

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 90-37 Introduction

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

ACTION: Summary presentation of final and interim rules with request for comment.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules which follow it in the order listed below. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are issuing Federal Acquisition Circular (FAC) 90-37 to amend the FAR.

DATES: For effective dates and comment dates, see separate documents which follow. Please cite FAC 90-37 and the appropriate FAR case number(s) in all

correspondence related to the following documents.

FOR FURTHER INFORMATION CONTACT:

The analyst whose name appears (in the table below) in relation to each FAR case or subject area. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-37 and specific FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-37 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR case	Analyst
I	Inherently Governmental Functions	92-051	O'Such.
II	Javits-Wagner-O'Day Program	91-108	Klein.
III	Made in America Labels/Unfair Trade Practices	93-301/ 93-306	De Stefano.
IV	Debarment and Suspension Certificate	92-615	De Stefano.
V	Nonprofit Institutions Clause Prescription	92-010	Olson.
VI	Field Pricing Support Request	95-006	Olson.
VII	Subcontract Proposal Audits	92-002	Olson.
VIII	Overhead Should-Cost Reviews	92-017	Olson.
IX	SBA Responsibility, Certificate of Competency Requests	92-606	Klein.
X	Mentor Protégé Program (Interim)	93-308	Klein.
XI	Subcontracting Plans	92-019	Klein.
XII	Insurance—Liability to Third Persons (under Cost Reimbursement Contracts)	92-014	O'Such.
XIII	Availability of Accounting Guide	94-002	Olson.
XIV	Nonallowability of Excise Taxes on Nondeductible Contributions to Deferred Compensation Plans	92-604	Olson.
XV	Contractors' Purchasing Systems Reviews and Subcontractor Consent	92-040	Klein.

Item I—Inherently Governmental Functions (FAR Case 92-051)

This final rule amends FAR Parts 7, 11, and 37 to provide policy and procedures relating to inherently governmental functions. Subpart 7.5 is added to provide a definition of "inherently governmental functions" and to provide a list of examples of functions considered to be inherently governmental, or which shall be treated as such, and a list of certain services and actions that are not considered to be inherently governmental functions.

Item II—Javits-Wagner-O'Day Program (JWOD) (FAR Case 91-108)

This final rule amends FAR Parts 8, 51, and 52 to clarify that the Government's statutory obligation to purchase certain items from the Committee for Purchase from People Who Are Blind or Severely Disabled also applies when contractors purchase items for Government use.

Item III—Made in America Labels/Unfair Trade Practices (FAR Cases 93-301 and 93-306)

This final rule amends FAR 9.403, 9.406, and 9.407 to add language concerning suspension or debarment of

contractors who engage in unfair trade practices and/or intentionally affix a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States.

Item IV—Debarment and Suspension Certificate (FAR Case 92-615)

This final rule amends FAR 9.406-2, 9.407-2, and 52.209-5 to add "tax evasion" as a cause for debarment or suspension.

Item V—Nonprofit Institutions Clause Prescription (FAR Case 92-010)

This final rule amends the prescriptions for use of the clauses at 52.215-27, Termination of Defined Benefit Pension Plans, and 52.215-39, Reversion or Adjustment of Plans for Postretirement Benefits Other Than Pensions (PRB), and also clarifies the language of the clauses.

Item VI—Field Pricing Support Request (FAR Case 95-006)

This final rule revises FAR 15.805-5(c)(1) to clarify that contracting officers may send audit requests directly to the cognizant audit office, if no other type of field pricing support is required.

Item VII—Subcontract Proposal Audits (FAR Case 92-002)

This final rule amends FAR 15.806-3, Field pricing reports, to add two additional examples of when field pricing support audits of subcontract proposals may be appropriate. The first example is when the contractor or higher tier subcontractor has been cited for having significant estimating system deficiencies in the area of subcontract pricing. The second example is when a lower tier subcontractor has been cited as having significant estimating system deficiencies.

Item VIII—Overhead Should-Cost Reviews (FAR Case 92-017)

This final rule amends FAR 15.810 to add guidance on overhead should-cost reviews.

Item IX—SBA Responsibility, Certificate of Competency Requests (FAR Case 92-606)

This final rule amends FAR 19.602-2 to reflect the approval of Small Business Administration regional offices to issue Certificate of Competency (COC) Determinations as provided in 13 CFR Part 125.

Item X—Mentor Protégé Program (FAR Case 93-308)

This interim rule amends FAR 19.702, Statutory requirements, to allow mentor firms participating in the Department of Defense (DOD) Mentor-Protégé Program to be granted credit toward subcontracting goals under small business subcontracting plans entered into with any executive agency. FAR 52.244-5, Competition in Subcontracting, is amended to permit DOD mentor firms to award subcontracts on a noncompetitive basis to protégé firms under DOD and other contracts.

Item XI—Subcontracting Plans (FAR Case 92-019)

This final rule amends FAR 19.705-2(d) to expand the circumstances when subcontracting plans may be required from and negotiated with more than the apparently successful offeror. The clause prescription at 19.708(b)(1) and Alternate II for the clause at 52.219-9 are added for use when subcontracting plans are required with initial proposals.

Item XII—Insurance—Liability to Third Persons (under Cost Reimbursement Contracting) (FAR Case 92-014)

This final rule deletes the provision at FAR 52.228-6 and makes related changes at 28.311, 52.228-7, 52.245-7, and 52.245-10 to remove obsolete language pertaining to liability insurance under cost-reimbursement contracts.

Item XIII—Availability of Accounting Guide (FAR Case 94-002)

This final rule amends FAR Part 31 to add a new section 31.001 advising contractors on how to obtain a copy of an informational guide entitled "Guidance for New Contractors."

Item XIV—Nonallowability of Excise Taxes on Nondeductible Contributions to Deferred Compensation Plans (FAR Case 92-604)

This final rule amends FAR 31.205-41 to designate excise taxes at subtitle D, chapter 43 of the Internal Revenue Code, as unallowable costs.

Item XV—Contractors' Purchasing Systems Reviews and Subcontractor Consent (FAR Case 92-40)

This final rule amends FAR Parts 44 and 52 to increase the thresholds for Contractors' Purchasing Systems Reviews (CPSR's) and subcontract consent. The threshold at 44.302(a) for performing CPSR's is raised from \$10 million to \$25 million. The threshold at 52.244-2(a) for consent to subcontract

under cost-reimbursement and letter prime contracts for fabrication, purchase, rental, installation, or other acquisition for special test equipment is raised from \$10,000 to \$25,000. The threshold at 52.244-2(b)(1) requiring additional information on certain subcontracts is raised from \$10,000 to \$25,000.

Dated: January 11, 1996.

Edward C. Loeb,
Acting Director, Office of Federal Acquisition Policy.

**Federal Acquisition Circular
Number 90-37**

Federal Acquisition Circular (FAC) 90-37 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-37 is effective March 26, 1996, except for Item X which is effective January 26, 1996.

Dated: January 4, 1996.

Eleanor R. Spector,
Director, Defense Procurement.

Dated: January 17, 1996.

Ada M. Ustad,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: January 12, 1996.

Deidre A. Lee,
Associate Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 7, 11, and 37**

[FAC 90-37; FAR Case 92-051 Item I]

RIN 9000-AF56

**Federal Acquisition Regulation;
Inherently Governmental Functions**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to revise the Federal Acquisition Regulation (FAR) to implement Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, Inherently Governmental Functions. This rule provides a definition of, and internal Government responsibilities and procedures relating to, inherently governmental functions. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: March 26, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such (202) 501-1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-37, FAR case 92-051.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule implements the requirements of the Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, Inherently Governmental Functions. The OFPP published its proposed policy letter for public comment in the Federal Register at 56 FR 65279, December 16, 1991. OFPP evaluated public comments and published the final policy letter in the Federal Register at 57 FR 45096, September 30, 1992.

A FAR proposed rule to implement the policy letter was published in the Federal Register at 59 FAR 29696, June 8, 1994. Thirteen sources submitted public comments. Minor revisions were made to the rule as a result of those comments.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule pertains to internal Government responsibilities and procedures relating to inherently governmental functions.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors,