.205–19) of depreciable property shall be included in the year in which they occur as credits or charges to the cost grouping(s) in which the depreciation or amortization applicable to those assets was included (but see paragraph (d) of this subsection). However, no gain or loss shall be recognized as a result of the transfer of assets in a business combination (see 31.205–52).

* * * * *

(e) Gains and losses arising from mass or extraordinary sales, retirements, or other disposition other than through business combinations shall be considered on a case-by-case basis.

* * * * *

31.205–18 [Amended]

35. Section 31.205–18 is amended by removing in paragraphs (c)(1)(i) and (c)(1)(v) the figures "$4,400,000" and "$4 million" and inserting in each place the figure "$5,400,000"; and by removing in paragraph (c)(1)(ii) the figures "$550,000" and "$500,000" and inserting in each place the figure "$675,000".

36. Section 31.205–52 is added to read as follows:

31.205–52 Asset valuations resulting from business combinations.

When the purchase method of accounting for a business combination is used, allowable amortization, cost of money, and depreciation shall be limited to the total of the amounts that would have been allowed had the combination not taken place.

PART 32—CONTRACT FINANCING

37. Section 32.412 is amended by revising paragraph (f) to read as follows:

32.412 Contract clause.

* * * * *

(f) If the requirement for a special bank account is eliminated in accordance with 32.409–3 (e) or (g), the contracting officer shall insert in the solicitation or contract the clause set forth in Alternate V of 52.232–12, Advance Payments, instead of the basic clause.

32.902 [Amended]

38. Section 32.902 is amended in the definition "Receiving report" by removing the reference "32.905(e)" and inserting in its place "32.905(f)".

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.521 [Redesignated from 36.520]

39. Section 36.520 is redesignated as 36.521.

36.520 [Added and Reserved]

40. New section 36.520 is added and reserved.

PART 45—GOVERNMENT PROPERTY

41. Section 45.506 is amended in paragraph (c) by revising the first sentence to read as follows:

45.506 Identification.

* * * * *

(c) In accordance with procedures approved by the property administrator, the contractor shall mark Government owned special tooling and special test equipment with a serial number and an indication of Government ownership. * * *

* * * * *

42. Section 45.605–2 is amended by adding a fourth sentence to read as follows:

45.605–2 Return to suppliers.

* * * A contractor's property control system shall include procedures to ensure property is returned to the supplier for appropriate credit whenever feasible.

45.606–3 [Amended]

43. Section 45.606–3 is amended by inserting in the first sentence of paragraph (b)(4), a period following the word "work" and removing the remainder of the sentence.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.207–1 [Amended]

44. Section 52.207–1 is amended by removing in the title of the provision the date "(APR 1985)" and inserting in its placed "(JUL 1990)"; and by removing in the italicized text within the brackets in paragraph (c), the words "5 to 15" and inserting in their place "15 to 30".

45. Section 52.207–2 is amended by revising the introductory text of the provision; by removing in the title of the provision the date "(APR 1984)" and inserting in its place "(JUL 1990)"; by removing in the italicized text within the

bracket in paragraphs (c)(1) and (c)(2), the words "5 to 15" and inserting in both places "15 to 30"; and by removing the derivation line following "(End of provision)" to read as follows:

52.207-2 Notice of Cost Comparison (Negotiated).

As prescribed in 7.305(b), insert the following provision:

* * * * *

52.209-3 [Amended]

46. Section 52.209-3 is amended in the introductory text by removing the reference "9.308-2" and inserting in its place the reference "9.308-1".

52.214-6 [Amended]

47. Section 52.214-6 is amended in the introductory text by inserting a colon following the word "provision" in the first sentence and removing the remainder of the paragraph.

52.214-8 [Removed and Reserved]

48. Section 52.214-8 is removed and reserved.

49. Section 52.214-10 is amended by removing in the title of the provision the date "(APR 1985)" and inserting in its place the date "(JUL 1990)"; and by adding paragraph (e) to read as follows:

52.214-10 Contract Award—Sealed Bidding.

* * * * *

(e) The Government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

* * * * *

52.214-18 [Amended]

50. Section 52.214-18 is amended in the introductory text by inserting a colon following the word "provision" in the first sentence and removing the remainder of the paragraph.

51. Section 52.215-16 is amended by removing in the title of the provision the date "(APR 1985)" and inserting in its place the date "(JUL 1990)"; and by adding paragraph (g) to read as follows:

52.215-16 Contract Award.

* * * * *

(g) The Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items or subline items. An offer is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the offer will result in the lowest overall cost to the Government, even though it may be the low evaluated offer, or it is so unbalanced as to be tantamount to allowing an advance payment.

* * * * *

52.215-18 [Amended]

52. Section 52.215-18 is amended in the introductory text by removing the reference "15.407(i)" and inserting in its place "15.407(j)".

53. Section 52.215-32 is revised to read as follows:

52.215-32 Certification of Commercial Pricing for Parts or Components.

As prescribed in 15.813-7(a), insert the following clause:

Certification of Commercial Pricing for Parts or Components (JUL 1990)

(a) *Definitions.*

Lowest commercial price, as used in this section, means the lowest price at which a sale was made to the general public of a particular part or component. The term does not include the price at which a sale was made to—

(1) Any agency of the United States;

(2) Customers located outside the United States;

(3) A subsidiary, affiliate, or parent business organization of the contractor, or any other branch of the same business entity; and

(4) For acquisitions of the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, such term also does not include the sale to any customer—

(i) For resale after such customer performs a service or function in connection with such part or component that increases the cost of the part or component unless the agency procuring the part or component can demonstrate that the agency is procuring the part or component before such service or function has been performed by any such customer (see 15.813-6(c)); or

(ii) At a price that, for the purpose of making a donation, has been substantially discounted below the fair market value or regular price of such part or component.

Part or component, as used in this section, means—

(1) For acquisitions of the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, any individual piece, part, subassembly, or component which is furnished for the logistic support or repair of an end item and not as an end item itself; or

(2) For acquisitions of civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, any individual part, component, subassembly, assembly or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of a part or component.

(b) *Submission requirements.* The Offeror/Contractor shall execute and submit to the Contracting Officer the following certificate with any offer/proposal as required by FAR 15.813-4 when requested by the Contracting Officer:

Certificate of Commercial Pricing for Parts or Components

(1) Unless justified in subparagraph (b)(2) of this clause, by submission of this offer/proposal, the Offeror/Contractor certifies that, to the best of its knowledge and belief, the prices offered for those parts or components (whether or not separately identified) that the Contractor offers for sale are no higher than the lowest commercial price at which such items were sold to the public during the most recent regular monthly, quarterly, or other period for which sales data are reasonably available, *provided* that in no event shall this period be less than 1-month in duration.

(2) All parts or components for which prices offered are higher than the lowest commercial price referred to in subparagraph (b)(1) of this certificate are identified below (including the amounts by which such offered prices are higher) and a written justification for the differences is attached (list as necessary):

Part or Component	Price Difference
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Offer/Proposal No. _____
Time period for sales data _____
Firm _____
Typed name and signature _____
Title _____
Date _____

(End of certificate)

(c) *Audit.* The Contracting Officer or representatives of the Contracting Officer who are employees of the Government shall have the right to examine and audit all directly pertinent records of sales and related documents, including contract terms and conditions, necessary to verify the validity of any certificate executed in accordance with paragraph (b) of this clause. The Contractor shall make those records, books, data, and documents available for examination, audit, or reproduction until 3 years after the date the certificate set forth in paragraph (b) of this clause is executed. Nothing contained in this clause shall require the submission of cost or pricing data not otherwise required by law or regulation.

(d) *Price reduction.* If any price, including profit or fee negotiated in connection with this contract, or any cost reimbursable under this contract, has increased because the certification in subparagraph (b)(1) of the certificate or the information provided as justification in subparagraph (b)(2) of the certificate was inaccurate, incomplete, or misleading, the price or cost shall be reduced

accordingly and the contract shall be modified to reflect the reduction.

(End of clause)

Alternate I (JUL 1990). As prescribed in 15.813–7(a)(2), insert the following paragraph in the clause without a paragraph identifier, before paragraph (a) of this clause:

The requirements of this clause shall become operative only for any modifications to this contract involving the furnishing of parts or components, as defined in paragraph (a) of this clause, if awarded as a result of other than full and open competition.

54. Section 52.215–37 is added to read as follows:

52.215–37 Commercial Pricing Certificate—Notice.

As prescribed in 15.813–7(b), insert the following provision:

Commercial Pricing Certificate—Notice (JUL 1990)

Line items _____ of this solicitation are parts or components to be acquired under conditions that require the submission of a commercial pricing certificate. The Offeror shall comply with the clause at FAR 52.215–32, Certification of Commercial Pricing for Parts or Components, and execute and submit a certificate with its offer.

(End of provision)

52.217–5 [Amended]

55. Section 52.217–5 is amended by removing in the title of the provision the date "(JUL 1988)" and inserting in its place the date "(JUL 1990)"; by removing the designation "(a)" from paragraph (a); and by removing paragraph (b).

52.219–18 [Amended]

56. Section 52.219–18 is amended by removing in Alternate III the reference "19.502(b)" and inserting in its place "19.502–2(b)".

57. Section 52.222–2 is amended in the introductory text by inserting a colon following the word "clause" and removing the remainder of the sentence; by removing in the title of the clause the date "(APR 1984)" and inserting in its place "(JUL 1990)"; by revising paragraph (a) and its asterisked footnote preceding "(End of clause)"; and by removing the derivation line following "(End of clause)" to read as follows:

52.222–2 Payment for Overtime Premiums.

* * * * *

(a) The use of overtime is authorized under this contract if the overtime premium does not exceed *_____ or the overtime premium is paid for work—

* * * * *

*Insert either "zero" or the dollar amount agreed to during negotiations. The inserted figure does not apply to the exceptions in subparagraph (a)(1) through (a)(4) of the clause.

§ 52.227–15 [Amended]

58. Section 52.227–15 is amended in the first sentence of paragraph (b) of the clause by removing the words "of this clause" and inserting in their place "of this provision".

52.227–17 [Amended]

59. Section 52.227–17 is amended in the introductory text by removing the reference "27.409(a)(1)(iv)" and inserting in its place "27.409(i)".

52.227–20 [Amended]

60. Section 52.227–20 is amended in paragraph (b)(1)(iv) of the clause by revising the reference "paragraph (g)" to read "paragraph (f)".

61. Section 52.232–12 is amended by adding Alternate V to the clause to read as follows:

52.232–12 Advance Payments.

* * * * *

Alternate V (JUL 1990). If the requirement for a special bank account is eliminated in accordance with 32.409–3 (e) or (g), insert the clause set forth below instead of the basic clause.

If this Alternate is used in combination with *Alternate II*, disregard the instructions concerning paragraph (c), *Use of funds*, in *Alternate II*; substitute paragraph (e), *Maximum payment*, in *Alternate II* for paragraph (d) below; and substitute paragraph (f), *Interest*, in *Alternate II* for paragraph (e) below and change the reference to paragraph (f)(3) in the first sentence of paragraph (f) of *Alternate II* to (e)(3).

If this Alternate is used in combination with *Alternate III*, insert the additional sentence set forth in *Alternate III* as the first sentence of paragraph (d) of this Alternate.

If this Alternate is used in combination with *Alternate IV*, insert the additional sentences set forth in *Alternate IV* as the beginning sentences of paragraph (e) of this Alternate.

Advance Payments Without Special Bank Account (JUL 1990)

(a) *Requirements for payment.* Advance payments will be made under this contract (1) upon submission of properly certified invoices or vouchers by the contractor, and approval by the administering office, _____ [*insert the name of the office designated under agency procedures*], or (2) under a letter of credit. The amount of the invoice or voucher submitted plus all advance payments previously approved shall not exceed $_____. If a letter of credit is used, the Contractor shall withdraw cash only when needed for disbursements acceptable under this contract and report cash disbursements and balances as required by the administering office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

(b) *Use of funds.* The Contractor may use advance payment funds only to pay for properly allocable, allowable, and reasonable costs for direct materials, direct labor, and indirect costs. Determinations of whether costs are properly allocable, allowable, and reasonable shall be in accordance with generally accepted accounting principles, subject to any applicable subparts of part 31 of the Federal Acquisition Regulation.

(c) *Repayment to the Government.* At any time, the Contractor may repay all or any part of the funds advanced by the Government. Whenever requested in writing to do so by the administering office, the Contractor shall repay to the Government any part of unliquidated advance payments considered by the administering office to exceed the Contractor's current requirements or the amount specified in paragraph (a) of this clause.

(d) *Maximum payment.* When the sum of all unliquidated advance payments, unpaid interest charges, and other payments exceed _____ percent of the contract price, the Government shall withhold further payments to the Contractor. On completion or termination of the contract, the Government shall deduct from the amount due to the Contractor all unliquidated advance payments and all interest charges payable. If previous payments to the Contractor exceed the amount due, the excess amount shall be paid to the Government on demand. For purposes of this paragraph, the contract price shall be considered to be the stated contract price of $_____, less any subsequent price reductions under the contract, plus (1) any price increases resulting from any terms of this contract for price redetermination or escalation, and (2) any other price increases that do not, in the aggregate, exceed $_____ [*insert an amount not higher than 10 percent of the stated contract amount inserted in this paragraph*]. Any payments withheld under this paragraph shall be applied to reduce the unliquidated advance payments. If full liquidation has been made, payments under the contract shall resume.

(e) *Interest.* (1) The Contractor shall pay interest to the Government on the daily unliquidated advance payments at the daily rate in subparagraph (e)(3) of this clause. Interest shall be computed at the end of each calendar month for the actual number of days involved. For the purpose of computing the interest charge—

(i) Advance payments shall be considered as increasing the unliquidated balance as of the date of the advance payment check;

(ii) Repayments by Contractor check shall be considered as decreasing the unliquidated balance as of the date on which the check is received by the Government authority designated by the Contracting Officer; and

(iii) Liquidations by deductions from Government payments to the Contractor shall be considered as decreasing the unliquidated balance as of the date of the check for the reduced payment.

(2) Interest charges resulting from the monthly computation shall be deducted from payments, other than advance payments, due the Contractor. If the accrued interest exceeds the payment due, any excess interest shall be carried forward and deducted from subsequent payments. Interest carried

forward shall not be compounded. Interest on advance payments shall cease to accrue upon satisfactory completion or termination of the contract for the convenience of the Government. The Contractor shall charge interest on advance payments to subcontractors in the manner described above and credit the interest to the Government. Interest need not be charged on advance payments to nonprofit educational or research subcontractors, for experimental, developmental, or research work.

(3) If interest is required under the contract, the Contracting Officer shall determine a daily interest rate based on the rate established by the Secretary of the Treasury under Pub. L. 92–41 (50 U.S.C. App., 1215(b)(2)). The Contracting Officer shall revise the daily interest rate during the contract period in keeping with any changes in the cited interest rate.

(4) If the full amount of interest charged under this paragraph has not been paid by deduction or otherwise upon completion or termination of this contract, the Contractor shall pay the remaining interest to the Government on demand.

(f) *Lien on property under contract.* (1) All advance payments under this contract, together with interest charges, shall be secured, when made, by a lien in favor of the Government, paramount to all other liens, on the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other terms of this contract, or otherwise, shall have valid title to the supplies, materials, or other property as against other creditors of the Contractor.

(2) The Contractor shall identify, by marking or segregation, all property that is subject to a lien in favor of the Government by virtue of any terms of this contract in such a way as to indicate that it is subject to a lien and that it has been acquired for or allocated to performing this contract. If, for any reason, the supplies, materials, or other property are not identified by marking or segregation, the Government shall be considered to have a lien to the extent of the Government's interest under this contract on any mass of property with which the supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over the property on its books and records.

(3) If, at any time during the progress of the work on the contract, it becomes necessary to deliver to a third person any items or materials on which the Government has a lien, the Contractor shall notify the third person of the lien and shall obtain from the third person a receipt in duplicate acknowledging the existence of the lien. The Contractor shall provide a copy of each receipt to the Contracting Officer.

(4) If, under the termination clause, the Contracting Officer authorizes the contractor to sell or retain termination inventory, the approval shall constitute a release of the Government's lien to the extent that—

(i) The termination inventory is sold or retained; and

(ii) The sale proceeds or retention credits are applied to reduce any outstanding advance payments.

(g) *Insurance.* The Contractor represents and warrants that it maintains with responsible insurance carriers (1) insurance on plant and equipment against fire and other hazards, to the extent that similar properties are usually insured by others operating plants and properties of similar character in the same general locality; (2) adequate insurance against liability on account of damage to persons or property; and (3) adequate insurance under all applicable worker's compensation laws. The Contractor agrees that, until work under this contract has been completed and all advance payments made under the contract have been liquidated, it will maintain this insurance; maintain adequate insurance on any materials, parts, assemblies, subassemblies, supplies, equipment, and other property acquired for or allocable to this contract and subject to the Government lien under paragraph (f) of this clause; and furnish any certificates with respect to its insurance that the administering office may require.

(h) *Default.* (1) If any of the following events occur, the Government may, by written notice to the Contractor, withhold further payments on this contract:

(i) Termination of this contract for a fault of the Contractor.

(ii) A finding by the administering office that the Contractor has failed to—

(A) Observe any of the conditions of the advance payment terms;

(B) Comply with any material term of this contract;

(C) Make progress or maintain a financial condition adequate for performance of this contract;

(D) Limit inventory allocated to this contract to reasonable requirements; or

(E) Avoid delinquency in payment of taxes or of the costs of performing this contract in the ordinary course of business.

(iii) The appointment of a trustee, receiver, or liquidator for all or a substantial part of the Contractor's property, or the institution of proceedings by or against the Contractor for bankruptcy, reorganization, arrangement, or liquidation.

(iv) The commission of an act of bankruptcy.

(2) If any of the events described in subparagraph (h)(1) of this clause continue for 30 days after the written notice to the Contractor, the Government may take any of the following additional actions:

(i) Charge interest, in the manner prescribed in paragraph (e) of this clause, on outstanding advance payments during the period of any event described in subparagraph (h)(1) of this clause.

(ii) Demand immediate repayment by the Contractor of the unliquidated balance of advance payments.

(iii) Take possession of and, with or without advertisement, sell at public or private sale all or any part of the property on which the Government has a lien under this contract and, after deducting any expenses incident to the sale, apply the net proceeds of the sale to reduce the unliquidated balance of advance payments or other Government claims against the Contractor.

(3) The Government may take any of the actions described in subparagraphs (h)(1) and (h)(2) of this clause it considers appropriate at its discretion and without limiting any other rights of the Government.

(i) *Prohibition against assignment.* Notwithstanding any other terms of this contract, the Contractor shall not assign this contract, any interest therein, or any claim under the contract to any party.

(j) *Information and access to records.* The Contractor shall furnish to the administering office (1) monthly or at other intervals as required, signed or certified balance sheets and profit and loss statements, and, (2) if requested, other information concerning the operation of the contractor's business. The Contractor shall provide the authorized Government representatives proper facilities for inspection of the Contractor's books, records, and accounts.

(k) *Other security.* The terms of this contract are considered to provide adequate security to the Government for advance payments; however, if the administering office considers the security inadequate, the Contractor shall furnish additional security satisfactory to the administering office, to the extent that the security is available.

(l) *Representations and warranties.* The Contractor represents and warrants the following:

(1) The balance sheet, the profit and loss statement, and any other supporting financial statements furnished to the administering office fairly reflect the financial condition of the Contractor at the date shown or the period covered, and there has been no subsequent materially adverse change in the financial condition of the Contractor.

(2) No litigation or proceedings are presently pending or threatened against the Contractor, except as shown in the financial statements.

(3) The Contractor has disclosed all contingent liabilities, except for liability resulting from the renegotiation of defense production contracts, in the financial statements furnished to the administering office.

(4) None of the terms in this clause conflict with the authority under which the Contractor is doing business or with the provision of any existing indenture or agreement of the Contractor.

(5) The Contractor has the power to enter into this contract and accept advance payments, and has takken all necessary action to authorize the acceptance under the terms of this contract.

(6) The assets of the Contractor are not subject to any lien or encumbrance of any character except for current taxes not delinquent, and except as shown in the financial statements furnished by the Contractor. There is no current assignment of claims under any contract affected by these advance payment provisions.

(7) All information furnished by the Contractor to the administering office in connection with each request for advance payments is true and correct.

(8) These representations and warranties shall be continuing and shall be considered to

have been repeated by the submission of each invoice for advance payments.

(m) *Covenants.* To the extent the Government considers it necessary while any advance payments made under this contract remain outstanding, the Contractor, without the prior written consent of the administering office, shall not—

(1) Mortgage, pledge, or otherwise encumber or allow to be encumbered, any of the assets of the Contractor now owned or subsequently acquired, or permit any preexisting mortgages, liens, or other encumbrances to remain on or attach to any assets of the Contractor which are allocated to performing this contract and with respect to which the Government has a lien under this contract;

(2) Sell, assign, transfer, or otherwise dispose of accounts receivable, notes, or claims for money due or to become due;

(3) Declare or pay any dividends, except dividends payable in stock of the corporation, or make any other distribution on account of any shares of its capital stock, or purchase, redeem, or otherwise acquire for value any of its stock, except as required by sinking fund or redemption arrangements reported to the administering office incident to the establishment of these advance payment provisions;

(4) Sell, convey, or lease all or a substantial part of its assets;

(5) Acquire for value the stock or other securities of any corporation, municipality, or Governmental authority, except direct obligations of the United States;

(6) Make any advance or loan or incur any liability as guarantor, surety, or accommodation endorser for any party;

(7) Permit a writ of attachment or any similar process to be issued against its property without getting a release or bonding the property within 30 days after the entry of the writ of attachment or other process;

(8) Pay any remuneration in any form to its directors, officers, or key employees higher than rates provided in existing agreements of which notice has been given to the administering office; accure excess remuneration without first obtaining an agreement subordinating it to all claims of the Government; or employ any person at a rate of compensation over _____ a year.

(9) Change substantially the management, ownership, or control of the corporation;

(10) Merge or consolidate with any other firm or corporation, change the type of business, or engage in any transaction outside the ordinary course of the Contractor's business as presently conducted;

(11) Deposit any of its funds except in a bank or trust company insure by the Federal Deposit Insurance Corporation.

(12) Create or incur indebtedness for advances, other than advances to be made under the terms of this contract, or for borrowings;

(13) Make or covenant for capital expenditures exceeding $____ in total;

(14) Permit its net current assets, computed in accordance with generally accepted accounting principles, to become less than ____; or

(15) Make any payments on account of the obligations listed below, except in the manner and to the extent provided in this contract:

[List the pertinent obligations]

52.243-7 [Amended]

62. Section 52.243-7 is amended in the first sentence of the introductory text by removing the reference "43.106" and inserting in its place "43.107".

PART 53—FORMS

63. Section 53.209-1 is revised to read as follows:

53.209-1 Responsible prospective contractors.

(a) *SF 1403 (REV. 9/88), Preaward Survey of Prospective Contractor (General).* SF 1403 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(b) *SF 1404 (REV. 9/88), Preaward Survey of Prospective Contractor—Technical.* SF 1404 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(c) *SF 1405 (REV. 9/88), Preaward Survey of Prospective Contractor—Production.* SF 1405 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(d) *SF 1406 (REV. 9/88), Preaward Survey of Prospective Contractor—Quality Assurance.* SF 1406 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(e) *SF 1407 (REV. 9/88), Preaward Survey of Prospective Contractor—Financial Capability.* SF 1407 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(f) *SF 1408 (REV. 9/88), Preaward Survey of Prospective Contractor—Accounting System.* SF 1408 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

64. Section 53.219 is amended by revising the section title; in paragraphs (a) and (b) by removing each date "(REV. 10/83)" and inserting in each place the date "(REV. 1/90)"; and by inserting in paragraph (b) a second sentence to read as follows:

53.219 Small business and small disadvantaged business concerns.

* * * * *

(b) * * * Standard Form 295 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

65. Section 53.228 is amended by revising the section title; in paragraphs (a), (b), (c), and (e) by removing each date "(REV. X/XX)" and inserting in each place the date "(REV. 1/90)"; and by revising paragraphs (f), (g), (m), (n), and (o) to read as follows:

53.228 Bonds and insurance.

* * * * *

(f) *SF 34 (REV. 1/90), Annual Bid Bond.* (See 28.106-1(f).) SF 34 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(g) *SF 35 (REV. 1/90), Annual Performance Bond.* (See 28.106-1.) SF 35 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

* * * * *

(m) *SF 1416 (REV. 1/90), Payment Bond for Other than Construction Contracts.* (See 28.106-1(m).) SF 1416 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(n) *OF 90 (REV. 1/90), Release of Lien on Real Property.* (See 28.106-1(n) and 28.203-5(a).) OF 90 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(o) *OF 91 (REV. 1/90), Release of Personal Property from Escrow.* (See 28.106-1(o) and 28.203-5(a).) OF 91 is authorized for local reproduction and a copy is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

BILLING CODE 6820-34-M

66. Section 53.301–24 is revised to read as follows:

53.301–24 Bid Bond.

BID BOND (See instructions on reverse)	DATE BOND EXECUTED (Must not be later than bid opening date)	FORM APPROVED OMB NO. 9000–0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION

SURETY(IES) (Name and business address)

PENAL SUM OF BOND					BID IDENTIFICATION	
PERCENT OF BID PRICE	AMOUNT NOT TO EXCEED				BID DATE	INVITATION NO.
	MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENTS	FOR (Construction, Supplies or Services)	

OBLIGATION:

We, the Principal and Surety(ies) are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The Principal has submitted the bid identified above.

THEREFORE:

The above obligation is void if the Principal - (a) upon acceptance by the Government of the bid identified above, within the period specified therein for acceptance (sixty (60) days if no period is specified), executes the further contractual documents and gives the bond(s) required by the terms of the bid as accepted within the time specified (ten (10) days if no period is specified) after receipt of the forms by the principal; or (b) in the event of failure to execute such further contractual documents and give such bonds, pays the Government for any cost of procuring the work which exceeds the amount of the bid.

Each Surety executing this instrument agrees that its obligation is not impaired by any extension(s) of the time for acceptance of the bid that the Principal may grant to the Government. Notice to the surety(ies) of extension(s) are waived. However, waiver of the notice applies only to extensions aggregating not more than sixty (60) calendar days in addition to the period originally allowed for acceptance of the bid.

WITNESS:

The Principal and Surety(ies) executed this bid bond and affixed their seals on the above date.

PRINCIPAL				
SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	3.	

INDIVIDUAL SURETY(IES)		
SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) (Typed)	1.	2.

CORPORATE SURETY(IES)					
SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

NSN 7540-01-152-8059 EXPIRATION DATE: 12-31-92 24-106 STANDARD FORM 24 (REV. 1-90)
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CORPORATE SURETY(IES) (Continued)					
SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

INSTRUCTIONS

1. This form is authorized for use when a bid guaranty is required. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. The bond may express penal sum as a percentage of the bid price. In these cases, the bond may state a maximum dollar limitation (e.g., 20% of the bid price but the amount not to exceed _____ dollars).

4. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

5. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

6. Type the name and title of each person signing this bond in the space provided.

7. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror."

67. Section 53.301–25 is revised to read as follows:

53.301–25 Performance Bonds.

PERFORMANCE BOND (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	FORM APPROVED OMB NO. 9000–0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION
SURETY(IES) (Name(s) and business address(es))	PENAL SUM OF BOND MILLION(S) | THOUSAND(S) | HUNDRED(S) | CENTS CONTRACT DATE | CONTRACT NO.

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The principal has entered into the contract identified above.

THEREFORE:

The above obligation is void if the Principal –

(a)(1) Performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of the contract during the original term of the contract and any extensions thereof that are granted by the Government, with or without notice to the Surety(ies), and during the life of any guaranty required under the contract, and (2) performs and fulfills all the undertakings, covenants, terms conditions, and agreements of any and all duly authorized modifications of the contract that hereafter are made. Notice of those modifications to the Surety(ies) are waived.

(b) Pays to the Government the full amount of the taxes imposed by the Government, if the said contract is subject to the Miller Act, (40 U.S.C. 270a–270e), which are collected, deducted, or withheld from wages paid by the Principal in carrying out the construction contract with respect to which this bond is furnished.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

PRINCIPAL				
SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	3.	

INDIVIDUAL SURETY(IES)		
SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) (Typed)	1.	2.

CORPORATE SURETY(IES)				
SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $
	SIGNATURE(S)	1.	2.	Corporate Seal
	NAME(S) & TITLE(S) (Typed)	1.	2.	

NSN 7540-01-152-8060 Previous edition not usable EXPIRATION DATE 12-31-92 25-107 STANDARD FORM 25 (REV. 1-90) Prescribed by GSA – FAR (48 CFR) 53.228(b)

CORPORATE SURETY(IES) (Continued)					
SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

BOND PREMIUM ▶	RATE PER THOUSAND $	TOTAL $

INSTRUCTIONS

1. This form is authorized for use in connection with Government contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of the approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

68. Section 53.301–25–A is revised to read as follows:

53.301–25–A Payment Bond.

PAYMENT BOND (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	FORM APPROVED OMB NO. 9000–0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION
SURETY(IES) (Name(s) and business address(es))	PENAL SUM OF BOND MILLION(S) | THOUSAND(S) | HUNDRED(S) | CENTS CONTRACT DATE | CONTRACT NO.

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the Surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above, and any authorized modifications of the contract that subsequently are made. Notice of those modifications to the Surety(ies) are waived.

WITNESS:

The principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

PRINCIPAL				
SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	3.	

INDIVIDUAL SURETY(IES)		
SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) (Typed)	1.	2.

CORPORATE SURETY(IES)				
SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $
	SIGNATURE(S)	1.	2.	Corporate Seal
	NAME(S) & TITLE(S) (Typed)	1.	2.	

NSN 7540-01-152-8061 EXPIRATION DATE: 12-31-92 25-205 **STANDARD FORM 25–A** (REV. 1-90)
Previous edition not usable Prescribed by GSA – FAR (48 CFR) 53.228(a)

CORPORATE SURETY(IES) (Continued)					
SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY C	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY D	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY E	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY F	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY G	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

INSTRUCTIONS

1. This form, for the protection of persons supplying labor and material, is used when a payment bond is required under the Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a-270e). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning their financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal", and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

69. Section 53.301–28 is revised to read as follows:

53.301–28 Affidavit of individual surety.

AFFIDAVIT OF INDIVIDUAL SURETY

(See instructions on reverse)

FORM APPROVED OMB NO. 9000–0001

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0001), Washington, D.C. 20503.

STATE OF

COUNTY OF SS.

I, the undersigned, being duly sworn, depose and say that I am: (1) the surety to the attached bond(s); (2) a citizen of the United States; and of full age and legally competent. I also depose and say that, concerning any stocks or bonds included in the assets listed below, that there are no restrictions on the resale of these securities pursuant to the registration provisions of Section 5 of the Securities Act of 1933. I recognize that statements contained herein concern a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious or fraudulent statement may render the maker subject to prosecution under Title 18, United States Code Sections 1001 and 494. This affidavit is made to induce the United States of America to accept me as surety on the attached bond.

1. NAME (First, Middle, Last) (Type or Print)

2. HOME ADDRESS (Number, Street, City, State, ZIP Code)

3. TYPE AND DURATION OF OCCUPATION

4. NAME AND ADDRESS OF EMPLOYER (If Self-employed, so State)

5. NAME AND ADDRESS OF INDIVIDUAL SURETY BROKER USED (If any) (Number, Street, City, State, ZIP Code)

6. TELEPHONE NUMBER
HOME –
BUSINESS –

7. THE FOLLOWING IS A TRUE REPRESENTATION OF THE ASSETS I HAVE PLEDGED TO THE UNITED STATES IN SUPPORT OF THE ATTACHED BOND:

(a) Real estate (include a legal description, street address and other identifying description; the market value; attach supporting certified documents including recorded lien; evidence of title and the current tax assessment on the property. For market value approach, also provide a current appraisal.)

(b) Assets other than real estate (describe the assets, the details of the escrow account, and attach certified evidence thereof).

8. IDENTIFY ALL MORTGAGES, LIENS, JUDGEMENTS, OR ANY OTHER ENCUMBRANCES INVOLVING SUBJECT ASSETS INCLUDING REAL ESTATE TAXES DUE AND PAYABLE.

9. IDENTIFY ALL BONDS, INCLUDING BID GUARANTEES, FOR WHICH THE SUBJECT ASSETS HAVE BEEN PLEDGED WITHIN 3 YEARS PRIOR TO THE DATE OF EXECUTION OF THIS AFFIDAVIT.

DOCUMENTATION OF THE PLEDGED ASSET MUST BE ATTACHED.

10. SIGNATURE

11. BOND AND CONTRACT TO WHICH THIS AFFIDAVIT RELATES (Where appropriate)

12. SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:

a. DATE OATH ADMINISTERED (MONTH, DAY, YEAR)

b. CITY AND STATE (Or other jurisdiction)

Official Seal

c. NAME AND TITLE OF OFFICIAL ADMINISTERING OATH (Type or print)

d. SIGNATURE

e. MY COMMISSION EXPIRES

NSN 7540–01–152–8063 EXPIRATION DATE 12–31–92 28–108 STANDARD FORM 28 (REV. 1–90)
Previous edition is not usable Prescribed by GSA – FAR (48 CFR) 53.228(e)

INSTRUCTIONS

1. Individual sureties on bonds executed in connection with Government contracts, shall comp ete and submit this form with the bond. (See 48 CFR 28.203, 53.228(e).) The surety shall have the completed form notarized.

2. No corporation, partnership, or other unincorporated associations or firms, as such, are acceptable as individual sureties. Likewise members of a partnership are not acceptable as sureties on bonds which partnership or associations, or any co-partner or member thereof is the principal obligor. However, stockholders of corporate principals are acceptable provided (a) their qualifications are independent of their stockholdings or financial interest therein, and (b) that the fact is expressed in the affidavit of justification. An individual surety will not include any financial interest in assets connected with the principal on the bond which this affidavit supports.

3. United States citizenship is a requirement for individual sureties. However, only a permanent resident of the place of execution of the contract and bond is required for individual sureties in the following locations - any foreign country; the Commonwealth of Puerto Rico; the Virgin Islands; the Canal Zone; Guam; or any other territory or possession of the United States.

4. All signatures on the affidavit submitted must be originals. Affidavits bearing reproduced signatures are not acceptable. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of firm, partnership, or joint venture, or an officer of the corporation involved.

70. Section 53.301–34 is revised to read as follows:

53.301–34 Annual Bid Bond.

ANNUAL BID BOND (See instructions on reverse)	DATE BOND EXECUTED	FORM APPROVED OMB NO. 9000–0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION

SURETY(IES) (Name, business address, and State of incorporation)

AGENCY TO WHICH BIDS ARE TO BE SUBMITTED	BIDS TO BE SUBMITTED DURING FISCAL YEAR ENDING September 30, 19____

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the penal sum or sums that is sufficient to indemnify the Government in case of the default of the Principal as provided herein. For payment of the penal sum or sums, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally.

CONDITIONS:

The Principal contemplates submitting bids from time to time during the fiscal year shown above to the department or agency named above for furnishing supplies or services to the Government. The Principal desires that all of those bids submitted for opening during the fiscal year be covered by a single bond instead of by a separate bid bond for each bid.

THEREFORE:

The above obligation is void and of no effect if the Principal – (a) upon acceptance by the Government of any such bid within the period specified therein for acceptance (sixty (60) days if no period is specified), executes the further contractual documents and gives the bond(s) required by the terms of the bid as accepted within the time specified (ten (10) days if no period is specified) after receipt of forms by him; or (b) in the event of failure to execute the further contractual documents and give the bond(s), pays the Government for any cost of acquiring the work which exceeds the amount of the bid.

WITNESS:

The Principal and Surety(ies) executed this bid bond and affixed their seals on the above date.

SIGNATURES	NAMES AND TITLES (Typed)	
PRINCIPAL		
1. (Seal)	1.	Corporate Seal
2. (Seal)	2.	
3. (Seal)	3.	
INDIVIDUAL SURETIES		
1. (Seal)	1.	
2. (Seal)	2.	
CORPORATE SURETY		
1.	1.	Corporate Seal
2.	2.	

AUTHORIZED FOR LOCAL REPRODUCTION Previous edition not usable EXPIRATION DATE 12–31–92 34–105 STANDARD FORM 34 (REV. 1–90) Prescribed by GSA – FAR (48 CFR) 53.228(f)

INSTRUCTIONS

1. This form is authorized for use in the acquisition of supplies and services, excluding construction, in lieu of Standard Form 24 (Bid Bond). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4 Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

6. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror."

71. Section 53.301–35 is revised to read as follows:

53.301–35 Annual Performance Bond.

ANNUAL PERFORMANCE BOND (See instructions on reverse)	DATE BOND EXECUTED	FORM APPROVED OMB NO. 9000–0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address)	TYPE OF ORGANIZATION ("X" one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION
SURETY(IES) (Name, business address, and State of Incorporation)	PENAL SUM OF BOND MILLION(S) | THOUSAND(S) | HUNDRED(S) | CENTS FISCAL YEAR ENDING September 30, 19——
AGENCY REPRESENTING THE GOVERNMENT	

OBLIGATION:

We, the Principal and Surety(ies), are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally.

CONDITIONS:

The Principal contemplates entering into contracts, from time to time during the fiscal year shown above, with the Government department or agency shown above, for furnishing supplies or services to the government. The Principal desires that all of those contracts be covered by one bond instead of by a separate performance bond for each contract.

THEREFORE:

The above obligation is void if the Principal – (a) performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of any and all of those contracts entered into during the original term and any extensions granted by the Government with or without notice to the surety(ies) and during the life of any guaranty required under the contracts; and (b) performs and fulfills all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of those contracts, that subsequently are made. Notice of those modifications to the surety(ies) is waived.

WITNESS:

The Principal and Surety(ies) executed this performance bond and affixed their seals on the above date.

SIGNATURES	NAMES AND TITLES (Typed)	
PRINCIPAL		
1. (Seal)	1.	Corporate Seal
2. (Seal)	2.	
3. (Seal)	3.	
INDIVIDUAL SURETIES		
1. (Seal)	1.	
2. (Seal)	2.	
CORPORATE SURETY		
1.	1.	Corporate Seal
2.	2.	

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition not usable

EXPIRATION DATE 12-31-92

35–105

STANDARD FORM 35 (REV. 1–90)
Prescribed by GSA – FAR (48 CFR) 53.228(g)

INSTRUCTIONS

1. This form is authorized for use in the acquisition of supplies and services, excluding construction, in lieu of Standard Form 25 (Performance Bond). Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein.

(b) Where individual sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

6. In its application to negotiated contracts, the terms "bid" and "bidder" shall include "proposal" and "offeror."

72. Section 53.301–119 is revised to read as follows:

53.301–119 Statement of Contingent or Other Fees.

STATEMENT OF CONTINGENT OR OTHER FEES (FOR SOLICITING OR OBTAINING, OR RESULTING FROM AWARD OF A CONTRACT)	FORM APPROVED OMB NUMBER 9000–0003

Public reporting burden for this collection of information is estimated to average .0041 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0003), Washington, D.C. 20503.

1. SOLICITATION NO. (If any)	2. CONTRACT NO. (or other identification)	3. GOVERNMENT CONTRACTING OFFICE

The following information is furnished by the undersigned offeror concerning any company or person employed or retained to solicit or obtain the above identified contract, or concerning any company or person to whom the offeror has paid or agreed to pay any commission, percentage, brokerage, or other fee, contingent upon or resulting from the award of that contract.

4. FULL NAME AND BUSINESS ADDRESS OF SUCH COMPANY OR PERSON (If more than one, identify all) AND INDICATE WHETHER CORPORATION, PARTNERSHIP, INDIVIDUAL, ETC.: (Include ZIP Code(s))

5A. DESCRIBE RELATIONSHIP TO OFFEROR OF THE COMPANY OR PERSON LISTED IN ITEM 4. (For example, is the company or person a sales agent or representative? A purchasing agent or representative? A broker? An employee? A corporate officer or principal?

5B. IF THERE IS A WRITTEN CONTRACT OR AGREEMENT COVERING SUCH RELATIONSHIP, ATTACH A COPY. IF NOT, STATE IN DETAIL THE TERMS OF SUCH ARRANGEMENT. (Include the amount and method of computation of compensation and expenses.)

(IF ADDITIONAL SPACE IS NECESSARY, USE ITEM 11 OR ATTACH A SEPARATE SHEET WHICH ALSO MUST BE SIGNED)

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition is usable

EXPIRATION DATE: 8–31–92

119–106

STANDARD FORM 119 (REV. 1–90)
Prescribed by GSA – FAR (48 CFR) 53.203(a)
FPMR (41 CFR) 101–45.313–5

NOTE: Complete items 6A through 6D only if person listed in item 4 is an employee.

6A. DURATION OF EMPLOYMENT (Dates) FROM	TO	6B. IS THE PERSON ON THE OFFEROR'S PAYROLL FOR PURPOSES OF SOCIAL SECURITY AND FEDERAL INCOME TAX WITHHOLDING? ☐ YES ☐ NO
6C. IS THE PERSON EMPLOYED BY ANY OTHER CONCERN? ☐ YES ☐ NO (If "YES" complete)	CAPACITY	NAME AND ADDRESS OF OTHER CONCERN
6D. DOES THE PERSON REPRESENT ANY OTHER CONCERN? ☐ YES ☐ NO (If "YES" complete)	CAPACITY	NAME AND ADDRESS OF OTHER CONCERN

7. DOES THE COMPANY OR PERSON, LISTED IN ITEM 4 REPRESENT THE OFFEROR ON:	YES (✓)	NO (✓)	E. IF ITEM 7D CHECKED "YES," SPECIFY OFFICES
A. BOTH COMMERCIAL AND GOVERNMENT BUSINESS?			
B. ONLY GOVERNMENT BUSINESS?			
C. ONLY THIS CONTRACT?			
D. CONTRACTS OF PARTICULAR GOVERNMENT ACQUISITION OR SALES OFFICES?			

8. REGARDING THE CONTRACT, ARE THE DUTIES OF THE COMPANY OR PERSON LISTED IN ITEM 4 CONFINED TO SOLICITING, OBTAINING OR ASSISTING IN OBTAINING THE CONTRACT?
☐ YES ☐ NO (If "NO," describe other services included in the company or person's duties)

9. IS THE OFFEROR'S REGULAR PRACTICE TO HAVE AN ARRANGEMENT OF THE TYPE SPECIFIED IN ITEM 8? ☐ YES ☐ NO	10. HOW LONG HAS THE COMPANY OR PERSON SPECIFIED IN ITEM 4: A. BEEN ENGAGED IN THIS TYPE OF WORK (i.e., Sales or Purchasing representative, etc.)?	B. PERFORMED THIS TYPE OF WORK FOR THE OFFEROR?

11. ADDITIONAL COMMENTS (Key comments to item numbers)

IMPORTANT

U.S. Code, Title 18 **(Crimes and Criminal Procedure)** Section 1001 makes it a criminal offense to make willfully false statements or representations on this form or any attachment to it.

12A. OFFEROR (To be signed only by authorized principal, such as corporate officer of offeror, i.e., may not be signed by sales or purchasing agent, etc.)

BY ▶

12B. TITLE	12C. DATE

12D. ADDRESS OF OFFEROR (Include ZIP Code)

STANDARD FORM 119 (REV. 1-90) BACK

73. Section 53.301–294 is revised to read as follows:

53.301–294 Subcontracting Report for Individual Contracts.

SUBCONTRACTING REPORT FOR INDIVIDUAL CONTRACTS
(Whole dollar amounts should be indicated. See instructions on reverse)

FORM APPROVED OMB NUMBER 9000–0006

Public reporting burden for this collection of information is estimated to average 5.73 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0006), Washington, D.C. 20503.

IMPORTANT: DOD contractors—complete all items. Civilian contractors—do not complete shaded items unless required by the agency.	1. REPORTING PERIOD: ☐ OCT 1 – MAR 31 ☐ APR 1 – SEP 30 FY _____	2. TYPE OF REPORT ☐ REGULAR ☐ FINAL ☐ REVISED	3. DATE SUBMITTED 4. REPORT NO.
5. REPORT SUBMITTED AS: ☐ PRIME CONTRACTOR ☐ SUBCONTRACTOR	6. AGENCY OR CONTRACTOR AWARDING CONTRACT (Name, address and ZIP Code)	7. REPORTING CONTRACTOR (Name, address, and ZIP Code)	

8. DATES OF CONTRACT PERIOD OF PERFORMANCE (MM/DD/YY) FROM: TO:	12A. EST. AMT. OF SUBCONTRACT AWDS. UNDER ORIG. CONTRACT $	12B. REV. AMT. OF SUBCONTRACT AWDS. UNDER MOD. CONTRACT (If applicable) $
9. PRIME CONTRACT AND SUBCONTRACT NO. (If applicable)		
10. ADMINISTERING AGENCY (If other than Awarding Agency)		
11A. ORIGINAL CONTRACT AMOUNT $	11B. REVISED CONTRACT AMOUNT (If applicable) $	

13A. ORIGINAL GOALS	DOLLARS	PERCENT
1. SMALL BUSINESS CONCERNS		
2. SMALL DISADV. BUSINESS CONCERNS		
13B. REVISED GOALS (If applicable)		
1. SMALL BUSINESS CONCERNS		
2. SMALL DISADV. BUSINESS CONCERNS		

14. GOAL AMOUNTS IN 13A. AND 13B. ☐ DO INCLUDE INDIRECT COSTS ☐ DO NOT INCLUDE INDIRECT COSTS

SUBCONTRACT AWARDS

DIRECT SUBCONTRACT AWARDS	THIS REPORTING PERIOD		CUMULATIVE (From beginning of Subcontract Plan)	
	DOLLARS	PERCENT	DOLLARS	PERCENT
15A. SMALL BUSINESS CONCERNS (Include Disadv.) ($ amt. and % of 15C.)				
15B. LARGE BUSINESS CONCERNS ($ amt. and % of 15C.)				
15C. TOTAL (Sum of 15A. and 15B.)		100		100
16. SMALL DISADVANTAGED BUSINESS CONCERNS ($ amt. and % of 15C)				

INDIRECT SUBCONTRACT AWARDS	DOLLARS	
	THIS REPORTING PERIOD	CUMULATIVE (From beginning of Subcontract Plan)
17A. SMALL BUSINESS CONCERNS (Not Disadvantaged)		
17B. LARGE BUSINESS CONCERNS		
17C. SMALL DISADVANTAGED BUSINESS CONCERNS		

18. REMARKS (Enter a short narrative explanation if: (a) Small Business or Small Disadvantaged Business accomplishments fall below that which would be expected using a straight line projection of goals through the period of contract performances or (b) either goal is not met if this is the final report.)

19. TYPED NAME AND TITLE OF INDIVIDUAL ADMINISTERING SUBCONTRACTING PLAN	SIGNATURE	TELEPHONE NO. ( )
20. TYPED NAME AND TITLE OF APPROVING OFFICER	SIGNATURE	DATE

NSN 7540–01–152–8078
Previous edition is not usable

EXPIRATION DATE: 8–31–92

294–103

STANDARD FORM 294 (REV. 1–90)
Prescribed by GSA – FAR (48 CFR) 53.219(a)

GENERAL INSTRUCTIONS

1. This form collects subcontract data from Federal contractors and subcontractors that: (a) hold one or more contracts over $500,000 ($1 million for construction); and (b) are required to report subcontract awards to small business (SB) and small disadvantaged business (SDB) concerns under a subcontracting plan pursuant to the Small Business Act of 1958.

2. Reports shall be submitted to the contracting officer semi-annually during the period of contract performance. A separate report is required for each contract at contract completion. This report is due by the 30th day of the month following the close of the reporting periods, in accordance with instructions contained in the contract or subcontract, or as directed by the contracting officer. Reports are required when due, including negative reports (i.e., when there has been no subcontracting activity or there has been no change from the last reporting period).

3. This report should not be submitted by small business concerns.

4. This report is not required for commercial products for which a company-wide annual plan has been approved. The Summary Subcontract Report (SF 295) is required for commercial products in accordance with instructions on that form.

5. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.

6. All dollar amounts shall be rounded to the the nearest whole dollar. All percentages shall be rounded to the nearest tenth of one percent.

SPECIFIC INSTRUCTIONS (for items which are not self explanatory)

ITEM 1: Check the appropriate block for the reporting period though which the report is being submitted and enter the Federal fiscal year (October 1 through September 30). Leave blank if this is a final report.

ITEM 2: Check whether report is a regular report or final report and/or is a revision.

ITEM 4: Specify the sequential report covering this contract. The initial report shall be identified as Report Number 1.

ITEM 5: Check whether the reporting contractor is reporting as a Federal Prime contractor or a subcontractor.

ITEM 6: Enter the name and address of the Federal Department or Agency awarding the contract, or the prime contractor awarding the subcontract.

ITEM 7: Enter the name and address of the contractor submitting the report.

ITEM 8: Enter the beginning and projected ending dates of the period of performance of the contract, including priced option periods.

ITEM 10: Identify the Federal agency administering the contract if other than the awarding agency. If DOD is the administering agency, identify the appropriate military department, i.e., Army, Navy, Air Force, or Defense Logistics Agency. This item is not required if reporting as a subcontractor.

ITEM 11A: Enter the total dollar value of the original contract. (State the estimated cost if cost-type contract, price if fixed-price contract, and maximum contract amount if indefinite quantity contract. Include all priced options.)

ITEM 11B: If the dollar value of the original contract has been modified, enter the revised contract amount.

ITEM 12A: Enter the estimated dollar value of subcontracts as set forth in the Subcontracting Plan in the original contract.

ITEM 12B: If the dollar value of the Subcontracting Plan has been modified, enter the revised amount under the modified contract.

ITEM 13A: Enter in the appropriate blocks the dollar amount and percent of the reporting contractor's total planned subcontract awards contractually agreed upon as goals for subcontracting with SB and SDB concerns. NOTE: In 13A(1) the amounts entered should include planned subcontracting with both SB and SDB concerns. In 13A(2) the amounts entered should reflect only planned subcontracting with SDB concerns. (For DOD contracts, include planned subcontract awards to Historically Black Colleges and Universities or Minority Institutions (HBCUs/MIs) in 13A(1) and 13A(2).)

ITEM 13B: If the original goals agreed upon at contract award have been revised as a result of contract modifications, the amounts entered should reflect those revised goals. NOTE: In 13B(1), the amounts should include planned subcontracting with both SB and SDB concerns, if applicable. In 13B(2) the amounts entered should reflect only planned subcontracting with SDB concerns. (For DOD contracts, include planned subcontract awards to HBCUs/MIs in 13B(1) and 13B(2).)

ITEM 14: Check the appropriate block to indicate whether indirect awards are included in the goal amounts entered in items 13A and 13B as specified in the Subcontracting Plan.

ITEM 15A: Enter the dollar amount and percent of subcontracting with SDB concerns, including subcontracting with SDB concerns for this period and cumulatively. This item reflects progress toward Small Business goal accomplishment indicated in items 13A(1) or 13B(1) (if applicable), and includes indirect awards if such costs are included in goal amounts. For DOD contracts include subcontract awards to HBCUs/MIs.

ITEM 15B: Enter the amounts for subcontracting with large business concerns (excluding subcontracts with non-profit, educational institutions, and state/local governments) for this period and cumulatively. Include indirect awards if such costs are included in goal amounts.

ITEM 15C: Total the dollar amounts of items 15A and 15B.

ITEM 16: Enter the dollar amount of subcontracting with SDB concerns only (for DOD include subcontracts with HBCUs and MIs) and the percent that this amount represents of total subcontracting for this period and cumulatively. This item reflects progress toward Small Disadvantaged Business goal accomplishment as indicated in item 13A(2) or 13B(2) (if applicable), and includes indirect awards if such costs are included in goal amounts.

ITEM 17: For DOD activities, if indirect awards are included in goal amounts (as indicated in item 14), enter the dollar amount of indirect subcontracting with SB (including SDB and HBCUs/MIs), Large Business, and SDB concerns (including HBCUs/MIs). These amounts are subsets of items 15A, 15B, and 16, respectively, and represent the portion of goal achievement being accomplished by indirect subcontracting.

ITEM 19: Enter the name, title, signature and telephone number of the reporting contractor's administrator responsible for monitoring the Subcontracting Plan.

ITEM 20: The approving officer shall be the senior official of the company, division, or subdivision (plant or profit center) responsible for contract performance.

DEFINITIONS

1. Commercial Products means products sold in substantial quantities to the general public and/or industry at established catalog or market prices.

2. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the reporting organization calling for supplies or services required for the performance of the original contract or subcontract. Purchases from a corporation, company, or subdivision which is an affiliate of the reporting organization are not considered "subcontracts" and are not to be included in this report.

3. Direct Subcontract Awards are those which are identified with the performance of a specific government contract, including the allocable parts of awards for materials which are to be incorporated into products under more than one Government contract.

4. Indirect Subcontract Awards are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts; these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

74. Section 53.301-295 is revised to read as follows:

53.301-295 Summary Subcontract Report.

SUMMARY SUBCONTRACT REPORT
(See instructions on reverse)

FORM APPROVED OMB NUMBER 9000-0007

Public reporting burden for this collection of information is estimated to average 16.21 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0007), Washington, D.C. 20503.

IMPORTANT: DOD contractors—complete all items. Civilian contractors—do not complete shaded items unless required by the agency.

1. REPORTING PERIOD (check one):
- A. DOD FEDERAL FY 19___ QUARTER ENDING: ☐ DEC 31 ☐ JUN 30 ☐ MAR 31 ☐ SEP 30
- B. CIVILIAN FEDERAL FY 19___ ☐ ANNUAL (OCT 1 - SEP 30) (except commercial product)
- C. DOD & CIVILIAN FEDERAL FY 19___ ☐ ANNUAL (OCT 1 - SEP 30) (commercial product)

2. TYPE OF REPORT: ☐ REGULAR ☐ FINAL ☐ REVISED

3. CONTRACTING AGENCY

4. ADMINISTERING AGENCY (If different from Item 3)

5. DATE OF LAST GOV. REVIEW

6. REVIEWING AGENCY

7. CONTRACTOR ESTABLISHMENT CODE (If available)

8. REPORT SUBMITTED AS: ☐ PRIME CONTRACTOR ☐ SUBCONTRACTOR ☐ BOTH

9. CORPORATION, COMPANY OR SUBDIVISION COVERED (Name, address, ZIP Code)

10. MAJOR PRODUCTS OR SERVICE LINES

CUMULATIVE FISCAL YEAR SUBCONTRACT AWARDS
(Report in whole dollars)

SUBCONTRACT AWARDS	CURRENT FY (Through Reporting Qtr.)		SAME PERIOD LAST YEAR	
	DOLLARS	PERCENT	DOLLARS	PERCENT
11A. SMALL BUSINESS CONCERNS (Include Disadv.) ($ amt. and % of 11C.)				
11B. LARGE BUSINESS CONCERNS ($ amt. and % of 11C.)				
11C. TOTAL (Sum of 11A. and 11B.)		100		100
12. SMALL DISADVANTAGED BUSINESS CONCERNS ($ amt. and % of 11C.)				
13. WOMEN-OWNED SMALL BUSINESS CONCERNS				
14. LABOR SURPLUS AREA CONCERNS ($ amt. and % of 11C.)				
15. HIST. BLACK COLLEGES & UNIV/MINORITY INST.				

16. REMARKS (Enter a short narrative explanation if: (a) zero is entered in Blocks 11A or 12 for the current fiscal year, (b) the percent entry in Block 11A for current fiscal year is more than 5 percentage points below the percent reported for the same period last year, or (c) the percent entry in Block 12 for the current fiscal year is lower than the percent reported for the same period last year.)

SUBCONTRACT GOAL ACHIEVEMENT
(Report in whole dollars)

CONTRACTS			NO. OF CONTRACTS WITH GOALS	TOTAL $ VALUE OF SUBCONTRACTS AWARDED	$ VALUE OF SUBCONTRACT GOALS	ACTUAL GOAL ACHIEVEMENT	
						DOLLARS	PERCENT
17. CONTRACTS WITH SMALL BUSINESS SUBCONTRACT GOALS	A. ACTIVE CONTRACTS						
	B. CONTRACTS COMPLETED THIS QTR.	(1) WHICH MET GOALS					
		(2) NOT MEETING GOALS					
18. CONTRACTS WITH SMALL DISADV. BUSINESS SUB-CONTRACT GOALS	A. ACTIVE CONTRACTS						
	B. CONTRACTS COMPLETED THIS QTR.	(1) WHICH MET GOALS					
		(2) NOT MEETING GOALS					

19. NAME AND TITLE OF LIAISON OFFICER | SIGNATURE | DATE | TELEPHONE NO. ( )

20. NAME AND TITLE OF THE APPROVING OFFICER | SIGNATURE | DATE

AUTHORIZED FOR LOCAL REPRODUCTION Previous edition is not usable EXPIRATION DATE: 9-30-92 295-102 STANDARD FORM 295 (REV. 1-90) Prescribed by GSA - FAR (48 CFR) 53.219(b)

GENERAL INSTRUCTIONS

1. This form collects subcontract data from Federal contractors and subcontractors that: (a) hold one or more contracts over $500,000 ($1 million for construction); and (b) are required to report subcontract awards to Small Business (SB) and Small Disadvantaged Business Concerns (SDB) under a subcontracting plan and to report subcontract awards to Women-Owned Small Business Concerns (WOSB) pursuant to the Small Business Act of 1958.

2. This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating as a separate profit center) basis, unless otherwise directed by the agency awarding the contract. However, after submission of the first report on this form, the reporting organization shall submit succeeding reports on the same basis.

3. If a reporting organization is performing work for more than one Federal agency, a separate report shall be submitted to each agency covering only that agency's contracts, provided at least one of that agency's contracts is over $500,000 ($1 million for construction) and contains a subcontracting plan. (See special instructions for commercial products plans.)

4. For DOD activities, reports shall be submitted quarterly, except that, for contracts covered by an approved company-wide subcontracting plan for commercial products, reports shall be submitted annually. Reports are due 30 days after the close of each reporting period. For civilian agencies, reports shall be submitted annually. For civilian agencies, reports are due 30 days after the close of the fiscal year (September 30). See special instructions for commercial products plans below.

5. All dollar amounts shall be rounded to the nearest whole dollar. All percentages shall be rounded to the nearest tenth of one percent.

6. Only subcontracts involving performance within the U.S., its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands should be included in this report.

7. Subcontract award data reported on this form shall be limited to awards made by the reporting organization to its immediate subcontractors. Reporting organizations may not take credit for awards made by lower tier subcontractors.

SPECIFIC INSTRUCTIONS

ITEM 2: Check whether report is a regular report or final report and/or revision. Final report should be checked only if contractor has completed all Government contracts containing subcontracting plans.

ITEM 3: If reporting as a "Prime Contractor" or "Both" in Item 8, identify the agency (e.g., DOD, HUD, GSA, etc.) which awarded the prime contract(s) to the reporting organization. If reporting as a "Subcontractor" in Item 8, identify the department or agency responsible for the prime contract award(s) which resulted in the largest dollar value subcontract of those subcontracts reflected in this report.

ITEM 4: Identify the department or agency performing contract administration over the reporting organization (if different from Item 3). For DOD contracts enter the military department or agency which has responsibility for the subcontracting program of the reporting entity (i.e., Army, Navy, Air Force, or Defense Logistics Agency), not the "Office of the Deputy Secretary of Defense."

ITEMS 5 & 6: Enter the date of the last formal surveillance review conducted by the cognizant department or agency Small and Disadvantaged Business Specialist or other review personnel. For DOD also identify the military department or Defense Contract Administration Service that conducted the review. In those cases where the Small Business Administration conducted its own review, enter "SBA" and the date.

ITEM 7: Enter the nine position number assigned by Dun & Bradstreet that identifies the contractor establishment, if available.

ITEM 8: Check whether the reporting organization is reporting as a Federal prime contractor or a subcontractor or both.

ITEM 9: Enter the name and address of the reporting organization, corporation, company, or subdivision thereof which is covered by the data submitted.

ITEM 10: Identify the major product or service lines of the reporting organization.

ITEMS 11 & 12: These entries include all subcontract awards, both those made under contracts with plans and goals and those made under contracts which do not have plans and goals. Amounts reported include both direct awards and an appropriate prorated portion of indirect awards. Base the indirect portion on the percentage of work being performed for the organization to which the report is being submitted (shown in Item 3) in relation to other work being performed by the reporting organization. Do not include awards made in support of commercial business being performed by the reporting entity. For DOD activities, report on a quarterly cumulative basis until the end of the fiscal year (September 30) and begin a new quarterly reporting cycle each October 1.

ITEM 11A: Report all subcontract awards to SBs (including subcontracts with SDBs and WOSBs) regardless of dollar value, made by the reporting orgainzation under all Federal prime contracts awarded by the contracting agency shown in Item 3, and/or under all subcontracts under prime contracts, if reporting as a subcontractor. (For DOD contracts, include subcontracting awards to Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs)).

ITEM 11B: Report all subcontract awards to large business, regardless of dollar value, made by the reporting organization under all Federal prime contracts awarded by the contracting agency shown in Item 3, and/or under all subcontracts under prime contracts, if reporting as a subcontractor. For DOD contracts exclude subcontracting awards to HBCUs and MIs.

ITEM 12: Report all subcontract awards to SDBs (including Women-Owned SDBs) regardless of dollar value, made by the reporting organization under all Federal prime contracts awarded by the contracting agency shown in Item 3, and/or under all subcontracts under prime contracts, if reporting as a subcontractor. For DOD contracts include subcontract awards to HBCUs and MIs.

ITEM 13: Report all subcontract awards to WOSBs. This amount is a subset of Item 11A.

ITEM 14: Show dollar amount of subcontracts valued over $25,000 placed with labor surplus area (LSA) concerns (i.e., those that will perform substantially in labor surplus areas). Prime contractors are also encouraged to include awards valued less than $25,000 if such additional reporting does not impose a burden on the contractor. LSAs are identified in the Department of Labor publication "Area Trends in Employment and Unemployment" which can be obtained from the Federal agency contracting officer or by writing to Employment and Training Administration, (Attn: TPPL), Department of Labor, 601 "D" Street, Washington, D.C. 20213.

ITEM 15: For DOD, enter the dollar value of all subcontracts with HBCUs/MIs. This is a subset of awards to SDBs (Item 12).

ITEMS 17 & 18: For each item (as applicable), enter the number of prime and subcontracts valued over $500,000 ($1 million for construction) which have goals, the dollar value of all subcontracts awarded to date under these contracts, the dollar value of subcontract goals as set forth in subcontracting plan, and, for completed contracts, your actual goal achievement expressed in dollars and percent of goal. The percentage of actual goal achievement is determined by dividing the amount of dollars shown in the column entitled "Actual Goal Achievement" by the dollars shown in the column entitled "$ Value of Subcontract Goals." Information presented in this section represents subcontract awards from the inception of the contract(s) and is not restricted to this fiscal year. The percentages reported in Item 16B(1) and 17B(1) will always be 100 or more and the percentages reported in Items 16B(2) and 17B(2) will always be less than 100.

ITEM 19: The liason officer shall be the reporting contractor's official responsible for administering the subcontracting program.

ITEM 20: The approving officer shall be the chief executive officer or in the case of a separate division or plant, the senior individual responsible for overall division plant operations.

SPECIAL INSTRUCTIONS FOR COMMERCIAL PRODUCTS PLANS

1. Reporting organizations that have an approved company-wide annual subcontracting plan for commercial products shall submit this report annually as of September 30 each year.

2. The annual report shall include all subcontracting activity under commercial products plans in effect during the Government fiscal year and shall be submitted in addition to required reports for other than commercial products, if any.

3. Enter in Items 11 and 12 the total of all subcontract awards under the reporting organization's commercial products plans. Show in Item 16 or in an attachment, the percentage of this total attributable to each agency from which contracts for such commercial products were received. Send a copy of this report to each agency on that listing.

4. Do not complete Items 17 and 18.

DEFINITIONS

1. Commercial Products means products sold in substantial quantities to the general public and/or industry at established catalog or market prices.

2. Subcontract means a contract, purchase order, amendment, or other legal obligation executed by the reporting organization calling for supplies or services required for the performance of the original contract or subcontract. Purchases from a corporation, company, or subdivision which is an affiliate of the reporting organization are not considered "subcontracts" and are not to be included in this report.

3. Direct Subcontract Awards are those which are identified with the performance of a specific government contract, including allocable parts of awards for materials which are to be incorporated into products under more than one Government contract.

4. Indirect Subcontract Awards are those which, because of incurrence for common or joint purposes, are not identified with specific Government contracts, these awards are related to Government contract performance but remain for allocation after direct awards have been determined and identified to specific Government contracts.

SUBMITTAL ADDRESSES

FOR DOD CONTRACTORS:
Prepare a consolidated report for all contracts awarded by military department/agencies for the Department of Defense (DOD) and/or subcontracts awarded by DOD prime contractors (i.e., do not segregate subcontract data by DOD component). DOD contractors involved in construction and related maintenance and repair, however, shall prepare separate reports for each DOD component, segregating subcontract data accordingly. All contractors shall distribute the original and copies as follows:
(1) The original of each report directly to the office listed below whose military activity is responsible for the administration of the majority of the organization's DOD contracts/subcontracts. Contractors involved in construction and related maintenance shall submit separate, unique reports to each DOD component which administers their DOD contracts:
ARMY - Director of Small and Disadvantaged Business Utilization, Office of the Secretary of the Army, Washington, D.C. 20310-0106
NAVY - Director of Small and Disadvantaged Business Utilization, Office of the Secretary of the Navy, Washington, D.C. 20360-5000
AIR FORCE - Director of Small and Disadvantaged Business Utilization, Office of the Secretary of the Air Force, Washington, D.C. 20330-1000
DLA - Staff Director of Small and Disadvantaged Business Utilization, HQ Defense Logistics Agency (DLA-U) Cameron Station, Alexandria, VA 22304-6100
(2) A copy of each report directly to the Office of the Deputy Secretary of Defense, Attention: Director of Small and Disadvantaged Business Utilization, the Pentagon, Washington, D.C. 20301-3061
(3) A copy to the cognizant contract administration office.

FOR CIVILIAN AGENCY CONTRACTORS:
NASA - Forward reports to NASA - Office of Procurement (HM), Washington, D.C. 20546
DOE - Forward reports to DOE - Office of Small and Disadvantaged Business Utilization, Washington, D.C. 20585

OTHER FEDERAL DEPARTMENTS OR AGENCIES - Forward reports to the Department or Agency Director of Small and Disadvantaged Business Utilization or as otherwise provided for in instructions issued by the Department or Agency.

75. Section 53.301–1403 is revised to read as follows:

53.301–1403 Preaward Survey of Prospective Contractor (General).

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR (GENERAL)

1. SERIAL NO. (For surveying activity use)

FORM APPROVED OMB NO. 9000–0011

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0011), Washington, D.C. 20503.

SECTION I – REQUEST (For Completion by Contracting Office)

2. NAME AND ADDRESS OF SURVEYING ACTIVITY

3. SOLICITATION NO.

4. TOTAL OFFERED PRICE $

5. TYPE OF CONTRACT

6A. NAME AND ADDRESS OF SECONDARY SURVEY ACTIVITY (For surveying activity use)

7A. NAME AND ADDRESS PROSPECTIVE CONTRACTOR

6B. TELEPHONE NO. (Include AUTOVON, WATS or FTS, if available)

7B. FIRM'S CONTACT

7C. TELEPHONE NO. (with area code)

8. WILL CONTRACTING OFFICE PARTICIPATE IN SURVEY?
☐ YES ☐ NO

13. NAME AND ADDRESS OF PARENT COMPANY (If applicable)

9. DATE OF THIS REQUEST

10. DATE REPORT REQUIRED

11. PROSPECTIVE CONTRACTOR REPRESENTS THAT IT ☐ IS, ☐ IS NOT A SMALL BUSINESS CONCERN.

12. WALSH–HEALEY CONTRACTS ACT (Check applicable boxes))
☐ A. IS NOT APPLICABLE
☐ B. IS APPLICABLE AND PROSPECTIVE CONTRACTOR REPRESENTS HIS CLASSIFICATON AS:
☐ MANUFACTURER ☐ REGULAR DEALER
☐ OTHER (Specify)

14A. PLANT AND LOCATION (If different from Item 7, above)

15A. NAME OF REQUESTING ACTIVITY CONTRACTING OFFICER

14B. POINT OF CONTACT

14C. TELEPHONE NO. (with area code)

15B. SIGNATURE

16A. NAME OF CONTACT POINT AT REQUESTING ACTIVITY (If different from Item 15A)

15C. TELEPHONE NO. (Include AUTOVON, WATS or FTS, if available)

17. RETURN PREAWARD SURVEY TO THIS ADDRESS:

ATTN:

16B. TELEPHONE NO. (Include AUTOVON, WATS or FTS, if available)

SECTION II – DATA (For Completion by Contracting Office)

18A. ITEM NO.	18B. NATIONAL STOCK NUMBER (NSN) AND NOMENCLATURE		18C. TOTAL QUANTITY	18D. UNIT PRICE	18E. DELIVERY SCHEDULE (a)	(b)	(c)	(d)	(e)
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition is usable.

EXPIRATION DATE: 9–30–91

1403–103

STANDARD FORM 1403 (REV. 9–88)
Prescribed by GSA – FAR (48 CFR) 53.209–1(a)

SECTION III – FACTORS TO BE INVESTIGATED

19. MAJOR FACTORS	CHK. (a)	SAT. (b)	UN-SAT. (c)	20. OTHER FACTORS (Provide specific requirements in Remarks)	CHK. (a)	SAT. (b)	UN-SAT. (c)
A. TECHNICAL CAPABILITY				A. GOVERNMENT PROPERTY CONTROL			
B. PRODUCTION CAPABILITY				B. TRANSPORTATION			
C. QUALITY ASSURANCE CAPABILITY				C. PACKAGING			
D. FINANCIAL CAPABILITY				D. SECURITY			
E. ACCOUNTING SYSTEM				E. SAFETY			
21. IS THIS A SHORT FORM PREAWARD REPORT? (For completion by surveying activity)				F. ENVIRONMENTAL/ENERGY CONSIDERATIONS			
				G. FLIGHT OPERATIONS/FLIGHT SAFETY			
☐ YES ☐ NO				H. OTHER (Specify)			
22. IS A FINANCIAL ASSISTANCE PAYMENT PROVISION IN THE SOLICITATION? (For completion by contracting activity)							
☐ YES ☐ NO							

23. REMARKS (For Contracting Activity Use)

SECTION IV – SURVEYING ACTIVITY RECOMMENDATIONS

24. RECOMMEND	25A. NAME AND TITLE OF SURVEY APPROVING OFFICIAL	25B. TELEPHONE NO.
☐ A. COMPLETE AWARD ☐ B. PARTIAL AWARD (Quantity_____) ☐ C. NO AWARD	25C. SIGNATURE	25D. DATE

STANDARD FORM 1403 (REV. 9-88) BACK

76. Section 53.301–1404 is revised to read as follows:

53.301–1404 Preaward Survey of Prospective Contractor-Technical.

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR TECHNICAL	SERIAL NO. (For surveying activity use)	FORM APPROVED OMB NO. 9000–0011
	PROSPECTIVE CONTRACTOR	

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0011), Washington, D.C. 20503.

1. RECOMMENDED

☐ a. COMPLETE AWARD ☐ b. PARTIAL AWARD (Quantity: _____) ☐ c. NO AWARD

2. NARRATIVE (Include the following information concerning key personnel who will be involved with the prospective contract: (1) Names, qualifications/experience and length of affiliation with prospective contractor; (2) Evaluate technical capabilities with respect to the requirements of the proposed contract or item classification; (3) Description of any technical capabilities which the prospective contractor lacks. Comment on the prospective contractor's efforts to obtain the needed technical capabilities.)

IF CONTINUATION SHEETS ATTACHED – MARK HERE ☐

3. FIRM HAS AND/OR UNDERSTANDS (Give explanation for any items marked "NO" in 2. narrative)

a. SPECIFICATIONS	☐ YES ☐ NO	b. EXHIBITS	☐ YES ☐ NO
c. DRAWINGS	☐ YES ☐ NO	d. TECHNICAL DATA REQUIREMENTS	☐ YES ☐ NO

4. SURVEY MADE BY	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE SIGNED
5. SURVEY REVIEWING OFFICIAL	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE REVIEWED

AUTHORIZED FOR LOCAL REPRODUCTION Previous edition is usable. EXPIRATION DATE: 9–30–91 1404–103 STANDARD FORM 1404 (REV. 9–88) Prescribed by GSA – FAR (48 CFR) 53.209–1(b)

77. Section 53.301–1405 is revised to read as follows:

53.301–1405 Preaward Survey of Prospective Contractor-Production.

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR PRODUCTION	SERIAL NO. (For surveying activity use)	FORM APPROVED OMB NO. 9000–0011
	PROSPECTIVE CONTRACTOR	

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0011), Washington, D.C. 20503.

SECTION I – RECOMMENDATION

1. RECOMMENDED

☐ a. COMPLETE AWARD ☐ b. PARTIAL AWARD (Quantity: _____) ☐ c. NO AWARD

2. NARRATIVE (Cite those sections of this report which substantiate the recommendations. List any other backup information in this space or on attached sheet if necessary. Identify any formal systems reviews and state results.)

IF CONTINUATION SHEETS ATTACHED – MARK HERE ☐

	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE SIGNED
3. SURVEY MADE BY			
4. SURVEY REVIEWING OFFICIAL	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE REVIEWED

AUTHORIZED FOR LOCAL REPRODUCTION Previous edition is usable. EXPIRATION DATE: 9–30–91 1405–103 STANDARD FORM 1405 (REV. 9–88) Prescribed by GSA – FAR (48 CFR) 53.209–1(d)

SECTION II – PLANT FACILITIES

1. SIZE OF TRACT		4. DESCRIPTION AND TYPE OF BUILDING(S) ☐ OWNED ☐ LEASED (Give expiration date)
2. SQUARE FEET UNDER ROOF	3. NO. OF BUILDINGS	

5. SPACE					6. MISCELLANEOUS PLANT OBSERVATIONS		
	TYPE	SQUARE FEET	ADEQUATE	INADEQUATE	(Explain any items marked "NO" on an attached sheet.)	YES	NO
MANUFACTURING	a. TOTAL MANUFACTURING SPACE				a. GOOD HOUSEKEEPING MAINTAINED		
	b. SPACE AVAILABLE FOR OFFERED ITEM				b. POWER AND FUEL SUPPLY ADEQUATE TO MEET PRODUCTION REQUIREMENTS		
					c. ALTERNATE POWER AND FUEL SOURCE AVAILABLE		
STORAGE	c. TOTAL STORAGE SPACE				d. ADEQUATE MATERIAL HANDLING EQUIPMENT AVAILABLE		
	d. FOR INSPECTION LOTS				e. TRANSPORTATION FACILITIES AVAILABLE FOR SHIPPING PRODUCT		
	e. FOR SHIPPING QUANTITIES						
	f. SPACE AVAILABLE FOR OFFERED ITEM				OTHER (Specify) f.		
					g.		
	g. AMOUNT OF STORAGE THAT CAN BE CONVERTED FOR MANUFACTURING, IF REQUIRED				h.		

SECTION III – PRODUCTION EQUIPMENT

	LIST MAJOR EQUIPMENT REQUIRED (Include GFP and annotate it as such) (a)	QUANTITY REQUIRED FOR PROPOSED CONTRACT (b)	TOTAL QTY. REQD. DURING LIFE OF PROPOSED CONTRACT (c)	QUANTITY ON HAND (d)	CONDITION (e) G	F	P	QUANTITY SHORT* (Col. (c) minus (d)) (f)	SOURCE, IF NOT ON HAND (g)	VERIFIED DELIVERY DATE (h)
1. MANUFACTURING										
2. SPECIAL TOOLING										
3. SPECIAL TEST										

* Coordinate shortage information for financial implications.

SECTION IV – MATERIALS, PURCHASED PARTS AND SUBCONTRACTS

1. PARTS/MATERIALS/SUBCONTRACTS WITH LONGEST LEAD TIME OR CRUCIAL ITEMS

DESCRIPTION (a)	SOURCE (b)	VERIFIED DELIVERY DATE TO MEET PROD. (c)

2. DESCRIBE THE MATERIAL CONTROL SYSTEM, INDICATING WHETHER IT IS CURRENTLY OPERATIONAL, AND EVALUATE ITS ABILITY TO MEET THE NEEDS OF THE PROPOSED ACQUISITION.

SECTION V – PERSONNEL

1. NUMBER AND SOURCE OF EMPLOYEES

TYPE OF EMPLOYEES	NO. ON BOARD	ADD. NO. REQUIRED	AVAIL. YES	AVAIL. NO	SOURCE
a. Skilled Production					
b. Unskilled Production					
c. Engineering					
d. Administrative					
e. TOT. (Lines a thru d)					

2. SHIFTS ON WHICH WORK IS TO BE PERFORMED

☐ FIRST ☐ SECOND ☐ THIRD

3. UNION AFFILIATION

AGREEMENT EXPIRATION DATE ▶

4. RELATIONSHIP WITH LABOR INDICATES PROBLEMS AFFECTING TIMELY PERFORMANCE OF PROPOSED CONTRACT (If "Yes," explain on attached sheet)

☐ YES ☐ NO

SECTION VI – DELIVERY PERFORMANCE RECORD

SECTION VII – RELATED PREVIOUS PRODUCTION (Government)

PAST YEAR PRODUCTION		GOVERNMENT CONTRACT NUMBER 1/	PERFORMANCE		QUANTITY	DOLLAR VALUE ($000)
ITEM NOMENCLATURE (a)	NATIONAL STOCK NO. (NSN) (b)	(c)	ON SCHED. (d)	DELIN-QUENT (e)	(f)	(g)

1/ Identify identical items by an asterisk (*) after the Government contract number.

SECTION VIII – CURRENT PRODUCTION

(Government and civilian concurrent production schedule using same equipment and/or personnel as offered item.)

	ITEM(S) (Include Government Contract No., if applicable. Identify unsatisfactory performance with asterisk (*))	MONTHLY SCHEDULE OF CONCURRENT DELIVERIES (Quantity)										
		1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	BAL.
BEING PRODUCED	1.											
PENDING AWARD	2.											

SECTION IX – ORGANIZATION AND MANAGEMENT DATA

Provide the following information in SECTION I NARRATIVE:

1. Describe the relationship between management, production, and inspection. Attach an organizational chart, if available.

2. Describe the prospective contractor's production control system. State whether or not it is operational.

3. Evaluate the prospective contractor's production control system in terms of (a) historical effectiveness, (b) the proposed contract, and (c) total production during performance of the proposed contract.

4. Comment on or evaluate other areas unique to this survey (include all special requests by the contracting office and any other information pertinent to the proposed contract or item classification).

78. Section 53.301–1406 is revised to read as follows:

53.301–1406 Preaward Survey of Prospective Contractor-Quality Assurance.

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR QUALITY ASSURANCE	SERIAL NO. (For surveying activity use)	FORM APPROVED OMB NO. 9000–0011
	PROSPECTIVE CONTRACTOR	

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0011), Washington, D.C. 20503.

SECTION I – RECOMMENDATION

1. RECOMMEND: ☐ AWARD ☐ NO AWARD (Provide full substantiation for recommendation in 4. NARRATIVE)

2. IF PROSPECTIVE CONTRACTOR RECEIVES AWARD, A POST AWARD CONFERENCE, IS RECOMMENDED. ☐ YES ☐ NO

3. AN ON-SITE SURVEY WAS PERFORMED. ☐ YES ☐ NO

4. NARRATIVE

IF CONTINUATION SHEETS – MARK HERE ☐

	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE SIGNED
5. SURVEY MADE BY			
6. SURVEY REVIEWING OFFICIAL	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE REVIEWED

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SECTION II – COMPANY AND SOLICITATION DATA

1. QUALITY ASSURANCE ORGANIZATION (Describe briefly and attach organization chart.)

2. QUALITY ASSURANCE OFFICIALS CONTACTED (Names, titles, and years of quality assurance experience)

3. QUALITY, RELIABILITY, MAINTAINABILITY REQUIREMENTS WHICH APPLY					
	☐ MIL-I-45208	☐ MIL-STD-45662	☐ OTHER (Specify)		
	☐ MIL-I-45607	☐ MIL-STD-785			
	☐ MIL-Q-9858	☐ MIL-STD-470	☐ MIL-S-52779		

4. ☐ IDENTICAL OR ☐ SIMILAR ITEMS HAVE BEEN ☐ PRODUCED ☐ SERVICED BY PROSPECTIVE CONTRACTOR

(If similar items, identify:)

SECTION III – EVALUATION CHECKLIST

STATEMENTS		YES	NO
1. AS PERTAINS TO THE CONTRACT, THESE ITEMS ARE UNDERSTOOD BY THE CONTRACTOR	a. Exhibits, technical data, drawings, specifications, and approval requirements.		
	b. Preservation, packaging, packing, and marking requirements.		
	c. OTHER (Specify)		
2. Records available indicate that the prospective contractor has a satisfactory quality performance record during the past twelve (12) months for similar items.			
3. Used or reconditioned material and former Government surplus material will be furnished by the prospective contractor. (If Yes, explain in Section I NARRATIVE)			
4. Prospective contractor will require unusual assistance from the Government.			
5. Did prospective contractor fulfill commitments to correct deficiencies, as proposed on previous surveys, when awarded that contract?			
6. Quality control, inspection, and test personnel.	NUMBER SKILLED / NUMBER SEMI-SKILLED		
7. Inspection to production personnel ratio.	RATIO		
The following are available and adequate. (If not applicable, show "N/A" in "Yes" column.)			
8. Inspection and test equipment, gauges, and instruments for first article and production (including solicitation specified equipment).			
9. Calibration/metrology program.			
10. Written procedures and instructions for inspections, tests, process controls, and other requirements; conformance thereto; in conjunction with other planning control functions.			
11. Control of specifications, drawings, changes and modifications, work/process instructions.			
12. Quality assurance/control organizational structure.			
13. System for determining inspection, test, and measurement requirements.			
14. Controls for selecting qualified suppliers and assuring the quality of purchased materials.			
15. Material control: identification, segregation, maintenance, preservation, and correction of defects.			
16. Government furnished property controls.			
17. In-process inspection controls.			
18. System for timely identification and correction of deficiencies to prevent recurrence.			
19. Preservation, packaging, packing, marking controls.			
20. Quality control records (such as: inspection, test, corrective actions, calibration, etc.)			
21. Controls for investigation of customer complaints and correction of deficiencies.			
22. Reliability and/or maintainability program.			
23. Computer software (deliverable and/or non-deliverable) quality assurance program.			

STANDARD FORM 1406 (REV. 9-88) BACK

79. Section 53.301–1407 is revised to read as follows:

53.301–1407 Preaward Survey of Prospective Contractor-Financial Capability.

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR FINANCIAL CAPABILITY	SERIAL NO. (For surveying activity use)	FORM APPROVED OMB NO. 9000–0011
	PROSPECTIVE CONTRACTOR	

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0011), Washington, D.C. 20503.

SECTION I – RECOMMENDATION

1. RECOMMENDED

☐ a. COMPLETE AWARD ☐ b. PARTIAL AWARD (Quantity: _____) ☐ c. NO AWARD

2. TOTAL OFFERED PRICE

3. NARRATIVE (Cite those sections of the report which substantiate the recommendation. Give any other backup information in this space or on an additional sheet, if necessary.)

IF CONTINUATION SHEETS ATTACHED – MARK HERE ☐

	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE SIGNED
4. SURVEY MADE BY			
5. SURVEY REVIEWING OFFICIAL			

AUTHORIZED FOR LOCAL REPRODUCTION Previous edition is usable. EXPIRATION DATE: 9–30–91 1407–103 STANDARD FORM 1407 (REV. 9–88) Prescribed by GSA – FAR (48 CFR) 53.209–1(e)

SECTION II – GENERAL

1. TYPE OF COMPANY

☐ CORPORATION ☐ PARTNERSHIP

☐ SUBSIDIARY ☐ DIVISION

☐ PROPRIETORSHIP ☐ OTHER (Specify)

2. YEAR ESTABLISHED:

3. NAME AND ADDRESS OF:

a. PARENT CO.

b. SUBSIDIARIES

SECTION III – BALANCE SHEET/PROFIT AND LOSS STATEMENT

PART A – LATEST BALANCE SHEET

1. DATE	2. FILED WITH

3. FINANCIAL POSITION

	$
a. Cash	
b. Accounts Receivable	
c. Inventory	
d. Other Current Assets	
e. Total Current Assets	
f. Fixed Assets	
g. Current Liabilities	
h. Long Term Liabilities	
i. Total Liabilities	
j. Net Worth	

4. WORKING CAPITAL (Current Assets less Current Liabilities)

5. RATIOS

a. CURRENT ASSETS TO CURRENT LIABILITIES	b. ACID TEST (Cash, temporary investments held in lieu of cash and current receivables to current liabilities)	c. TOTAL LIABILITIES TO NET WORTH

PART B – LATEST PROFIT AND LOSS STATEMENT

1. CURRENT PERIOD a. FROM	1. CURRENT PERIOD b. TO	2. FILED WITH

		$
3. NET SALES	a. CURRENT PERIOD	
	b. First prior fiscal year	
	c. Second prior fiscal year	
4. NET PROFITS BEFORE TAXES	a. CURRENT PERIOD	
	b. First prior fiscal year	
	c. Second prior fiscal year	

PART C – OTHER

1. FISCAL YEAR ENDS (Date):

2. BALANCE SHEETS AND PROFIT AND LOSS STATEMENTS HAVE BEEN CERTIFIED ▶ a. THROUGH (Date) b. BY (Signature)

3. OTHER PERTINENT DATA

SECTION IV – PROSPECTIVE CONTRACTOR'S FINANCIAL ARRANGEMENTS

Mark "X" in appropriate column.	YES	NO
1. USE OF OWN RESOURCES		
2. USE OF BANK CREDITS		
3. OTHER (Specify)		

4. INDEPENDENT ANALYSIS OF FINANCIAL POSITION SUPPORTS THE STATEMENTS SHOWN IN ITEMS 1, 2, AND 3 ☐ YES ☐ NO (If "NO", explain)

SECTION V – GOVERNMENT FINANCIAL AID

1. TO BE REQUESTED IN CONNECTION WITH PERFORMANCE OF PROPOSED CONTRACT

Mark "X" in appropriate column.	YES	NO
a. PROGRESS PAYMENT(S)		
b. GUARANTEED LOAN		
c. ADVANCE PAYMENTS		

2. EXPLAIN ANY "YES" ANSWERS TO ITEMS 1a, b, AND c

3. FINANCIAL AID CURRENTLY OBTAINED FROM THE GOVERNMENT

a. PROSPECTIVE CONTRACTOR RECEIVES GOVERNMENT FINANCING AT PRESENT	b. IS LIQUIDATION CURRENT?	c. AMOUNT OF UNLIQUIDATED PROGRESS PAYMENTS OUTSTANDING
☐ YES ☐ NO	☐ YES ☐ NO	$

Complete items below only if item a., is marked "YES."

DOLLAR AMOUNTS	(a) AUTHORIZED	(b) IN USE
a. Guaranteed loans	$	$
b. Advance payments	$	$

4. LIST THE GOVERNMENT AGENCIES INVOLVED	5. SHOW THE APPLICABLE CONTRACT NOS.

SECTION VI – BUSINESS AND FINANCIAL REPUTATION

1. COMMENTS OF PROSPECTIVE CONTRACTOR'S BANK

2. COMMENTS OF TRADE CREDITORS

3. COMMENTS AND REPORTS OF COMMERCIAL FINANCIAL SERVICES AND CREDIT ORGANIZATIONS (Such as, Dun & Bradstreet, Standard and Poor, etc.)

4. MOST RECENT CREDIT RATING ▶	a. DATE	b. BY

5. DOES PRICE APPEAR UNREALISTICALLY LOW? ☐ YES ☐ NO (If YES, explain in Section I NARRATIVE)

6. DESCRIBE ANY OUTSTANDING LIENS OR JUDGEMENTS

SECTION VII – SALES (000'S) FOR NEXT SIX QUARTERS

CATEGORY	1	2	3	4	5	6	TOTAL
1. CURRENT CONTRACT SALES (Backlog)	$	$	$	$	$	$	$
A. GOVERNMENT (Prime & Subcontractor)							
B. COMMERCIAL							
2. ANTICIPATED ADDITIONAL SALES							
A. GOVERNMENT (Prime and Subcontractor)							
B. COMMERCIAL							
3. TOTALS							

80. Section 53.301–1408 is revised to read as follows:

53.301–1408 Preaward Survey of Prospective Contractor-Production.

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR ACCOUNTING SYSTEM	SERIAL NO. (For surveying activity use)	FORM APPROVED OMB NO. 9000–0011
	PROSPECTIVE CONTRACTOR	

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000–0011), Washington, D.C. 20503.

SECTION I – RECOMMENDATION

1. PROSPECTIVE CONTRACTOR'S ACCOUNTING SYSTEM IS ACCEPTABLE FOR AWARD OF PROSPECTIVE CONTRACT

☐ YES ☐ NO (Explain in 2. NARRATIVE)

☐ YES, WITH A RECOMMENDATION THAT A FOLLOW ON ACCOUNTING SYSTEM REVIEW BE PERFORMED AFTER CONTRACT AWARD (Explain in 2. NARRATIVE)

2. NARRATIVE (Clarification of deficiencies, and other pertinent comments. If additional space is required, continue on plain sheets of paper.)

IF CONTINUATION SHEETS ATTACHED – MARK HERE ☐

	a. SIGNATURE AND OFFICE (Include typed or printed name)	b. TELEPHONE NO. (Include area code)	c. DATE SIGNED
3. SURVEY MADE BY			
4. SURVEY REVIEWING OFFICIAL			

AUTHORIZED FOR LOCAL REPRODUCTION Previous edition is usable. EXPIRATION DATE: 9-30-91 1408-103 STANDARD FORM 1408 (REV. 9-88) Prescribed by GSA - FAR (48 CFR) 53.209-1(f)

SECTION II – EVALUATION CHECKLIST			
MARK "X" IN THE APPROPRIATE COLUMN (Explain any deficiencies in SECTION I NARRATIVE)	YES	NO	NOT APPLI-CABLE
1. EXCEPT AS STATED IN SECTION I NARRATIVE, IS THE ACCOUNTING SYSTEM IN ACCORD WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES APPLICABLE IN THE CIRCUMSTANCES?			
2. ACCOUNTING SYSTEM PROVIDES FOR:			
a. Proper segregation of direct costs from indirect costs.			
b. Identification and accumulation of direct costs by contract.			
c. A logical and consistent method for the allocation of indirect costs to intermediate and final cost objectives. (A contract is a final cost objective.)			
d. Accumulation of costs under general ledger control.			
e. A timekeeping system that identifies employees' labor by intermediate or final cost objectives.			
f. A labor distribution system that charges direct and indirect labor to the appropriate cost objectives.			
g. Interim (at least monthly) determination of costs charged to a contract through routine posting of books of account.			
h. Exclusion from costs charged to government contracts of amounts which are not allowable in terms of FAR 31, Contract Cost Principles and Procedures, or other contract provisions.			
i. Identification of costs by contract line item and by units (as if each unit or line item were a separate contract) if required by the proposed contract.			
j. Segregation of preproduction costs from production costs.			
3. ACCOUNTING SYSTEM PROVIDES FINANCIAL INFORMATION:			
a. Required by contract clauses concerning limitation of cost (FAR 52.232-20 and 21) or limitation on payments (FAR 52.216-16).			
b. Required to support requests for progress payments.			
4. IS THE ACCOUNTING SYSTEM DESIGNED, AND ARE THE RECORDS MAINTAINED IN SUCH A MANNER THAT ADEQUATE, RELIABLE DATA ARE DEVELOPED FOR USE IN PRICING FOLLOW-ON ACQUISITIONS?			
5. IS THE ACCOUNTING SYSTEM CURRENTLY IN FULL OPERATION? (If not, describe in Section I Narrative which portions are (1) in operation, (2) set up, but not yet in operation, (3) anticipated, or (4) nonexistent.)			

81. Section 53.301-1416 is revised to read as follows:

53.301-1416 Payment Bond for Other than Construction Contracts.

PAYMENT BOND FOR OTHER THAN CONSTRUCTION CONTRACTS (See instructions on reverse)	DATE BOND EXECUTED (Must be same or later than date of contract)	FORM APPROVED OMB NO. 9000-0045

Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0045), Washington, D.C. 20503.

PRINCIPAL (Legal name and business address) (Include ZIP Code)	TYPE OF ORGANIZATION (Check one) ☐ INDIVIDUAL ☐ PARTNERSHIP ☐ JOINT VENTURE ☐ CORPORATION STATE OF INCORPORATION
SURETY(IES) (Name(s) and business address(es)) (Include ZIP Code)	PENAL SUM OF BOND MILLION(S) | THOUSAND(S) | HUNDRED(S) | CENTS CONTRACT DATE | CONTRACT NO.

We, the Principal and Surety(ies) are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum. For payment of the penal sum, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally. However, where the Sureties are corporations acting as co-sureties, we, the sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us. For all other purposes, each Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the surety. If no limit of liability is indicated, the limit of liability is the full amount of the penal sum.

CONDITIONS:

The principal has entered into the contract identified above.

THEREFORE:

(a) The above obligation is void if the Principal promptly makes payment to all persons (claimants) having a contract relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the work provided for in the contract identified above and any duly authorized modifications thereof. Notice of those modifications to the Surety(ies) are waived.

(b) The above obligation shall remain in full force if the Principal does not promptly make payments to all persons (claimants) having a contract relationship with the Principal or a subcontractor of the Principal for furnishing labor, material or both in the prosecution of the contract identified above. In these cases, persons not paid in full before the expiration of ninety (90) days after the date of which the last labor was performed or material furnishing, have a direct right of action against the Principal and Surety(ies) on this bond for the sum or sums justly due. The claimant, however, may not bring a suit or any action -

(1) Unless claimant, other than one having a direct contract with the Principal, had given written notice to the Principal within ninety (90) days after the claimant did or performed the last of the work or labor, or furnished or supplied the last of the materials for which the claim is made. The notice is to state with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished or supplied, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the Principal at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process is served in the state in which the contract is being performed, save that such service need not be made by a public officer.

(2) After the expiration of one (1) year following the date on which claimant did or performed the last of the work or labor, or furnished or supplied the last of the materials for which the suit is brought.

(3) Other than in the United States District Court for the district in which the contract, or any part thereof, was performed and executed, and not elsewhere.

WITNESS:

The Principal and Surety(ies) executed this payment bond and affixed their seals on the above date.

PRINCIPAL				
SIGNATURE(S)	1. (Seal)	2. (Seal)	3. (Seal)	Corporate Seal
NAME(S) & TITLE(S) (Typed)	1.	2.	3.	

INDIVIDUAL SURETY(IES)		
SIGNATURE(S)	1. (Seal)	2. (Seal)
NAME(S) & TITLE(S) (Typed)	1.	2.

CORPORATE SURETY(IES)					
SURETY A	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		
SURETY B	NAME & ADDRESS		STATE OF INC.	LIABILITY LIMIT $	Corporate Seal
	SIGNATURE(S)	1.	2.		
	NAME(S) & TITLE(S) (Typed)	1.	2.		

INSTRUCTIONS

1. This form is authorized for use when payment bonds are required under FAR (48 CFR) 28.103-3, i.e., payment bonds for other than construction contracts. Any deviation from this form will require the written approval of the Administrator of General Services.

2. Insert the full legal name and business address of the Principal in the space designated "Principal" on the face of the form. An authorized person shall sign the bond. Any person signing in a representative capacity (e.g., an attorney-in-fact) must furnish evidence of authority if that representative is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved.

3. (a) Corporations executing the bond as sureties must appear on the Department of the Treasury's list of approved sureties and must act within the limitation listed therein. Where more than one corporate surety is involved, their names and addresses shall appear in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)." In the space designated "SURETY(IES)" on the face of the form, insert only the letter identification of the sureties.

(b) Where individual Sureties are involved, a completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. The Government may require the surety to furnish additional substantiating information concerning its financial capability.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Corporate Seal"; and shall affix an adhesive seal if executed in Maine, New Hampshire, or any other jurisdiction requiring adhesive seals.

5. Type the name and title of each person signing this bond in the space provided.

82. Section 53.302–90 is revised to read as follows:

53.302–90 Release of Lien on Real Property.

RELEASE OF LIEN ON REAL PROPERTY

Whereas _____, of _____, by a bond
(Name) (Place of Residence)
for the performance of U.S. Government Contract Number _____,
became a surety for the complete and successful performance of said contract, which bond includes a lien upon certain real property further described hereafter, and

Whereas said surety established the said lien upon the following property

and recorded this pledge on _____
(Name of Land Records)
in the _____ of _____
(Locality) (State)
and

Whereas, I, _____, being a duly authorized representative of the United States Government as a warranted contracting officer, have determined that the lien is no longer required to ensure further performance of the said Government contract or satisfaction of claims arising therefrom,
and

Whereas the surety remains liable to the United States Government for continued performance of the said Government contract and satisfaction of claims pertaining thereto.

Now, therefore, this agreement witnesseth that the Government hereby releases the aforementioned lien.

[Date] [Signature]

Seal

AUTHORIZED FOR LOCAL REPRODUCTION

OPTIONAL FORM 90 (REV. 1-90)
Prescribed by GSA
FAR (48 CFR) 53.228(n)

83. Section 53.302–91 is revised to read as follows:

53.302–91 Release of Personal Property from Escrow.

RELEASE OF PERSONAL PROPERTY FROM ESCROW

Whereas _____, of _____, by a bond
(Name) (Place of Residence)
for the performance of U.S. Government Contract Number _____,
became a surety for the complete and successful performance of said contract, and

Whereas said surety has placed certain personal property in escrow

in Account Number _____ on deposit

at _____
(Name of Financial Institution)

located at _____, and
(Address of Financial Institution)

Whereas I, _____, being a duly authorized representative of the United States Government as a warranted contracting officer, have determined that retention in escrow of the following property is no longer required to ensure further performance of the said Government contract or satisfaction of claims arising therefrom:

and

Whereas the surety remains liable to the United States Government for the continued performance of the said Government contract and satisfaction of claims pertaining thereto.

Now, therefore, this agreement witnesseth that the Government hereby releases from escrow the property listed above, and directs the custodian of the aforementioned escrow account to deliver the listed property to the surety. If the listed property comprises the whole of the property placed in escrow in the aforementioned escrow account, the Government further directs the custodian to close the account and to return all property therein to the surety, along with any interest accruing which remains after the deduction of any fees lawfully owed to _____.
(Name of Financial Institution)

[Date] [Signature]

Seal

OPTIONAL FORM 91 (1–90)
Prescribed by GSA
FAR (48 CFR) 53.228(o)

AUTHORIZED FOR LOCAL REPRODUCTION

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Thursday
June 21, 1990

Part V

Department of Transportation

Research and Special Programs Administration

State of Louisiana; Statutes and Regulations on Hazardous Materials Transportation; Notice

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Inconsistency Ruling No. IR-31; Docket IRA-49]

State of Louisiana; Statutes and Regulations on Hazardous Materials Transportation

APPLICANT: State of Louisiana.

REGULATIONS AFFECTED: Louisiana Revised Statutes 32:1501–1520 and Louisiana Regulations, title 33, part V, 10501–10505 and 10901–10905.

APPLICABLE FEDERAL REQUIREMENTS: Hazardous Materials Transportation Act (HMTA) (Pub. L. 93–633, 49 U.S.C. App. sec. 1801 *et seq.*) and the Hazardous Materials Regulations (HMR) (49 CFR parts 171–180) issued thereunder.

MODES AFFECTED: Rail and Highway.

ISSUE DATE: June 15, 1990 .

SUMMARY: This inconsistency ruling is the opinion of the Office of Hazardous Materials Transportation (OHMT) of the Department of Transportation (DOT) concerning whether Louisiana Revised Statutes 32:1501–1520 and Louisiana Administrative Code, title 33, part V, sections 10501–10505 and 10901–10905 are inconsistent with the HMTA and the HMR and thus preempted by section 112(a) of the HMTA. This ruling was applied for and is issued under the procedures set forth at 49 CFR 107.201–107.209.

RULING: Louisiana Revised Statutes 32:1501–1520 and Louisiana Regulations, title 33, part V, sections 10501–10505 and 10901–10905 are consistent with the HMTA and the HMR except that the following provisions thereof are inconsistent with the HMTA or the HMR to the extent indicated and thus preempted to that extent under section 112(a) of the HMTA (49 U.S.C. 1811(a)):

(1) La. Rev. Stat. 32:1502(5)(a) and (8) insofar as they authorize the designation as hazardous materials of any materials other than those so designated in the HMR;

(2) La. Rev. Stat. 32:1502(5)(b) to the extent it defines as "explosives" any material not so defined in the HMR;

(3) La. Admin. Code, Tit. 33, §§ 10501(c) and 10901(c) definitions of "train";

(4) La. Rev. Stat. 32:1503, imposing hazardous materials transportation insurance requirements;

(5) La. Rev. Stat. 32:1510, requiring written incident/accident reports;

(6) La. Rev. Stat. 32:1512–1514 insofar as those penalty provisions relate to the enforcement of inconsistent substantive requirements;

(7) La. Rev. Stat. 32:1512 insofar as it imposes civil penalties for other than "knowing" violations; and

(8) La. Rev. Stat. 32:1504B, 32:1505, 32:1508, and 32:1509A(3) insofar as those inspection and enforcement provisions relate to inconsistent substantive requirements.

This ruling does not address the issues of whether those Louisiana provisions are preempted under the Federal Railroad Safety Act (FRSA), 45 U.S.C. 421 *et seq.*, the Motor Carrier Safety Act, 49 U.S.C. 2501 *et seq.*, or any statute other than the HMTA.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001 [Tel. (202) 366–4400].

I. Background

On September 18, 1989, the State of Louisiana filed an inconsistency ruling application. That application requested a ruling concerning the consistency of the above-cited State statutes and regulations with the HMTA and the HMR.

The State contends that those statutes and regulations, as they apply to rail carriers and shippers of hazardous materials in Louisiana, are consistent with the HMTA and the HMR.

On September 27, 1989, OHMT published a Public Notice and Invitation to Comment (54 FR 39622) soliciting public comments on Louisiana's application. It expanded the proceeding to include the consistency of those statutes and regulations as they pertain to carriers and shippers in all modes of transportation.

Comments in support of findings of inconsistency were filed by the Air Transport Association of America, the Association of American Railroads, Norfolk Southern Corporation, and Union Pacific System. Comments partially in support of, and partially opposing, findings of inconsistency were filed by National Tank Truck Carriers, Inc. and Olin Chemicals.

II. General Authority and Preemption Under the HMTA

The HMTA at section 112(a) (49 U.S.C. App. 1811(a)) preempts "* * * any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in the [the HMTA], or in a regulation issued under [the HMTA]." This express preemption provision makes it evident that Congress did not intend the HMTA and its regulations to completely occupy the field of transportation so as to preclude any state and local requirements that are not "inconsistent."

In the HMTA's Declaration of Policy (section 102) and in the Senate Commerce Committee language reporting out what became section 112 of the HMTA, Congress indicated a desire for uniform national standards in the field of hazardous materials transportation. Congress inserted the preemption language in section 112(a) "in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation" (S. Rep. No. 1192, 93rd Cong., 2d Sess. 37 (1974)). Through its enactment of the HMTA, Congress gave the Department the authority to promulgate uniform national standards. While the HMTA did not totally preclude state or local action in this area, Congress intended, to the extent possible, to make such state or local action unnecessary. The comprehensiveness of the HMR, issued to implement the HMTA, severely restricts the scope of historically permissible state or local activity.

Although advisory in nature, inconsistency rulings issued by OHMT under 49 CFR part 107 provide an alternative to litigation for a determination of the relationship between Federal requirements and those of a state or political subdivision. If a state or political subdivision requirement is found to be inconsistent, the state or local government may apply to OHMT for a waiver of preemption. 49 U.S.C. 1811(b); 49 CFR 107.215–107.225.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the Federal statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978.

Since these proceedings are conducted pursuant to the HMTA and the HMR, only the question of statutory preemption under the HMTA will be considered. A court might find a non-

Federal requirement preempted for other reasons, such as statutory preemption under another Federal statute, preemption under state law, or preemption by the Commerce Clause of the U.S. Constitution because of an undue burden on interstate commerce. However, OHMT does not make such determinations in an inconsistency ruling proceeding.

OHMT has incorporated into its procedures (49 CFR 107.209(c)) the following criteria for determining whether a state of local requirement is consistent with, and thus not preempted by, the HMTA:

(1) Whether compliance with both the non-Federal requirement and the Act or the regulations issued under the Act is possible; and

(2) The extent to which the non-Federal requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act. These criteria are based upon, and supported by, U.S. Supreme Court decisions on preemption. These include *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

The first criterion, the "dual compliance" test, concerns those non-Federal requirements which are irreconcilable with Federal requirements; that is, compliance with the non-Federal requirement causes the Federal requirement to be violated, or *vice versa*. The second criterion, the "obstacle" test, involves determining whether a state or local requirement is an obstacle to executing and accomplishing the purposes of the HMTA and the HMR; a requirement constituting such an obstacle is inconsistent. Application of this second criterion requires an analysis of the non-Federal requirement in light of the requirements of the HMTA and the HMR, as well as the purposes and objectives of Congress in enacting the HMTA and the manner and extent to which those purposes and objectives have been carried out through OHMT's regulatory program.

III. The Application for Inconsistency Ruling

On September 18, 1989, the State of Louisiana, Department of Public Safety and Corrections, through its Chief Counsel, applied for an inconsistency ruling concerning certain of its statutes and regulations as they pertain to rail carrier and shipper transportation of hazardous materials.

According to the State, in Louisiana Revised Statutes 32:1501–1520 and Louisiana Regulations, title 33, part V, §§ 10501–10505 and 10901–10905, Louisiana adopted without modification the provisions of 49 CFR parts 171 through 179 as they pertain to carriers and shippers of hazardous materials.

Louisiana said that in enforcing these provisions, its Office of State Police, Transportation and Environmental Safety Section cited the Illinois Central Railroad Company for violations and assessed a civil penalty after an administrative hearing. The application stated that the Illinois Central Railroad had appealed the imposition of the civil penalty to the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, based on a claim that Louisiana's Office of State Police and/or Department of Public Safety "are without authority to assess civil penalties in that these matters have been preempted by Federal Statutes and Regulations."

In its application, Louisiana maintained that its statutes and regulations, as they apply to rail carriers and shippers of hazardous materials in Louisiana, are consistent with the HMTA and parts 171–179 of the HMR because they were adopted in toto, without modification. The application further stated that the statutes and regulations "afford an equal level of protection to the public" as that afforded by the HMTA and the HMR and "do not unreasonably burden commerce." [The criteria in the preceding sentence are those for deciding nonpreemption determination applications under section 112(b) of the HMTA, 49 U.S.C. 1811(a), not for determining consistency or inconsistency under section 112(a) of the HMTA, 49 U.S.C. 1811(b).]

Louisiana stated that in enforcing these provisions it "has conformed to the civil penalties limitations" of the HMTA. Louisiana also contended that the regulatory scheme of the HMTA "obviously envisions state participation in the enforcement of regulations and penalties for violations." The application further stated that the number of Federal Railroad Administration inspectors in the Louisiana area makes it "physically impossible for the rail transportation of hazardous materials to be adequately policed by the Federal government alone."

Therefore, Louisiana requested a ruling that its statutes and regulations insofar as they pertain to rail carriers and shippers of hazardous maerials and the State's authority to administer these regulations are consistent with the HMR and, thus, are not preempted by section 112(a) of the HMTA.

Because, however, the above-cited Louisiana statutes and regulations apply to all modes of transportation, RSPA expanded this proceeding to include consideration of the issue of whether those Louisiana statutes and regulations as they pertain to carriers and shippers in all modes of transportation are consistent with the HMTA and the HMR.

IV. Public Comment Opposing Consistency

Comments favoring a finding of inconsistency were filed by the Association of American Railroads (AAR), Norfolk Southern Corporation (NSC), the Union Pacific Railroad Company (UPR), and Olin Chemicals (Olin)

AAR Comments

The AAR contends that the Louisiana statutes and regulations are preempted by both the HMTA and the FRSA, that both statutes preclude state regulation and enforcement in the area of hazardous materials transportation by rail, and that Louisiana's requirements differ from, and conflict with, the HMR.

Concerning its allegation of inconsistencies, AAR summarizes its position as follows:

> Louisiana states that its statutes and regulations merely replicate the federal regulations, specifically 49 C.F.R. Parts 171–179. 54 Fed. Reg. 39623. That is not the case. Louisiana's statutes contain a broader definition of hazardous materials than that contained in the *Code of Federal Regulations*, require carriers to have liability insurance, impose requirements for the marking of rail cars in addition to what RSPA requires, contains additional shipping paper requirements, impose unique accident reporting requirements, require locomotive engineers to be licensed, and grant state inspectors unique rights to stop trains. La. Rev. Stat. Ann. §§ 32:1502, 1503, 1507, 1509, 1510, and 1516. The regulations implementing the statutory requirements fail to include the exemptions granted by RSPA pursuant to 49 U.S.C. § 1806 and 49 C.F.R. Subpart b, §§ 107.101–123, incorporate by reference superseded federal regulations, and conflict with RSPA's regulations by using an overly broad definition of "train." *See* La. Admin. Code Tit. 33, chapters 105 and 109. Thus, Louisiana's statutory and regulatory system for the transportation of hazardous materials contains requirements far beyond what is found in the federal regulations and conflicts with those regulations.

The AAR urges RSPA to depart from its usual practice of restricting inconsistency rulings to preemption issues under the HMTA. It argues that Louisiana's requirements should be found to be preempted under the FRSA because courts have held and will hold that such is the case. It cites *CSX*

Transportation, Inc. v. *Public Utilities Comm'n of Ohio*, 701 F. Supp. 608 (S.D. Ohio 1988), *aff'd* Case 88–4185 (6th Cir. Apr. 13, 1990).

The balance of AAR's comments address preemption under the HMTA and consistency with the HMTA and the HMR. It cites and quotes from a RSPA notice entitled "Preemption Under the Hazarous Materials Transportation Act," 54 FR 26710 (June 23, 1989). It cites the discussion therein of the "dual compliance" and "obstacle" tests used to determine consistency and Congress' objective to achieve uniform national standards in the field of hazardous materials transportation.

AAR then proceeds to argue that section 205 of the FRSA, 45 U.S.C. 434, is helpful in determining Congress' intent in enacting the HMTA. Citing the *CSX* case and 45 U.S.C. 421, it states that the FRSA preemption language encompasses hazardous materials transportation and that Congress could not have intended a course of action in the HMTA contradicting its intent in enacting the FRSA. It quotes 45 U.S.C. 434:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State my adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

AAR concludes from this langauge and its legislative history that Congress intended that there should be a single, national system of regulation for the transportation of hazardous materials by rail.

It further contends that the District Court in the *CSX* case determined that this Congressional intent has continued. It cites *Atchison, Topeka & Santa Fe Railway* v. *Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977), as holding that State action was preempted when DOT issued hazardous materials regulations. AAR states that the RSPA Administrator testified before Congress in 1979 that states could not issue railroad hazardous materials regulations in areas regulated by DOT unless the state regulations addressed a local safety hazard. It then quotes the *CSX* District Court decision: "Congress' failure to amend the FRSA or the HMTA preemption provisions in response to either the *Atchison* decision or RSPA's (testimony) * * * can be read as acceptance of these interpretations." 701 F.Supp. at 615–6.

In addition, AAR cites a 1986 report issued by Congress' Office of Technology assessment, which stated, "Even where State inspectors have been trained in rail safety procedures, they cannot conduct hazardous materials inspections, because authority to do so has not been granted to States."

From the foregoing, AAR concludes that the language of the RFSA, its legislative history, case law, and Congressional testimony and reports show that Congress intended "uniform" hazardous materials regulation under the HMTA to mean that there was to be a single, national regulatory and enforcement system for the railroad industry. It further concludes that state adoption and enforcement of DOT regulations in the rail mode present an obstacle to the accomplishment of the Congressional objective of uniformity and thus are inconsistent. It notes that these principles do not apply to highway transportation and that, therefore, prior inconsistency rulings concerning highway transportation requirements are inapplicable.

Next AAR argues that Louisiana's requirements would be inconsistent even if they were identical to the Federal requirements because of allegedly unsafe, incorrect and improper enforcement thereof by State enforcement personnel. It cites case law for the proposition that in making preemption determinations Federal and state requirements must be evaluated as interpreted and applied and not solely as written. It also cites Inconsistency Ruling IR–8 (IR–8) (Decision on Appeal), 52 Fed. Reg. 13000, 13003 (Apr. 20, 1987), for the principle that the actual and potential effect of state or local rules, not their intent, determines their consistency.

After concluding that Louisiana's requirements are inconsistent even if identical because of the manner in which the State enforces them, AAR separately argues that, in fact, the Louisiana regulatory requirements are not identical to the HMR. It advances several arguments in support of that proposition.

First, AAR argues that Louisiana's failure to explicitly recognize exemptions which OHMT has issued under 49 U.S.C. App. 1806 and 49 CFR 107.101–123 results in Louisiana's regulations being inconsistent. AAR asserts that La. Rev. Stat. section 32:1507A apparently and vaguely directs the Secretary of the Department of Public Safety and Corrections to take OHMT's exemptions into account but that the Secretary has failed to do so in regulations (La. Admin. Code, Tit. 33, chapters 105 and 109).

AAR argues that states cannot be permitted to choose whether to accept or reject the 1,000 outstanding OHMT exemptions. It cites several examples of types of rail transportation exemptions which it claims Louisiana might not recognize: (1) Those authorizing transportation of hazardous materials in tank cars not authorized for such transportation by the MHR, (2) exemptions from HMR shipping paper requirements, and (3) exemptions authorizing transportation of railway track torpedoes and fusees in flagging kits without placards. It concludes that Louisiana's failure to recognize DOT's exemptions results in the State's regulations being inconsistent.

Second, AAR contends that Louisiana's statutory adoption of the October 1, 1987 version of the HMR is inconsistent because that version differs from the current HMR due to changes in the HMR which have occurred since that time. It cites IR–19, 52 FR 29404, 29410–1 (June 30, 1987), *affirmed* IR–19 (Decision on Appeal), 53 FR 11600, (Apr. 7, 1988) in support of its position.

Third, AAR alleges that the State has adopted a regulatory definition of "train" which differs from the HMR definition. It says that the State defines a train as "an engine or an engine coupled with one or more rail freight cars." La Admin. Code, tit. 33, secs. 10501(c) and 10901(c). It cites the following definition of a train in 49 CFR 171.8: "one or more engines coupled with one or more rail cars, *except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains.*" (Emphasis added.) AAR contends that as a result of the unrestricted Louisiana definition of "train," the State is requiring that during switching and assembling operations a buffer car always be used between engines and tank cars and that shipping papers be carried by a train crew member—practices which AAR alleges are unsafe and impracticable.

In addition to alleging the foregoing regulatory inconsistencies, AAR argues that several Louisiana statutory provisions are not identical and, therefore, are inconsistent.

First, it discusses different definitions of hazardous materials. It cites Louisiana's definition:

> "Hazardous materials" means any gaseous, liquid, or solid material which because of its

quantity, concentration, or physical, chemical, or biological composition poses a substantial present or potential hazard to human health, the environment, or property when transported in commerce, or which material is identified or designated as being hazardous by rules and regulations adopted and promulgated by the secretary of the Department of Public Safety and Corrections pursuant to the Louisiana Administrative Procedure Act. The secretary, in finding that a material is hazardous, shall consider the following factors with respect to each material.

* * * * *

The rules and regulations adopted by the secretary of the Department of Public Safety and Corrections shall be consistent with the Code of Federal Regulations, Title 49. "Explosives" as defined and regulated by R.S. 40:1471.1 through 1471.22 shall be considered to be hazardous material subject to regulation by this Chapter.

La. Rev. Stat. sec. 32:1502(5).

AAR states that the foregoing definition, although mandating consistency with the HMR, itself differs from the HMR definition [49 CFR 171.8] of a hazardous material as:

* * * a substance or material, including a hazardous substance, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated.

AAR cites a series of inconsistency rulings and *Missouri Pacific Railroad* v. *Railroad Comm'n of Texas*, 671 F. Supp. 466, 481 (W.D. Tex. 1987), *aff'd on other grounds*, 850 F.2d 267 (5th Cir. 1988), for the principle that definitions of hazardous materials differing from that in the HMR are inconsistent.

In addition, AAR specifically discusses Louisiana's allegedly inconsistent definition of "explosive" as:

any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; * * * The term "explosives" shall further include * * *

(a) "blasting agent" which shall mean any material or mixture, consisting of fuel and oxidizer, intended for blasting, not otherwise defined as an explosive; * * *

La. Rev. Stat. sec. 40:1471.2(1). The AAR asserts that because this definition encompasses blasting agents "not otherwise defined as an explosive," it classifies as hazardous materials blasting agents which do not have the primary or common purpose of functioning by explosion and thus is inconsistent with 49 CFR 173.50, which only includes as explosives those blasting agents which do not have as their primary or common purpose the functioning by explosion.

Second, AAR contends that the State's requirement that carriers have evidence of liability insurance, self-insurance and other evidence of financial responsibility acceptable to the Secretary of the Department of Public Safety and Corrections is inconsistent. It cites IR-25, 54 FR 16308, 16310-1 (Apr. 21, 1989), for the proposition that the subject of bonding, insurance and indemnity requirements for hazardous materials transportation is exclusively Federal.

Third, AAR claims that the State's requirement to mark the number of each exemption on the vehicle to which it is applied (La. Rev. Stat. sec. 32:1507B) is inconsistent because it seemingly requires that a tank car containing a hazardous material that is authorized in any way by an exemption have an exemption number stenciled thereon. It contends that this State requirement goes beyond the HMR (40 CFR part 106, Subpart B, Appendix B) by requiring the marking of tank cars when, for example, the only exemption involved is a shipping paper exemption.

Fourth, AAR contends that the following Louisiana incident reporting requirements are inconsistent:

A written report shall be submitted to the department on an approved form. Each report submitted shall contain the time and date of the incident or accident, a description of any injuries to persons or property, any continuing danger to life at the place of the accident or incident, the identity and classification of the material, and any other pertinent details.

[and]

In the case of an incident or accident involving hazardous materials which is not subject to this Chapter but which is subject to Title 49 and Title 46 of the Code of Federal Regulations, the carrier shall send a copy of the report filed with the United States Department of Transportation to the department.

La. Rev. Stat. secs. 32:1510 B and C. The HMR include a requirement for written reports concerning hazardous materials incidents. 49 CFR 171.16. AAR states that inconsistency rulings and court decisions have held that state and local requirements for written hazardous materials incident reports, including requirements for copies of such reports, are inconsistent. It cites IR-3 (Decision on Appeal), 47 FR 18457, 18462 (Apr. 29, 1982); IR-2, 44 FR 75566, 75572 (Dec. 20, 1979); IR-3, 46 FR 18918, 18924 (Mar. 26, 1981); and *Nat'l Tank Truck Carriers v. Burke*, 535 F. Supp. 509, 519 (D.R.I. 1982); *aff'd* 698 F.2d 559 (1st Cir. 1983).

Fifth, AAR asserts that Louisiana's requirement that locomotive engineers be licensed (La. Rev. Stat. sec. 32:1516A) is inconsistent. It argues that in IR-26, 54 FR 16314, (Apr. 21, 1989), correction 54 FR 21526 (May 10, 1989), OHMT ruled that a state could not require drivers of motor vehicles containing hazardous materials to have certificates indicating that a driver has met state training requirements. It says that multi-state licensing requirements could lead to chaos and adversely affect safety. In addition, it points to the licensing/certification requirements of the Rail Safety Improvement Act of 1988 as reflecting a Congressional intent that licensing requirements be nationally uniform.

Sixth, AAR contends that two Louisiana statutory enforcement provisions are inconsistent. It asserts that La. Rev. Stat. 32:1505A(2), authorizing state inspectors to stop and inspect any transport vehicle or part thereof for any violation, is inconsistent with the 49 CFR 174.14 requirement that a rail carrier must forward promptly each shipment of hazardous materials. It cites IR-26, *supra*, at 16323, quoting IR-2, *supra*, at 75576.

AAR also argues that La. Rev. Stat. sec. 32:1508 is inconsistent because it is too discretionary and likely to result in delays of hazardous materials transportation. That section authorizes state inspectors to take a rail car out of service if it would be hazardous to life or property during the transportation of a hazardous material and provides that the car cannot be returned to service until inspected and approved by a State inspector. AAR says that prior erroneous enforcement action by the State makes it possible that cars would be taken out of service for non-existent hazards.

ATA Comments

The Air Transport Association of America (ATA) filed comments opposing the issuance of any decision authorizing the State to issue or enforce hazardous materials regulations with respect to air transportation. ATA says that the State has not requested such a ruling and that OHMT, although it has broadened the scope of the proceeding, should not issue one—particularly since, ATA says, the State has not indicated an intention to enforce its hazardous materials law or regulations against air carriers. ATA argues that OHMT lacks statutory authority under 49 U.S.C. 1811(b) to issue such a ruling.

Alternatively, ATA contends that if OHMT issues a ruling addressing air transportation it should find that application of the Louisiana requirements to air transportation is inconsistent with HMTA. It contends that such a finding results from

application of the two tests set forth in 49 U.S.C. App. 1811(b) and 49 CFR 107.209(c). (Although the latter regulatory citation is correct, the former statutory citation is incorrect, and many of ATA's comments focus on the irrelevant "equivalent safety" and "burden on commerce" criteria, which apply to nonpreemption determinations under 49 U.S.C App. sec. 1811(b) and 49 CFR 107.215–221 rather than to inconsistency rulings under 49 U.S.C. App. sec. 1811(a) and 49 CFR 107.203–209. Those irrelevant comments are not considered in this ruling.)

The following ATA comments are relevant to the applicable standards, the "dual compliance" and "obstacle" tests:

> Uniformity of regulatory activities is essential to air carrier operations. Without it, air transportation is substantially impeded. Our members perform over 18,000 flights daily. The vast majority of those flights involve origin and destination points in different states. Our industry cannot function in an environment where different regulators apply hazardous material transportation requirements.
>
> Avoidance of a regulatory patchwork is precisely what Congress intended when it enacted section 112 of the HMTA. Further, an important purpose of the legislation "was to retain intact the authority over Hazardous Materials Transportation that presently exists under statutes such as the Federal Aviation Act * * *." 1974 U.S. Code Cong. & Ad. News 7669, 7680 (H.R. Report No. 93–1083).

ATA concludes that the Louisiana requirements should be found inconsistent as applied to air transportation.

Norfolk Southern Comments

Norfolk Southern Corporation (NSC) also filed extensive comments supporting a finding of inconsistency. Its initial contention is that OHMT should discard its policy of limiting inconsistency rulings to HMTA issues. NSC contends that OHMT cannot ignore "the primary vehicle for federal regulation of railroad safety," the FRSA, or its relationship with the HMTA and the HMR. It says that a ruling ignoring section 434 of the FRSA, which preempts state and local governments from all Federally regulated rail safety subject matters, would encourage a flood of both state and local governmental efforts to issue and enforce hazardous materials regulations for rail transportation.

NSC points out that the FRSA was enacted as the "Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970" and that it specifically states a Congressional intention "to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. 421. It also cites extensive FRSA legislative history reflecting an intent to establish a national rail transportation regulatory system with a minimal role for states.

Addressing the HMTA, NSC states that it was enacted to broaden Federal regulatory control, to provide uniform regulation, and to "preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation. It cites supporting legislative history and case law.

NSC then cites and discusses a series of Federal Court decisions applying the preemption provision (section 434) of the FRSA. Several of those cases are cited for the proposition that FRSA preemption results from the Secretary of Transportation issuing a regulation covering a particular rail transportation-related subject regardless of the statutory authority (including the HMTA) under which such a regulation is issued. *Missouri Pacific R. Co.* v *Railroad Comm. of Texas*, 653 F. Supp. 617, 623 (W.D. Tex. 1987), *modified*, 833 F. 2d 570 (5th Cir. 1988); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Ill. Commerce Comm.*, 453 F. Supp. 920, 924 (N.D. Ill. 1977); *CSX Transportation, Inc.* v. *City of Tullahoma*, Case No. 4–87–47, slip op. at 11 (E.D. Tenn. Feb. 17, 1988).

Finally on this point, NSC cites *CSX Transportation, Inc.* v. *Public Utilities Commission of Ohio*, 701 F. Supp. 608 (S.D. Ohio 1988), *aff'd* Case 88–4185 (6th Cir. Apr. 13, 1990). NSC says that this case demonstrates that the FRSA preemption provision extends to state regulation of hazardous materials transportation by rail and preempts such state requirements, even those identical to the HMR. Thus, NSC concludes that Louisiana's requirements would be preempted to the extent they are applicable to rail transportation even if they were identical to the HMR.

Next, NSC argues that the State's requirements would be inconsistent even if they were identical to the Federal requirements because state enforcement is an obstacle to a single, Federal enforcement scheme. It contends that different enforcement and interpretations of the same regulatory language result in inconsistency. It cites instances where it allegedly was cited for using faded placards, for violations while cars still were being classified in the yard, and for violations which were shipper, not carrier, responsibilities. NSC says that none of the five state enforcement cases against NSC was brought to fruition, that the States asserted its right to interpret the regulations as it saw fit, and that the State's inspectors were not adequately trained to enforce the HMR requirements the State has adopted.

NSC further submits that the manner in which the State has adopted the HMR appears to make parts of the HMR which are applicable only to shippers and other types of carriers apply within Louisiana to the railroads. It asserts that this can lead to confusion and to decreased safety through failure to take enforcement action against the proper responsible parties.

NSC concludes, therefore, that "there cannot be uniform enforcement without uniform interpretation and application. Thus any enforcement of the HMR by the State is inconsistent with the HMTA as well as the FRSA."

Then NSC proceeds to list seven areas in which the Louisiana regulations allegedly are not identical to the HMR and thus are inconsistent. Therefore, it denies the State's assertion that it has adopted the HMR *in toto*.

First, NSC says that section 10501B and 10901B are inconsistent insofar as they provide that any term in the State rules is to be used in its commonly accepted meaning "except where the term has been specifically defined [in the State rules], R.S. 32:1502 or the 49 CFR" NSC claims that the inconsistency arises because the State's regulations and statute define certain terms differently than the HMR.

Second, NSC points to the State's different definition of "train," which allegedly results in broader applicability of substantive reqirements.

Third, NSC alleges that the States has altered the civil penalty structure of the HMTA and the HMR. It asserts that the State has omitted the "knowingly" requirement for civil penalty liability and the "willfully" requirement for criminal liability. Instead, says NSC, the State imposes strict liability for civil penalties and imposes criminal liability for what would be a civil penalty matter under the HMTA. It says that the result of the State's approach is to hold carriers strictly liable for shipper violations.

Fourth, NSC alleges that the State uses or could use the civil penalty process in an inconsistent manner (e.g., alleging 49 CFR 172.33 violations for a single missing identification number and conceivably bringing penalty actions based upon the State's different definition of "train").

Fifth, NSC alleges that inconsistency results from the fact that the HMR is constantly changing and that this results in a gap betwen the HMR and the State's requirements because of the

State's adoption of the October 1, 1987 version of the HMR.

Sixth, NSC cites the State's substitution of State officials' titles for those of Federal officials in the HMR. It says that this results in rail carriers and shippers having to apply to the State Police for a certificate to operate within the State under a DOT-issued exemption or special approval.

Seventh, NSC contends that section 10905B(2) is inconsistent because it requires use of separate State incident reporting forms.

In addition, NSC argues that there are 12 inconsistencies between the State's statute and the HMTA and the HMR. These allegations are described in the following paragraphs.

First, NSC asserts that the State statute, specifically La. Rev. Stat. 32:1502 (5), (8) and (9), contains inconsistent definitions of "hazardous materials," hazardous wastes" and "transport vehicles." It says that the facts that the statute requires consistency with the HMR and that the State Police have adopted the HMR list of hazardous materials does not ameliorate the differing definitions because the State Police could designate any material it chooses as a hazardous material. NSC adds that the State's consistency requirement for hazardous materials does not apply to hazardous wastes.

Second, NSC alleges that La. Rev. Stat. 32:1503 is inconsistent in two respects. It says that it is inconsistent because, contrary to IR–25, *supra*, the State requires each carrier transporting hazardous materials or wastes to acquire and maintain liability insurance. It also states that it is inconsistent because it requires carriers to place placards on all four sides of each vehicle being used to transport hazardous materials while the HMR places the initial burden on shippers to provide proper placards.

Third, NSC contends that La. Rev. Stat. 32:1504 is inconsistent because it contains broad enforcement authority which violates the FRSA.

Fourth, NSC argues that La. Rev. Stat. 32:1505 is inconsistent with the HMTA and the HMR because it contains unfettered authority for State Police to stop and inspect transport vehicles for any violation of State statute or regulation.

Fifth, NSC asserts that La. Rev. Stat. 32:1506 and La. Rev. Stat. 32:1507 are inconsistent. It states that the former allows alternative compliance with State rules through discretionary State Police written authorization, exempts special permits from the written authorization requirement, and requires carriers to carry a copy of the State authorization on each vehicle to which it applies. It says that the latter section recognizes DOT exemptions and special permits but requires carriers to secure redundant State exemptions and to mark the State exemption number on the transport vehicle.

NSC argues that these provisions are inconsistent because they fail to recognize and honor OHMT special approvals ("special permits" being a Canada Transport term) and OHMT exemptions, they require redundant State approval (or possibly rejection) of OHMT exemptions, and they conflict with OHMT exemption requirements by themselves requiring the carrying of State authorizations and the marking of State numbers on vehicles.

Sixth, NSC avers that La. Rev. Stat. 32:1508 is inconsistent because it allows the State Police to put vehicles out of service and forbids their operation until required corrections have been made. It says that this section directly conflicts with an FRA rule (49 CFR § 215.9) prescribing how vehicles are to be returned to service and furthermore conflicts with FRA regulations authorizing the alerting of railroads as to defective cars and the recommending that they be taken out of service—*not* the tagging of cars as out of service.

Seventh, NSC maintains that La. Rev. Stat. 32:1509 is inconsistent in specifying how hazardous materials lading is to be described on shipping papers and prohibiting railroad acceptance of hazardous materials shipments unless shipping papers have been provided to the vehicle "operator" prior to departure. NSC cites IR–21, 52 FR 37072 (Oct. 2, 1987), IR–21 (Decision on Appeal), 53 FR 46735, (Nov. 18, 1988); IR–26, *supra;* and IR–27, 54 FR 16326 (Apr. 21, 1989), correction, 54 FR 20001 (May 9, 1989), for the principle that the Federal Government has exclusive jurisdiction over shipping papers. NSC asserts that

> the prohibition against acceptance of lading directly conflicts with the HMR, which only requires the shipping paper to be in the *possession of a member of the train crew* before a haz mat shipment can be accepted. Documentation is usually given to the conductor who is in charge of a train.

Eighth, NSC contends that the La. Rev. Stat. 32:1510 requirement for written reports of hazardous materials incidents/accidents is inconsistent with the FRSA, HMTA, and HMR. It cites the same legal authorities as the AAR.

Ninth, NSC argues that the penalty and enforcement provisions of La. Rev. Stat. 32:1512, 32:1513 and 32:1514 are inconsistent because they undermine the Congressional scheme of uniform national enforcement for railroads, they authorize civil penalties for other than "knowing" violations, they authorize seizure of rail equipment if penalties are not paid, and they authorize penalties of $25,000 per day in contrast to the HMTA maximum of $10,000.

Tenth, NSC contends that the injunctive provisions of La. Rev. Stat. 32:1515 are inconsistent for the same reasons as the enforcement provisions and also because they go beyond Section 436 of the FRSA in authorizing injunctive relief for alleged violations under the HMTA instead of just the FRSA.

Eleventh, NSC maintains that La. Rev. Stat. 32:1516, concerning driver qualifications, is inconsistent. It cites IR–26, *supra*, as stating that states cannot require drivers of motor vehicles containing hazardous materials to have certificates indicating the driver meets state training requirements. It also says that section 32:1516 is expressly preempted by FRA's regulation on alcohol and drug use, 49 CFR Part 219, insofar as it imposes drug and alcohol prohibitions and testing requirements.

Twelfth, NSC posits that La. Rev. Stat. 32:1517, authorizing State employment of enforcement personnel, is inconsistent because the State has no authority under the FRSA to conduct surveillance and investigative programs.

Subsequent to filing its initial comments, NSC submitted to the docket a copy of the April 13, 1990 decision of the U.S. Court of Appeals for the Sixth Circuit in *CSX Transportation, Inc.* v. *Public Utilities Commission of the State of Ohio*, which affirmed the decision of the U.S. District Court for the Southern District of Ohio.

Union Pacific Comments

Comments opposing the consistency of the Louisiana requirements as applied to rail transportation also were filed by the Union Pacific Railroad Company (UPR). It concludes that the HMTA and the FRSA do not authorize state enforcement of hazardous materials regulations against railroads, that Louisiana's concerns about allegedly insufficient FRA enforcement can be resolved by an increase in FRA inspectors or a change in law, and that certain specific provisions of Louisiana law are inconsistent with the HMTA and the HMR.

UPR first argues that state enforcement of railroad transportation hazardous materials requirements is an obstacle to obtaining the objectives of the HMTA. It says that OHMT must consider and give effect to the FRSA just as its HMR specifically recognizes and

refers to other Federal statutes. It contends that Congress clearly intended uniform national regulation of rail safety.

In support of its position, UPR cites *CSX Transportation, Inc.* v. *Public Utilities Comm. of Ohio, supra,* and summarizes the FRSA/HMTA legislative history discussed therein. It cites the strong preemptive approach taken by Congress in enacting the FRSA in 1970; Congressional failure to change the FRSA preemption or state participation provisions when enacting the HMTA and amending the FRSA in 1974, and Congressional failure to include the HMTA when it expanded the state participation provisions of the FRSA in 1980. It also cites previously-discussed legislative history and case law.

UPR points to pending proposed legislation, H.R. 3520, which includes a provision which would amend the HMTA to allow state participation in the enforcement of rail safety regulations pertaining to hazardous materials transportation, as evidence that Congress has not given such authority to the states.

In sharp contrast, UPR asserts, Congress has authorized state enforcement of the HMTA as it pertains to motor carriers. It points to the grants program under the Surface Transportation Assistance Act, 49 U.S.C. 2301 *et seq.*, and the specific authorization of HMR-related highway enforcement activities under the implementing grant regulations in 49 CFR part 350.

UPR finds further evidence of Congressional intent to involve states in hazardous materials highway transportation enforcement in the Motor Carrier Safety Act of 1984, 49 U.S.C. 2501 *et seq.*, and the Commercial Motor Vehicle Safety Act, 49 U.S.C. 2701 *et seq.* It points out that both statutes refer specifically to motor vehicles transporting hazardous materials. 49 U.S.C. 2503(1)(C) and 2716(6). It concludes:

> These statutes in conjunction with the Motor Carrier Safety Assistance Program (MCSAP) and the Cooperative Hazardous Materials Enforcement Development Program (COHMED) indicate that Congress and the federal agencies encourage state involvement in enforcement of hazardous materials regulations governing motor carrier movements. Congress has not bestowed that same enforcement authority on the states with respect to rail transportation of hazardous materials.

UPR contends that state verbatim adoption of the HMR and the HMTA penalty structure does not ensure uniformity in enforcement. It states that compliance with both Federal and State requirements may be impossible because Louisiana officials admit to being motivated by a desire to generate revenue and because that State's enforcement approach may be inconsistent with that of the FRA. It cites three instances when it allegedly was cited for non-violations and concludes that the State's pecuniary motives leads to a different and necessarily inconsistent approach to enforcement.

In addition, UPR cites several Louisiana statutory and regulatory provisions which allegedly are inconsistent with the HMTA and the HMR. Like other railroad commenters, it points to the State's definitions of "explosives" and "train", carrier liability insurance requirements, "stop and inspect" enforcement provisions, requirement for shipping paper exemption numbers to be marked on vehicles, shipping paper lading description requirements, written accident/incident reporting requirements, and operator licensing provisions.

Olin Chemicals Comments

In its initial comment, Olin Chemicals (Olin) supported a finding of inconsistency with respect to rail transportation. Olin states:

> Our position is based on our conviction that because railroad operations are so unique, enforcement personnel must have a thorough knowledge of railroad equipment and day to day operations. In this regard, we are aware of at least one or more federal inspectors who came from the ranks of the Association of American Railroads personnel. We do not believe that the Louisiana State Police personnel have the requisite experience and training to enforce the federal regulations (adopted by Louisiana), in the manner contemplated by the federal promulgators of said regulations.
>
> On the other hand, we do believe that the state of Louisiana has both a duty and an obligation to protect its citizenry and their property. We also sympathize with the frustration of state officials because of, what they believe, is inadequate staffing by the federal government.
>
> It is our understanding that the solution for the state of Louisiana's dilemma is already on the books in the form of the Federal Railroad Safety Act and court decisions. If in fact state enforcement personnel detect a possible violation of railroad regulations, they can inform the federal inspectors who can then take the appropriate action. In our view this is a marriage made in heaven i.e., the manpower of the Louisiana State Police and the expertise of the Federal Railroad Administration.

V. Public Comments Supporting Consistency

Olin Chemicals Comments

In a subsequent comment, Olin states:

> We wish to clarify our position by stating that Olin supports the Chemical Manufacturers Association position i.e., that state and local government should be allowed to enforce federal DOT Hazardous Materials Regulations (HMR), assuming the enforcement officials have been fully and properly trained. Further, should there be a disagreement as to interpretation of the HMR, the final arbiter should be the federal DOT.

NTTC Comments

The National Tank Truck Carriers, Inc. (NTTC) filed a comment generally supporting findings of consistency. It contends that the Louisiana statutes and regulations are consistent insofar as they: (1) Apply to highway transportation, (2) serve to reduce an essentially local safety hazard in rail transportation, (3) are compatible with regulations issued under the FRSA, impose no burden on rail commerce, and (4) regulate the actions of rail shippers and shippers' rail equipment which is not in the care, custody and control of a railroad company.

With respect to motor carriers, NTTC asserts that Louisiana's adoption of the HMR and the HMTA civil penalty limitations is consistent under the "dual compliance" and "obstacle" tests. Thus, it says, the State can use its agencies and personnel to carry out enforcement and compliance programs with respect to the highway mode.

With regard to railroads, NTTC recommends that OHMT defer to the District Court decision in *CSX Transportation, Inc.* v. *Public Utilities Commission of Ohio, supra,* with respect to hazardous materials transportation by rail generally but recognize that under the FRSA a state may regulate with respect to unique local safety hazards. NTTC asserts that the State's expressed concern about the alleged lack of sufficient FRA inspectors is sufficient to provide a basis for a finding of consistency.

Finally, NTTC argues that the *CSX* decision does not apply to shippers because the FRSA does not apply to them. From that hypothesis, it concludes that the State may consistently regulate most rail shippers:

> For instance, we note that most hazardous materials tank cars are owned or leased by shippers. More often than not, these cars are loaded and unloaded at private sidings and other points not on a railroad right-of-way; and, certain regulated operational functions may be performed prior to inspection and acceptance by a railroad company (and

following release of the car to the consignee). Shippers are responsible for the maintenance of their equipment, compliance with HMR specifications, preparation of shipping documents, etc.

Therefore, we conclude that Louisiana's compliance and enforcement program as it is applied to shipper-owned (or leased) equipment and when such equipment is not in the care, custody and control of a railroad company, is consistent with the HMR. Furthermore, we hold that the Administrator is under no compulsion to go beyond the HMTA when evaluating the lawfulness of Louisiana's program as applied to shippers.

VIII. Public Rebuttal Comments Opposing Consistency

Rebuttal comments were filed by AAR and UPR.

AAR Rebuttal Comments

AAR challenges NTTC's comments to the extent those comments contend that Louisiana's provisions are consistent insofar as they pertain to railroads. AAR says that NTTC does not address AAR's earlier comments that Louisiana's laws are not identical to the HMR and thus are inconsistent and that they would be preempted by the HMTA even if they were identical.

AAR agrees with NTTC that section 205 of the FRSA is relevant to a determination of consistency under section 112 of the HMTA. However, it contends that NTTC's assertion that identical state requirements can fall within the essentially local hazard provision of section 205 is directly contradicted by the legislative history thereof and court decisions thereon. AAR also says that there is no evidentiary basis for a finding that a hazardous materials rail transportation hazard exists in Louisiana that is not addressed by the U.S. DOT.

AAR argues that there is no such thing as a statewide local hazard. It points to the following legislative history concerning section 205:

> The purpose of [the local hazard provision of section 205] is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4104, 4117. AAR adds that courts unanimously have held that statewide standards are not permitted under the local hazard language of section 205—citing *Missouri Pacific Railroad* v. *Railroad Commission of Texas,* 671 F.Supp. 466, 471 (W.D. Tex. 1987) and cases cited therein.

It also states that Louisiana has not identified any areas DOT is incapable of addressing. Furthermore, it cites FRA accident statistics to show that no hazard exists in Louisiana to justify State action even if, contrary to AAR's assertion, section 205 permitted such statewide action.

UPR Rebuttal Comments

UPR filed similar comments rebutting the NTTC comments concerning local hazards. It cites the same legislative history and several court cases for the proposition that statewide standards cannot be justified under section 205 of the FRSA.

IX. Ruling

Scope of Ruling

The State of Louisiana's application for an inconsistency ruling pertained solely to rail transportation. To facilitate consideration of other relevant issues, OHMT broadened the scope of this proceeding to include all modes of transportation.

The record in this Docket, however, does not provide an adequate basis to address air or water transportation. This ruling, therefore, addresses only the consistency of Louisiana's specified statutes and regulations insofar as they apply to highway and rail transportation.

FRSA Issues

Several railroad industry commenters contended that OHMT should find all the Louisiana statutory and regulatory requirements at issue in this proceeding inconsistent because of the preemption provision of the FRSA and the application of that provision to hazardous materials rail transportation requirements of the State of Ohio in *CSX Transportation, Inc.* v. *Public Utilities Commission of Ohio, supra.* That case involved the issue of whether the Ohio Hazardous Materials Transportation Act (OHMTA) is preempted by the FRSA. Both the U.S. District Court for the Southern District of Ohio and the U.S. Court of Appeals for the Sixth Circuit (the latter in an April 13, 1990 decision) held that the OHMTA is preempted by the FRSA. Specifically, they held that it is preempted by the following FRSA preemption language:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. 434. The Court of Appeals held that this language was broad enough to include regulations issued under the HMTA. Furthermore, the Court of Appeals held that the enactment of the HMTA, with its different preemption language, subsequent to the FRSA has not resulted in repeal of the preemption language of the FRSA. In support of this conclusion, the Court cited a 1980 amendment to the FRSA broadening state participation in railroad safety investigative and surveillance activities, which amendment intentionally did not include HMTA enforcement activities.

Of particular relevance to this proceeding is the Court of Appeals' following disclaimer:

> Finding that the regulations issued pursuant to the OHMTA are preempted by the preemption provision found in the FRSA, we find it unnecessary to address the question of whether the Ohio regulations are also preempted by the preemption provision found in the HMTA.

Under the rationale of the Court of Appeals' decision, Louisiana's statutory and regulatory provisions under consideration in this proceeding would be deemed preempted by the FRSA. However, as indicated above, OHMT inconsistency rulings address only preemption issues under the HMTA. Because the Court of Appeals explicitly declined to address HMTA preemption issues, the *CSX* case is irrelevant to the consideration herein of whether Louisiana's requirements are consistent with the HMTA and the HMR. Therefore, comments based upon that case and the FRSA similarly are irrelevant and are not considered or addressed in this ruling.

State Adoption of the HMTA and the HMR

RSPA and OHMT have encouraged state governments to adopt the HMTA and the HMR as state law and to enforce such legal requirements. IR–17, 51 FR 20925 at 20929 (June 9, 1986); IR–19, *supra,* at 24410. In the early 1980's this effort was carried out through the State Hazardous Materials Enforcement Development (SHMED) Program; since 1986 it has been carried out through the Cooperative Hazardous Materials Enforcement Development (COHMED) Program. In its Report accompanying the Department of Transportation and Related Agencies Appropriation Bill, 1990, the Senate Appropriations Committee specifically directed RSPA to continue its financial support of, and involvement with, COHMED. Senate Report 101–121, Sept. 7, 1989.

State adoption and enforcement of the HMTA and the HMR as state law

multiplies the number of hazardous materials transportation enforcement personnel and fosters a uniform nationwide system of hazardous materials transportation regulation. Forty-nine states have followed this course of action with respect to highway transportation, and about 12 states have done so with respect to rail transportation.

State adoption of requirements identical to the Federal requirements is certainly a most effective means of fostering compliance with the "consistency" requirement of Section 112(a) of the HMTA. As this proceeding indicates, however, state adoption or incorporation by reference of the HMTA and the HMR is not necessarily an uncomplicated matter. Difficulties may arise in converting enforcement and other provisions from Federal to state legal verbiage and in determining the appropriate division of responsibility between state and Federal officials. Keeping state provisions reasonably up-to-date with Federal ones is a recurring issue. This ruling discusses those and other issues which may occur when states adopt the HMTA and the HMR.

In any event, the State of Louisiana's incorporation by reference and enforcement of the HMR through State statute and regulation is consistent with the HMTA and the HMR with respect to highway and rail transportation except as indicated below in this ruling.

Current Nature of Incorporated Regulations

Commenters alleged that the Louisiana incorporation of the HMR was inconsistent because it incorporated the October 1, 1987 Code of Federal Regulations (CFR) version of the HMR, which has been superseded by numerous amendments.

This issue was addressed in IR–19, *supra:*

> Some commenters contended that this regulation is inconsistent with the HMR because it adopts November 1, 1985 versions of the HMR, which have been superseded by the October 1, 1986 edition of the HMR and subsequent HMR amendments published in the **Federal Register**. This contention is without merit at this time. The HMR consist of an extensive body of regulations which are amended on a regular basis by changes published in the **Federal Register** and incorporated into the annual editions of the Code of Federal Regulations (CFR). RSPA encourages states to adopt and enforce the HMR as state requirements. IR–17, 51 Fed. Reg. 20925 at 20929 (June 9, 1986).
>
> It is impossible, however, for states to adopt new HMR requirements simultaneously with RSPA's issuance of them. This inconsistency ruling application was filed in November 1986, less than two months after the October 1, 1986 revision date of the current CFR version of the HMR. CFR volumes generally are not published and available for a few months after the dates as of which they are current. Therefore, the incorporation by reference in § 705.380 is reasonably current and thus consistent with the HMR.
>
> If a change to the HMR results in a direct conflict with a state requirement, the HMR would control as soon as the HMR change becomes effective. However, there is no basis for a wholesale preemption of state regulations which contain slightly outdated state incorporations by reference or adoptions of the HMR as state requirements.

52 FR at 24410–1. The situation here is similar. Like many states, Louisiana has incorporated by reference a specific version of the HMR. Because the version adopted was less than two years old at the time of the application for this ruling, the State's incorporation by reference is not deemed inconsistent *per se*. Instead, each specific alleged inconsistency will be judged on its own merits.

Definition of "Hazardous Materials"

Louisiana's statutory definition of "hazardous materials" provides:

> (5)(a) "Hazardous materials" means any gaseous, liquid, or solid material which because of its quanity, concentration, or physical, chemical, or biological composition poses a substantial present or potential hazard to human health, the environment, or property when transported in commerce, or which material is identified or designated as being hazardous by rules and regulations adopted and promulgated by the secretary of the Department of Public Safety and Corrections pursuant to the Louisiana Administrative Procedure Act. The secretary, in finding that a material is hazardous, shall consider the following factors with respect to each material:
>
> (i) Actual or relative potential for harm to human health, the environment, or property when transported in commerce.
>
> (ii) Scientific evidence of its potential for harm based upon quantity, concentration, or chemical or biological composition.
>
> (iii) State of current scientific knowledge regarding the material.
>
> (iv) Its history and current pattern of harm.
>
> (v) Actual or potential volatility when combined with other common substances likely to be encountered during transportation in commerce.
>
> (vi) Actual or relative potential for harm to human health if allowed to escape its containment.
>
> (b) The rules and regulations adopted by the secretary of the Department of Public Safety and Corrections shall be consistent with the Code of Federal Regulations Title 49. "Explosives" as defined and regulated by R.S. 40:1471.1 through 1471.22 shall be considered to be hazardous material subject to regulation by this Chapter.

La. Rev. Stat. Sec. 1502. In addition, under the cited statutory provisions on "explosives," the State law defines an explosive as

> any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion; * * * The term "explosives" shall further include * * *
>
> (a) "blasting agent' which shall mean any material or mixture, consisting of fuel and oxidizer, intended for blasting, not otherwise defined as an explosive; * * *

La. Rev. Stat. Sec. 40:1471.2(1).

Finally, the State statutes states that " 'hazardous waste' shall be as provided in R.S. 30:1133." La. Rev. Stat. sec. 32:1502(9). Furthermore, that section is not affected by the requirement for consistency with the HMR contained in the above-quoted definition of "hazardous materials."

At the Federal level, both the HMTA and the HMR address the definition/designation of hazardous materials. Section 103(2) of the HMTA, 49 U.S.C. App. sec. 1802(2) states that " 'hazardous material' means a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce * * *" Section 104 of the HMTA, 49 U.S.C. App. sec. 1803, is entitled "Designation of Hazardous Materials" and provides:

> Upon a finding by the Secretary [of Transportation], in his discretion, that the transportation of a particular quantity and form of material in commerce may pose an unreasonable risk to health and safety or property, he shall designate such quantity and form of material or group or class of such materials as a hazardous material. The materials so designated may include, but are not limited to, explosives, radioactive materials, etiologic agents, flammable liquids or solids, combustible liquids or solids, poisons, oxodizing or corrosive materials, and compressed gases.

The HMR, at 49 CFR 171.8, further defines "hazardous material" as "a substance or material, including a hazardous substance, which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated."

The materials which have been designated as hazardous materials subject to the HMTA and the HMR are lised in the Hazardous Materials Table, 49 CFR 172.101; the Appendix to that section (containing all hazardous substances); and the Optional Hazardous Materials Table, 49 CFR 172.102. Those regulations occupy over 260 pages of the CFR, list thousands of hazardous materials, and also establish over 40 "n.o.s." (not otherwise specified)

categories of hazardous materials (e.g., flammable liquids, n.o.s.) which result in thousands of other materials being designated as hazardous materials. Specific definitions of these n.o.s. hazardous materials are located throughout part 173 of the HMR.

The complexity of the above-described HMR system of defining hazardous materials demonstrates the desirability, even the necessity, of a single, national system. Therefore, local hazardous materials definitions which result in regulation or more or different materials as hazardous materials than the HMR are obstacles to uniformity in transportation regulation and thus are inconsistent with the HMTA and the HMR. IR–5, 47 FR 51991 (Nov. 18, 1982); IR–6, 48 FR 760 (Jan. 6, 1983); IR–28, 55 FR 9304 (Mar. 8, 1990); IR–29, 55 FR 9304 (Mar. 12, 1990). The specific problems with different hazardous materials definitions were discussed in, among others, two earlier inconsistency rulings:

> The key to hazardous materials transportation safety is precise communication of risk. The proliferation of differing State and local systems of hazard classification is antithetical to a uniform, comprehensive system of hazardous materials transportation safety regulations.
>
> IR–6, 48 FR at 764.

> If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety.
>
> IR–12, 49 FR 46650 at 46651 (Nov. 27, 1984).

For those reasons, the Federal role in defining hazard classes and hazardous materials is exclusive, and thus such state and local definitions differing from the HMR are inconsistent with the HMR. IR–18, 52 FR 200 (Jan. 2, 1987); IR–18 (Decision on Appeal), 53 FR 28850 (July 29, 1988): IR–19, *supra;* IR–19 (Decision on Appeal), *supra;* IR–20, 52 FR 24396 (June 30, 1987), correction, 52 FR 29468 (Aug. 7, 1987); IR–21, *supra;* IR–21 (Decision on Appeal), *supra;* IR–26, *supra; Missouri Pacific RR Co.* v. *Railroad Comm'n of Texas,* 671 F. Supp. 466 (W.D. Tex. 1987), *aff'd on other grounds* 850 F.2d 264 (5th Cir. 1988), *cert. denied,* 109 S. Ct. 794 (1989); *Union Pacific RR Co.* v. *City of Las Vegas,* CV–LV 85–932 HDM (D. Nev. 1986).

Therefore, La. Rev. Stat. 32:1502(5)(a) and (8) are inconsistent with the HMTA and the HMR insofar as they authorize the State's Secretary of the Department of Public Safety and Corrections to designate as "hazardous materials" any materials, including hazardous wastes, other than those designated as such in the HMR. It follows that the State's section 32:1502(5)(b) definition of "explosives" is inconsistent with the HMR to the extent that it defines as "explosives" any materials other than those defined as such in the HMR.

Definition of "Train"

Louisiana's definition of "train" differs from the definition of "train" in the HMR. The State defines "train" as "an engine or an engine coupled with one or more rail freight cars." La. Admin. Code, tit. 33, secs. 10501(c) and 10901(c). The HMR definition, however, provides that a train is "one or more engines coupled with one or more rail cars, *except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains."* 49 CFR 171.8 (emphasis added).

The effect of the State's different definition of "train" is that the State regulates aspects of switching and railroad yard operations which are not regulated under the HMR. According to unrebutted comments, this, in turn, leads to the State imposing additional impractical and unsafe requirements for those operations.

Where a specific decision has been made in the HMR that certain transportation in commerce of hazardous materials should not be subject to the general requirements of the HMR, state or local regulation of that transportation is inconsistent with the HMR under the "obstacle" test because it impedes the accomplishment of the purposes of the HMR. Therefore, the State's definition of "train" is inconsistent with the HMR because its definition lacks the "except" clause contained in the HMR definition.

Exemption and Approval Provision

La. Rev. State. 32:1507 contains the following provisions with respect to exemptions issued by OHMT under the HMTA and the HMR:

Sec. 1507. Special permits and exemptions

A. The secretary shall exempt any carrier from compliance with this Chapter or any regulation issued pursuant thereto if the exemption is identical to an exemption or special permit issued by the United States Department of Transportation. However, the secretary shall enforce the exemption or special permit if it pertains to transportation subject to this Chapter.

B. The number of each exemption granted shall be conspicuously marked on the vehicle to which it applied [sic].

Some commenters alleged that these provisions are inconsistent because they are ambiguous about whether OHMT exemptions and approvals are recognized as legally binding upon State enforcement personnel—particularly in light of the absence of regulatory provisions to that effect. In addition, they argued that paragraph B is inconsistent because it might require the marking of exemption numbers on rail cars for shipping paper exemptions and other types of exemptions not applicable to the cars themselves.

Exemptions from the requirements of the HMTA and the HMR may be issued by the Director of OHMT pursuant to section 107 of the HMTA, 49 U.S.C. App. 1806, and 49 CFR 107.101–123. To avoid regulatory chaos, the authority to issue, revoke, suspend or take other actions concerning exemptions from HMTA and HMR requirements must be exclusively Federal. This approach implements the Congressional mandate that, except for DOT-determined emergencies, "exemptions or renewals granted pursuant to [§ 107 of the HMTA] shall be the only means by which a person subject to the requirements of [the HMTA] may be exempted from or relieved of the obligation to meet any requirements imposed under [the HMTA]. "49 U.S.C. App. 1806(d).

The State's above-quoted statutory provisions appear to represent a good faith effort by the State to "dovetail" its legal requirements with the approximately 1,000 outstanding hazardous materials transportation exemptions issued by OHMT. To be consistent with the HMTA and the HMR, a state must implicitly or explicitly recognize the validity of OHMT's exemptions and approvals; a state may not establish its own exemptions and approvals program. Here the silence of the State's regulations concerning exemptions and approvals confirms rather than undermines the interpretation that § 32:1507 recognizes and gives effect to OHMT's exemptions and approvals. Furthermore, a fair reading of § 32:1505B is that it requires marking of the exemption number on a tank car or other vehicle only when the exemption pertains to the tank car or vehicle itself. As so construed, the State's exemption provisions are consistent with the HMTA and the HMR.

Insurance Requirements

La. Rev. Stat. 32:1503 requires each carrier that transports "hazardous material freight" or "hazardous waste" to carry at least $300,000 public liability and $200,000 property damage insurance for each vehicle. This required "financial responsibility" may be

established by one or more of: (1) Evidence of liability insurance, (2) self-insurance ("the level of self-insurance may not be less [sic] than twenty percent of equity"), and (3) other evidence of financial responsibility acceptable to the Secretary.

With respect to radioactive materials transportation, several prior inconsistency rulings have clearly stated that state and local governments may not impose indemnification, bonding or insurance requirements as prerequisites to such transportion. IR–10, 49 FR 46645 (Nov. 27, 1984); correction, 50 FR 9939 (Mar. 12, 1985); IR–11, 49 FR 46647 (Nov. 27, 1984); IR–15, 49 FR 46660 (Nov. 27, 1984); IR–15 (Decision on Appeal), 52 FR 13062 (Apr. 20, 1987); IR–18, *supra*; IR–18 (Decision on Appeal), *supra*; IR–25, *supra*. In IR–15 (Decision on Appeal), the RSPA Administrator stated with respect to radioactive materials transportation "insurance" requirements that the Federal requirements "have totally occupied that field, and any state or local bond, insurance or indemnification requirement not identical to the HMR requirement is an obstacle to the accomplishment of the objectives of the HMTA and the HMR." 52 FR 13062.

With respect to non-radioactive hazardous materials transportation, it was determined in IR–25, *supra*, that the absence of a bonding, insurance or indemnification requirement in the HMR represented an affirmative decision by OHMT "that no such requirement is necessary and that any such requirement imposed at the state or local level is inconsistent with the HMR." 54 FR 16311. Although that decision dealt with local bonding requirement, its rationale and language were applicable to similar state requirements.

As stated in IR–25, "[t]he subject of bonding, insurance and indemnity requirements for hazardous materials transportation is exclusively Federal." 54 FR 16311. Therefore, any such state requirement, such as Louisiana's § 32:1503, not identical to Federal requirements fails the "obstacle" test and, therefore, is inconsistent with the HMTA.

Incident Reporting Requirements

La. Rev. Stat. Sec. 32:1510 contains requirements for the telephonic and written reporting of certain incidents, accidents and cleanups involving the transportation of hazardous materials. Its requirements for such reports are as follows:

A. Each person involved in an incident, accident, or the cleanup of an incident or accident during the transportation, loading, unloading, or related storage in any place of a hazardous material subject to this Chapter shall report immediately by telephone to the department if that incident, accident, or cleanup of an incident or accident involves:

(1) A fatality due to fire, explosion, or exposure to any hazardous material.

(2) The hospitalization of any person due to fire, explosion, or exposure to any hazardous material.

(3) A continuing danger to life, health, or property at the place of the incident or accident.

(4) An estimated property damage of more than ten thousand dollars.

B. A written report shall be submitted to the department on an approved form. Each report submitted shall contain the time and date of the incident or accident, a description of any injuries to persons or property, any continuing danger to life at the place of the accident or incident, the identity and classification of the material, and any other pertinent details.

C. In the case of an incident or accident involving hazardous materials which is not subject to this Chapter but which is subject to Title 49 and Title 46 of the Code of Federal Regulations, the carrier shall send a copy of the report filed with the United States Department of Transportation to the department.

La. Rev. Stat. 32:1510.

Requirements for immediate telephonic hazardous materials transportation accident/incident reports for emergency response purposes generally are consistent with the HMTA and the HMR. IR–2, IR–3, IR–28, all *supra*; *National Tank Truck Carriers, Inc.* v *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

However, with respect to the State's telephonic reporting requirement applying to spent nuclear fuel, which also is called irradiated reactor fuel, it previously was determined that similar requirements were inconsistent with the HMR because of redundancy and possible conflict with the HMR. IR–8, IR–8 (Decision on Appeal), and IR–28, all *supra*. In IR–28, 55 FR 8884, 8893–94 (Mar. 6, 1990), the Director of OHMT stated:

Two HMR provisions are relevant to this issue. First, 49 CFR 177.861 requires the "earliest practicable" notification to the shipper of radioactive materials incidents. Second, 49 CFR 173.22(c) requires shippers of irradiated reactor fuel to provide physical protection in compliance with a plan established under Nuclear Regulatory Commission (NRC) requirements; those requirements include a 10 CFR 73.37[(b)(4)] provision for notification to appropriate agencies in the event of a "safeguards emergency."

However, 10 CFR 73.37(b)(6) also requires such shippers to arrange with local law enforcement agencies along its routes for their response to an emergency or call for assistance. Because they are clear and not in conflict with the HMR, the State's telephonic notification requirements are consistent with the HMR provision incorporating these requirements (49 CFR 173.22(c)).

Therefore, the State's requirements for telephonic notification concerning hazardous materials incidents/accidents are consistent with the HMTA and the HMR.

Furthermore, the provisions of State law which require the submission of *written* accident/incident reports, are redundant with Federal requirements (particularly 49 CFR 171.16), tend to undercut compliance with the HMR requirements, and thus are inconsistent. IR–2, IR–3, (Decision on Appeal), all *supra*; IR–30, 55 FR 9676 (Mar. 14, 1990), correction 55 Fed. Reg. 12111 (Mar. 30, 1990). This rationale also applies to requirements to provide copies of the incident reports filed with OHMT; as indicated in IR–3, *supra*, such a requirement is inconsistent but OHMT is prepared to routinely send copies of those reports to a designated state agency on request.

Licensing Requirements

La. Rev. Stat. 32:1516A and B provide for the licensing of persons in charge of vehicles transporting, *inter alia*, hazardous materials. Some commenters asserted that OHMT had indicated in IR–26, *supra*, that drivers of motor vehicles transporting hazardous materials could not be required to obtain State licenses. That Ruling was not so broad; it said that a State *could* impose hazardous materials transportation licensing requirements on its own domiciliaries as part of its motor vehicle licensing program but *could not* impose such requirements on non-domiciliaries (except after March 31, 1992, with respect to those not having current hazardous materials endorsements on their commercial drivers' licenses).

Applying those same principles to Louisiana, there is nothing in the HMTA or the HMR to preclude it from imposing hazardous materials transportation licensing requirements on its own domiciliaries. Therefore, the cited State licensing provisions are consistent insofar as they apply to Louisiana domicilaries but inconsistent insofar as they apply to other persons.

Placarding Requirement

Louisiana's statute addresses hazardous materials placarding:

Each carrier transporting hazardous materials shall indicate the proper hazard class by placing a placard stating such class

on all four sides of each vehicle as required by the rules and regulations promulgated by the secretary.

La. Rev. Stat. 1503D.

One commenter contended that this statutory provision is inconsistent with the HMTA and the HMR because the HMR places the initial burden on shippers to apply proper placards on transport vehicles. In fact, the HMR places responsibility for proper placarding on *both* shippers/offerors and transporters of hazardous materials. 49 CFR §§ 171.2 (a) and (b), 172.500, 172.504, 172.506, 172.508, 174.1, 174.7 and 177.800. (For example, § 172.508(b) states: "No rail carrier may accept a rail car containing a hazardous material for transportation unless the placards for the hazardous material are affixed thereto as required by this subpart.") Given the State's incorporation by reference of the HMR and the requirement in § 32:1504A for compatibility of the State's regulations with the HMR, there is no indication that the above-quoted language has the effect of placing placarding responsibility solely on carriers; therefore, it is consistent with the HMTA and the HMR.

The language of § 32:1503D, however, does raise an additional issue: whether it requires placards on *all* vehicles carrying *any* quantity of *any* hazardous material—in contrast to the HMR requirements for placarding of only certain vehicles, rail cars, freight containers, cargo tanks, etc. containing certain specified quantities of certain classes of hazardous materials.

Because of the critical hazard communication function of hazardous materials placards, requirements concerning them (as well as other hazard warning devices) are inconsistent if they are in addition to or different from Federal placarding requirements. IR–2, *supra;* IR–3, *supra;* IR–24, 53 FR 19848 (May 31, 1988); *Kappelmann* v. *Delta Air Lines, Inc.*, 539 F.2d 165 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977); *National Tank Truck Carriers, Inc.* v. *City of New York,* 677 F.2d 270 (2d Cir. 1982).

This issue was addressed in an early Inconsistency Ruling:

> Hazard warning systems are another area where [DOT] perceives the Federal role to be exclusive * * *. Additional, different requirements imposed by States or localities detract from the DOT systems and may confuse those to whom the DOT systems are meant to impart information.

IR–2, 44 FR at 75568.

Shortly thereafter both DOT and a Federal Court found a City of Boston requirement for different placards and product identification inconsistent with the HMTA and the HMR. IR–3, *supra; American Trucking Ass'ns* v. *City of Boston,* 12 Envtl. L. Rep. (Envtl. L. Inst.) 20,789 (D. Mass. 1981).

Finally, in IR–24, *supra,* a definitive statement was made on the exclusive Federal nature of placarding requirements:

> It is OHMT's view that the HMR placarding provisions do completely occupy the field and, therefore, preempt all state and local placarding and warning sign requirements for hazardous materials transportation which are not identical to the Federal requirements. This is true with respect to requirements applying solely to pickups and deliveries, as well as to requirements applying to through-traffic, because all such non-identical requirements create confusion and undermine the uniform system of hazard communication necessary for the safe transportation of hazardous materials. Transportation viewed as being a mere pickup or delivery by one jurisdiction actually may be just the beginning or end of multi-state transportation through numerous local jurisdictions.

52 FR 19848 at 19850.

It is critical, therefore, that Louisiana's placarding requirements not differ from those of the HMR. Although the applicability of § 32:1502 appears to be broader than the HMR placarding requirements, the State's provision does not contain any substantive standards requiring placarding and furthermore is qualified by the words "as required by the rules and regulations promulgated by the secretary [of the Department of Public Safety and Corrections]." Under § 32:1504, those rules and regulations must be compatible with the HMR. The only rules and regulations of the Louisiana Secretary of the Department of Public Safety and Corrections on this subject are those adopting the HMR. Therefore, the State's placarding requirements do not differ from those of the HMR, and § 32:1502D thus is not inconsistent with the HMR because of its *apparent* broader applicability.

Finally, the language of section 32:1503D raises one additional issue. On its face, it requires and authorizes only placards indicating the proper hazard classes of hazardous materials; it lacks a counterpart to the 49 CFR 172.504(b) provision authorizing the use of DANGEROUS placards—which do *not* indicate any specific hazard class—on a transport vehicle or freight container containing two or more classes of hazardous materials otherwise requiring different placards. However, section 32:1503D does not prohibit the use of DANGEROUS placards, and the State's adoption of the HMR results in DANGEROUS placards being authorized.

In summary, therefore, section 32:1503(D), considered in the overall context of the State's statutory and regulatory provisions, is consistent with the HMTA and the HMR.

Shipping Paper Requirements

La. Rev. Stat. 32:1509 imposes the following requirements concerning shipping papers for hazardous materials transportation:

> A. (1) No carrier shall transport any hazardous material unless shipping documents describing the lading are provided to the operator of the vehicle prior to departure and shall be carried in the vehicle or combination of vehicles.
>
> (2) The description of lading shall include at least the shipping name, classification, and weight or volume of the material.

State and local shipping paper requirements which differ from those of the HMR (49 CFR 172.200–204) are inconsistent because of the need for national uniformity of shipping papers. IR–4, 47 FR 1731 (Jan. 11, 1982); IR–4 (Decision on Appeal), 47 FR 33357 (Aug. 2, 1982), correction, 47 FR 34074 (Aug. 5, 1982). The issue here, therefore, is whether the State requirements differ from the HMR requirements. The information requirements themselves do not differ because they require no more information than the HMR; also, the State's adoption of the HMR incorporates the other detailed information requirements thereof.

One commenter argued that the State's requirement that the shipping papers be provided "to the operator of the vehicle" is inconsistent with an alleged HMR requirement that the shipping paper need only be in the possession of a member of the train crew (which, says the commenter, usually is the conductor). The relevant HMR provision is 49 CFR 174.24(a), which states that "* * * no person may accept for transportation by rail any hazardous material * * * unless he has received a shipping paper * * * *." It also provides that "* * * no member of the train crew of a train transporting the hazardous material is required to have a shipper's certificate on the shipping paper in his possess if the original shipping paper containing the certificate is in the originating carrier's possession."

Both the Federal and State provisions are sufficiently ambiguous concerning exactly who is to receive the shipping papers and whether another person may serve as that person's agent that there is no basis in this record for finding the State requirement inconsistent—particularly in light of the State's adoption of the quoted (and all other)

HMR provisions. Therefore, section 32:1509 is consistent.

Penalty Provisions

A commenter contended that the State's penalty provisions (La. Rev. Stat. 32:1512–1514) are inconsistent because they authorize the imposition of a civil penalty for other than "knowing" violations, they authorize the seizure of rail equipment if penalties are not paid, and they authorize imposition of a $25,000 civil penalty per violation—in contrast to the HMR's $10,000 civil penalty per violation.

Insofar as they relate to the enforcement of consistent requirements (see "Inspection and Enforcement Provisions" discussion below), neither the $25,000 civil penalty provision nor the seizure provision facilitating penalty collections is inconsistent with the HMTA or the HMR. State penalty amounts and collection procedures need not be identical to those of the HMTA and the HMR. IR–3, IR–27, IR–28, all *supra*. Only penalties imposed for violations of inconsistent substantive requirements are themselves inconsistent. IR–18, IR–18 (Decision on Appeal), IR–27, IR–28, all *supra;* IR–30, 55 FR 9676 (Mar. 14, 1990), correction 55 FR 12111 (Mar. 30, 1990); *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F. 2d 1103 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986):

However, the absence of a "knowingly" requirement with respect to the imposition of civil penalty liability (the State having deleted "knowingly" from section 32:1512 in 1982) is inconsistent with the HMTA. In section 110(a) of the HMTA (49 USC 1809(a)), Congress established civil penalties for persons "knowingly" violating the HMTA, the HMR, or other regulations issued under the HMTA; it used the word "knowingly" in each of the first three sentences of that section. The second sentence demonstrates Congress' approach:

> Whoever knowingly commits an act which is a violation of any regulation, applicable to any person who transports or causes to be transported or shipped hazardous materials, shall be subject to a civil penalty of not more than $10,000 for each violation.

Thus, Congress has clearly demonstrated its intention that persons not be subject to civil penalties for violations of hazardous materials transportation regulations as the basis of strict or absolute liability. The legislative history of that section has led RSPA to adopt the following regulation setting forth the standard for determining civil penalty liability under the "knowingly" test:

> "Knowledge" or "knowingly" means that a person who commits an act which is a violation of the Act or of the requirements of this subchapter or Subchapter C of this Chapter commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter and Subchapter C of this chapter. Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter or Subchapter C of this Chapter.

49 CFR 107.299. In other words, Congress imposed a negligence standard for civil penalty liability for violations of the HMTA and regulations thereunder. *Contract Courier System, Inc.* v. *The Research and Special Programs Administration of the U.S. Department of Transportation*, No. 88 C 9320 (N.D. Ill. Sept. 22, 1989), *appeal pending*, Nos. 90–1349 and 90–1384 (7th Cir.). *See also Southern Railway Co.* v. *John H. Riley, Administrator, Federal Railroad Administration*, C84–1990A (N.D. Ga. Oct. 10, 1986), *appeal dismissed*, No. 87–8060 (11th Cir. Dec. 7, 1987) (adopting a "willful negligence" standard), and *Southern Railway Co.* v. *Carmichael, No. 1:84–CV–1990–RCF (N.D. Ga. Feb. 12, 1990) (entering summary judgment for FRA in enforcement case decided on remand on basis of "willful negligence" standard). Louisiana's imposition of strict or absolute civil penalty liability for such violations is inconsistent with the HMTA.*

Inspection and Enforcement Provisions

Inspection authority, including the authority to stop and inspect any transport vehicle, is addressed in La. Rev. Stat. section 32:1505 and 32:1509A(3). In addition, section 32:1508 provides authority to:

> * * * declare and mark any transport vehicle or container as out-of-service if its condition, filling, equipment, or protective devices would be hazardous to life or property during the transportation of hazardous material, freight or passengers.

Enforcement authority is addressed in § 32:1504B, which provides:

> The secretary may conduct investigations; make reports on; issue subpoenas, conduct hearings; require the production of relevant documents, records, and property; take depositions; * * *.

Some commenters have contended that these inspection and enforcement provisions are inconsistent because they can cause delays in transportation and thereby impede compliance with HMR provisions requiring prompt transportation of hazardous materials (49 CFR 174.14 and 177.853). They have argued that improper enforcement by State personnel demonstrates the likelihood of such delays resulting from implementation of these inspection and enforcement provisions.

State and local hazardous materials transportation inspection requirements relating to consistent substantive requirements are encouraged by RSPA and are themselves consistent. IR–2, IR–8, IR–15, IR–17, IR–20, IR–27, all *supra*; *Colorado Pub. Utilities Comm'n* v. *Harmon*, No. CV 88–Z–1524 (D. Colo. 1989), *appeal docketed*, No. 89–1288 (10th Cir. Aug. 25, 1989). On the other hand, such inspection requirements relating to inconsistent substantive provisions are themselves inconsistent. IR–20, IR–21, IR–21 (Appeal), IR–27, all *supra*.

Similarly, state and local hazardous materials transportation enforcement provisions are consistent insofar as they apply to violations of consistent substantive requirements. IR–3, IR–27, both *supra*. However, they are inconsistent insofar as they apply to violations of inconsistent substantive requirements, IR–18, IR–18 (Appeal), IR–27, all *supra; Jersey Central Powers Light Co.* v. *Township of Lacey*, 772 F. 2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986).

Because all state and local inspection and enforcement provisions have a tendency to cause some delay in transportation, that delay does not *per se* cause those provisions to be inconsistent. Also, isolated instances of improper enforcement (e.g., misinterpretation of regulations) do not render such provisions inconsistent.

Therefore, the consistency of the cited Louisiana inspection and enforcement provisions depends upon the consistency of the requirements being enforced through use of them. They are consistent insofar as they relate to consistent substantive requirements and inconsistent insofar as they relate to inconsistent substantive requirements. For example, they would be inconsistent insofar as they would be used to enforce requirements applicable to (1) hazardous materials other than those included within the HMTA and HMR definitions of hazardous materials or (2) train switching and yard operations not subject to regulation under the HMR.

Injuction Provisions

La. Rev. Stat. 32:1515 authorizes the Secretary to seek a court injuction against imminent hazards with respect to hazardous materials transportation.

That section provides that an "imminent hazard" exists "when the transportation may present an imminent and substantial endangerment to health or the environment."

Similarly, section 111 of the HMTA, 49 U.S.C. App. 1810, authorizes court actions to redress violations, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages. It also authorizes the Secretary to petition a court for an order suspending or restricting the transportation of hazardous material responsible for an imminent hazard, which is defined as existing "if there is a substantial likelihood that serious harm will occur prior to the completion of an administrative hearing or other formal proceeding initiated to abate the risk of such harm."

Given the differences between Federal and State courts and their proceedings and procedures, there is no necessity for identical injunction provisions. Like other enforcement provisions, therefore, those concerning injunctions generally are consistent insofar as they relate to the enforcement of consistent substantive requirements. Therefore, section 32:1515 is consistent with the HMTA.

Summary

For the foregoing reasons and on the basis of this record, I make the following findings.

Louisiana Revised Statutes 32:1501–1520 and Louisiana Regulations, title 33, part V, sections 10501 through 10505 and 10901 through 10905 are consistent with the HMTA and the HMR except that the following provisions therefore are inconsistent with the HMTA or the HMR to the extent indicated and thus preempted to that extent under section 112(a) of the HMTA (49 U.S.C. 1811(a)):

(1) La. Rev. Stat. 32:1502 (5)(a) and (8) insofar as they authorize the designation as hazardous materials of any materials other than those so designated in the MHR;

(2) La. Rev. Stat. 32:1502(5)(b) to the extent it defines as "explosives" any material not so defined in the HMR;

(3) La. Admin. Code, Tit. 33 Secs. 10501(c) and 10901(c) definition of "train";

(4) La. Rev. Stat. 32:1503, imposing hazardous materials transportation insurance requirements;

(5) La. Rev. Stat. 32:1510, requiring written incident/accident reports;

(6) La. Rev. Stat. 32:1512–1514 insofar as those penalty provisions relate to the enforcement of inconsistent substantive requirements;

(7) La. Rev. Stat. 32:1512 insofar as it imposes civil penalties for other than "knowing" violations;

(8) La. Rev. Stat. 32:1504B, 32:1505, 32:1508, and 32:1509A(3) insofar as those inspection and enforcement provisions relate to inconsistent substantive requirements.

This ruling does not address the issues of whether those Louisiana provisions are preempted under the Federal Railroad Safety Act (FRSA), 45 U.S.C. App. Section 421 *et seq.*, the Motor Carrier Safety Act, 49 U.S.C. Section 2501 *et seq.*, or any statute other than the HMTA.

Any appeal of this ruling must be filed within 30 days of service in accordance with 49 CFR 107.211.

Issued in Washington, DC, on June 15, 1990.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[FR Doc. 90–14347 Filed 6–20–90; 8:45 am]

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federal register

Thursday
June 21, 1990

Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation and Determinations of Endangered Status; Final Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB31

Endangered and Threatened Wildlife and Plants; Endangered Status for the Lower Keys Rabbit and Threatened Status for the Squirrel Chimney Cave Shrimp

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rules.

SUMMARY: The Service determines the Lower Keys rabbit (*Sylvilagus palustris hefneri*) to be an endangered species and the Squirrel Chimney cave shrimp (*Palaemonetes cummingi*) to be a threatened species pursuant to the Endangered Species Act of 1973, as amended (Act). These species are found only in Florida. The Lower Keys rabbit is restricted to a few keys in Monroe County and is endangered by loss of wetlands to residential development. The Squirrel Chimney cave shrimp is restricted to one site in Alachua County, Florida. It is threatened by potential development. This action will implement the protection and recovery provisions afforded by the Act for these species.

EFFECTIVE DATE: July 23, 1990.

ADDRESSES: The complete files for these rules are available for inspection, by appointment, during normal business hours at the Jacksonville Field Office, U.S. Fish and Wildlife Service, 3100 University Boulevard, South, Suite 120, Jacksonville, Florida 32216.

FOR FURTHER INFORMATION CONTACT: David J. Wesley, Field Supervisor, at the above address (telephone 904/791-2580 or FTS 946-2580).

SUPPLEMENTARY INFORMATION:

Background

The Lower Keys rabbit (*Sylvilagus palustris hefneri*) is an island subspecies of the widespread marsh rabbit. The subspecies was described by Lazell in 1984, based on a specimen from Sugarloaf Key, Monroe County, Florida (Lazell 1984). The Lower Keys rabbit measures about 40 centimeters (16 inches) in total length and has brownish fur dorsally and gray fur ventrally. It differs from the marsh rabbit of peninsular Florida (*Sylvilagus palustris paludicola*) principally in skull characters.

In recent times, the Lower Keys rabbit was found on at least ten of the Lower Keys, but may now be extirpated from five of these. The rabbit does not occur east of the Seven Mile Bridge; it is replaced in the Upper Keys by the subspecies *Sylvilagus palustris paludicola*. The Lower Keys rabbit occurs primarily in marshes, ranging from saline to fresh water. It also feeds and disperses through adjacent upland pinelands and hammocks. Salt marshes in the area are typically vegetated with fringerush (*Fimbrystylis* sp.), buttonwood (*Conocarpus erectus*), cordgrass (*Spartina alterniflora*), saltwort (*Batis maritima*), glasswort (*Salicornia virginica*), sawgrass (*Cladium jamaicense*), and sea oxeye (*Borrichia frutescens*). Fresh water marshes support cattail (*Typha latifolia*), sedges (*Cyperus* sp.), and sawgrass. Marshes are very limited in the Lower Keys, since mangroves occupy many coastal areas and interior fresh water habitat is scarce. Known localities for the Lower Keys rabbit are on Federal (National Key Deer Refuge, KeyWest Naval Air Station), State (Florida Department of Transportation), and private lands. The primary cause of the decline of the Lower Keys rabbit is the filling of wetlands for residential, commercial, and military purposes.

The subspecies was considered a category 2 species (a species for which listing is possibly appropriate, but for which conclusive data is lacking) in the Service's vertebrate notice of review published September 18, 1985 (50 FR 37958), and as a category 1 species in the animal notice of review published January 6, 1989 (54 FR 554), indicating that listing was appropriate.

The Service was petitioned to list the Lower Keys rabbit as an endangered species by Ms. Joel Beardsley in a letter received April 17, 1985. Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended in 1982, requires that for any such listing petition containing substantial information, a finding be made within 12 months of receipt of the petition. The Service made a finding that the petition presented substantial information and that the requested action may be warranted on August 30, 1985 (50 FR 35272). Subsequent 1-year findings for 1986 (51 FR 29673; August 20, 1986), 1987 (53 FR 25512; July 7, 1988), and 1988 (53 FR 31723; August 19, 1988) were that the petition was warranted but precluded by other listing activities. The August 30, 1989 (54 FR 35905) proposal to classify the Lower Keys rabbit as endangered constituted the final finding required for this species.

The Squirrel Chimney cave shrimp (*Palaemonetes cummingi*), a decapod crustacean of the family Palaemonidae, was described by Chace in 1954. It measures about 30 millimeters (1.2 inches) in total length and is transparent. The body and eyes are unpigmented, and the eyes are reduced in size in comparison to surface-dwelling species of *Palaemonetes*. The Squirrel Chimney cave shrimp (also known as the Florida cave shrimp) is restricted to Squirrel Chimney, a sinkhole near Gainesville, Alachua County, Florida. The site is privately owned. Squirrel Chimney is a small sinkhole which leads to a flooded cave system over 30 meters (100 feet) deep. Several other cave-dwelling invertebrates are found in Squirrel Chimney: McLane's cave crayfish (*Troglocambarus maclanei*), the light-fleeing crayfish (*Procambarus lucifugus*), the pallid cave crayfish (*Procambarus pallidus*) (a category 2 candidate for Federal listing), and Hobb's cave amphipod (*Crangonyx hobbsi*). The site supports one of the richest cave invertebrate faunas in the United States. In 1983, the site was proposed for recognition as a National Natural Landmark, but the National Park Service has not yet taken final action on the proposal.

The Squirrel Chimney cave shrimp is considered threatened by the Florida Committee on Rare and Endangered Plants and Animals, while the other four species are considered species of special concern. The Squirrel Chimney cave shrimp was classified a category 2 species in the Service's May 22, 1984, invertebrate review notice (49 FR 21664), and also in the animal notice of review published January 6, 1989 (54 FR 554). It is threeatened by potential residential development and changes in land use. The Service proposed this species as a threatened species on August 30, 1989 (54 FR 35905).

Summary of Comments and Recommendations

In the August 30, 1989, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices, required by section 4(b)(5)(D) of the Act, were inadvertently not published during the comment period (August 30 to October 30, 1989) announced in the proposal; the comment period on the proposal was therefore reopened from December 4, 1989, to January 3, 1990, in a notice published on December 4, 1989 (54 FR 50006). Newspaper notices were published in

the *Key West Citizen* (Key West, Florida) for the Lower Keys rabbit on December 10, 1989; and in the *Gainesville Sun* (Gainesville, Florida) for the Squirrel Chimney cave shrimp on December 14, 1989.

Twenty comments were received regarding the proposal to list the Lower Keys rabbit. The proposal was supported by the Florida Game and Fresh Water Fish Commission, the Florida Natural Areas Inventory, six conservation organizations, and seven individuals. Three individuals opposed the proposal; one such letter included a petition signed by 26 local residents who opposed the listing of the Lower Keys rabbit. One individual opposed further land acquisition and regulation in the Florida Keys, stating that the tax burden would increase. Service response: Listing decisions pursuant to the Act are required to be based solely on the factors enumerated under section 4(a) of the Act; see the "Summary of Factors Affecting the Species" below. Only biological and threat criteria can be used to determine whether species are endangered or threatened; potential economic effects are not allowed to influence the decision on whether or not a species is endangered or threatened. In any case, it is likely that little, if any, public land acquisition will take place for the Lower Keys rabbit. Some of the habitat of the subspecies is already in government ownership (National Key Deer Refuge and Key West Naval Air Station); much of the reminder is in small isolated parcels that, even if acquired, would have limited effects on the Florida Keys economy.

One comment indicated that the Lower Keys rabbit had been seen on Saddlehill Key in recent years, a site previously not recorded. In another comment the biologist who had carried out the status survey for the Lower Keys rabbit reported his belief that the rabbit had continued to decline since the 1987 survey work. The U.S. Navy, Key West Naval Air Station, indicated its willingness to cooperate in conservation of this species on Navy lands in the Lower Keys. Several other points were raised in the comments. The biologist who scientifically described the Lower Keys rabbit pointed out that the species uses pinelands and hammocks in addition to wetland hammocks; that fact has been incorporated into the final rule. Another individual stated that the Lower Keys rabbit no longer existed and that the only rabbits in the area were escaped domestic rabbits. Service response: While feral domestic rabbits (the European rabbit, *Oryctalagus cuniculus*) may be found in the Lower Keys, the Lower Keys rabbit (*Sylvilagus palustris hefneri*) represents a different genus, not closely related to the escaped domestic rabbits. Lower Keys rabbits continue to exist, as evidenced by recent sightings and road-killed animals.

Two conservation groups disagreed with the Service's proposal to not designate critical habitat for the Lower Keys rabbit. They felt that critical habitat designation would provide additional protection to the rabbit and its habitat, particularly in areas that appear to be suitable habitat but are currently unoccupied by the species. The Service continues to believe that the disadvantages of critical habitat designation for the Lower Keys rabbit outweigh the benefits. Critical habitat, by definition, applies only to Federal agency actions. Section 7(a)(2) of the Act requires Federal agencies to insure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat of such species. The standards for establishing jeopardy to the species and for destruction and adverse modification of habitat are substantially identical. Since no apparent benefits would result from the designation of critical habitat for this species, the Service has not proposed such a regulation.

Four comments were received in response to the proposal to list the Squirrel Chimney cave shrimp as a threatened species. The proposal was supported by the Florida Game and Fresh Water Fish Commission, the Florida Natural Areas Inventory, and the Florida Speleological Society. The landowner of the site where the shrimp occurs opposed the listing of the shrimp, questioning the currentness of the data used to justify the proposal and fearing that the regulation might restrict development of the property. Service response: Although collections of the Squirrel Chimney cave shrimp have not been attempted for several years, there is no reason to believe that the species does not still occur at the site. Neither the landowner nor the Service has been able to identify any current or planned development activities that would be prevented by the listing of this species. No Federal agency activities are currently known or anticipated for the property.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Lower Keys rabbit should be classified as an endangered species and that the Squirrel Chimney cave shrimp should be classified as a threatened species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the Lower Keys rabbit (*Sylvilagus palustris hefneri*) and the Squirrel Chimney cave shrimp (*Palaemonetes cummingi*) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* (1) Lower Keys rabbit—This species probably originally occurred in suitable habitat throughout the larger Lower Florida Keys. Lazell (1984) reported the rabbit from Lower Sugarloaf, Geiger, Saddlebunch, Boca Chica, and Big Pine Keys. He documented 13 sites from these keys (records in Florida Natural Areas Inventory, Tallahassee, Florida). Based on interviews with local residents, he believes that the species also occurred on Cudjoe, Ramrod, Middle Torch, Big Torch, and Key West Keys, but has been extirpated at these sites (J.D. Lazell, The Conservation Agency, *in litt.*, 1985). Lazell (*in litt.* 1985) also provided a rough population estimate, based on pellet counts, of 259 remaining Lower Keys rabbits. Based on interviews with local residents, he believed that the Lower keys rabbit had been locally common as recently as the 1950's.

The Refuge Manager of the Service's National Wildlife Refuge Complex in the Florida Keys (Key Deer, Key West, and Great White Heron) reviewed the annual reports of that station for information on the Lower keys rabbit (*in litt.* 1986). The rabbit was known to be present on Refuge lands on Boca Chica, Saddlebunch, and Big Pine Keys, but not on the smaller, outer keys of these refuges. The species was not considered abundant, and was believed to be restricted to keys with available fresh water. Only a few rabbits have been seen since 1984. Howe (1988) surveyed Lazell's 13 sites, as well as additional areas, in a status survey funded by the Service and carried out by the Florida Game and Fresh Water Fish Commission. He found rabbits at 12 locations (one additional site was found following the conclusion of his survey), while they appear to have been extirpated from 4 or possibly 5 previously known sites. Filling for development or road construction has

resulted in the destruction of the rabbit's habitat at these sites. Only 6 of the 13 remaining known sites are secure from development. The species may also be extirpated from Saddlebunch Key, where most of the habitat has been destroyed. Howe estimates that 200-400 Lower Keys rabbits remain on Sugarloaf, Welles, Annette, Boca Chica, Big Pine, and Hopkins Keys in small, scattered populations. A few rabbits may also still occur on Saddlehill Key.

(2) Squirrel Chimney cave shrimp—This species is known from only one sinkhole. Any detrimental change to the sinkhole or the underlying aquifer has the potential to adversely affect or even cause the extinction of the species. The property surrounding the sinkhole is currently oak hammock and pine plantation, but it may be developed for residential use (single-family houses) in the foreseeable future. The property is in an actively developing area on the outskirts of Gainesville. Septic tanks and the use of pesticides and herbicides associated with residential development have the potential to degrade water quality in the aquifer, and human activities in the vicinity of the sinkhole could damage the vegetation in and around the sink. Forestry practices have the potential to damage the sinkhole through erosion or pesticides. The current property owners intend to give The Nature Conservancy the first option to purchase the land around the sinkhole, but even if this site is acquired, the sinkhole will remain vulnerable to development in the near vicinity.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* The Lower Keys rabbit was actively hunted in the past (Lazell 1985), but it is not known whether such activity continues. The current small population size and limited distribution of this animal would make any hunting a serious threat. The Squirrel Chimney cave shrimp is restricted to one small site that could be seriously damaged by a single act of vandalism.

C. *Disease or predation.* The Lower keys rabbit is vulnerable to predation by feral house cats, which are common on the Lower keys. Mammalian predators such as cats are not native to the Lower Keys, and wildlife there, as on many islands, may not be well adapted to withstanding such predation. Disease or predation are not known to be affecting the Squirrel Chimney cave shrimp.

D. *The inadequacy of existing regulatory mechanisms.* No existing regulatory mechanisms apply to the Lower keys rabbit or the Squirrel Chimney cave shrimp.

E. *Other natural or manmade factors affecting its continued existence.* The Lower keys rabbit occurs in small, disjunct populations which may persist only due to migration among colonies. The continuing urbanization of the Lower Keys makes such movements increasingly difficult. Other natural or manmade factors are not known to be affecting the Squirrel Chimney cave shrimp.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to propose this rule. Based on this evaluation, the preferred action is to list the Lower Keys rabbit as an endangered species and the Squirrel Chimney cave shrimp as a threatened species. The Lower Keys rabbit is in danger of extinction throughout a significant portion, if not all, of its range. While not in immediate danger of extinction, the Squirrel Chimney cave shrimp is likely to become an endangered species in the foreseeable future. Critical habitat is not being designated for either species for the reasons discussed below.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate any habitat of a species which is considered to be critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for the Lower Keys rabbit or the Squirrel Chimney cave shrimp. Publication of critical habitat maps for the Lower Keys rabbit could result in hunting or poaching of this species in its few remaining sites. Federal agencies with Lower Keys rabbits on their properties have been notified. Their activities will be subject to section 7 of the Act, as discussed under "Available Conservation Measures."

The Squirrel Chimney cave shrimp is restricted to a single known locality that could easily be damaged by vandalism (see factor "B." above). The private landowners do not desire visitors at the site. No Federal activities are known or anticipated at the site.

Publication of critical habitat description would make both species more vulnerable to take or vandalism. For the above reasons, the Service has concluded that designation of critical habitat is not prudent for the Lower Keys rabbit or the Squirrel Chimney cave shrimp. All involved parties and major land owners have been notified of the location and the importance of protecting the habitat of these species. Protection will be addressed through the recovery process and through the section 7 jeopardy standard.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

For the Lower Keys rabbit, affected Federal agencies are the U.S. Navy and the U.S. Army Corps of Engineers (Corps). The rabbit occurs on Key West Naval Air Station, and the Corps has jurisdiction over some of the wetlands used by the rabbit through its permitting authority pursuant to section 404 of the Clean Water Act. The Navy currently anticipates no conflicts with its mission on Key West Naval Air Station, and will assist in conserving the Lower Keys rabbit. The Corps must now evaluate wetland permit applications for potential effects on the Lower Keys rabbit. If appropriate, the Corps must consult with the Service concerning the Lower Keys rabbit. Wetland permitting in some areas may become more restrictive.

No Federal agency involvement is known or anticipated for the Squirrel Chimney cave shrimp.

The Act and its implementing regulations found at 50 CFR 17.21 and 17.31 set forth a series of general trade prohibitions and exceptions that apply to endangered and threatened wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these), import and export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22, 17.23, and 17.32. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. For threatened species, there are also permits for zoological exhibition, educational purposes, or for special purposes consistent with the purposes of the Act.

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Chace, F.A., Jr. 1954. Two new subterranean shrimp (Decapoda:Caridea) from Florida and the West Indies, with a revised key to the American species. J. Wash. Acad. Sci. 44:318–324.

Howe, S.E. 1988. Lower Keys rabbit status survey. Final report of Florida Game and Fresh Water Fish Commission to Jacksonville Field Office of U.S. Fish and Wildlife Service under Cooperative Agreement 14–16–004–87–939. 10 pp.

Lazell, J.D., Jr. 1984. A new marsh rabbit (*Sylvilagus palustris*) from Florida's Lower Keys. J. Mamm. 65(1):26–33.

Author

The primary author of this rule is Dr. Michael M. Bentzien (see **ADDRESSES** section above).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Fish, Marine mammals, Plants (agriculture).

Regulations promulgation

PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1543; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under the groups indicated, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
* * * * *							
Rabbit, Lower Keys	*Sylvilagus palustris*	U.S.A. (FL)	Entire	E	390	NA	NA
* * * * *							
Crustaceans							
* * * * *							
Shrimp, Squirrel Chimney (=Florida) Cave.	*Palaemonetes cummingi*	U.S.A. (FL)	NA	T	390	NA	NA
* * * * *							

Dated: May 15, 1990.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 90–14410 Filed 6–20–90; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB31

Endangered and Threatened Wildlife and Plants; Designation of the Freshwater Mussel, the Fanshell as an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service designates a freshwater mussel, the fanshell (*Cyprogenia stegaria* (=*C. Irrorata*)), as an endangered species under the Endangered Species Act of 1973, as amended (Act). This freshwater mussel historically occurred in the Ohio River and many of its large tributaries in Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Kentucky, Tennessee, Alabama, and Virginia. Presently, the fanshell is believed to be reproducing in only three rivers—the Green and Licking Rivers in Kentucky, and the Clinch River in Tennessee and Virginia. Additionally, small, apparently nonreproducing populations (based on the collection of a few old specimens in the 1980s) may still persist in the Muskingum River, Ohio; the Kanawha River, West Virginia; the Wabash River system in Illinois and Indiana; Tygarts Creek, Kentucky; and the Tennessee and Cumberland Rivers in Tennessee. The distribution and reproductive capacity of this species has been seriously impacted by the construction of impoundments and navigation facilities, dredging for channel maintenance, sand and gravel mining, and water pollution.

EFFECTIVE DATE: July 23, 1990.

ADDRESSES: The complete file for this rule is available for inspection, by