

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATION

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Chapter 1

[Federal Acquisition Circular 90-32]

Federal Acquisition Regulation;
Introduction of Miscellaneous
Amendments

AGENCIES: Department of Defense (DOD),
General Services Administration (GSA),

and National Aeronautics and Space
Administration (NASA).

ACTION: Summary presentation of final
rules.

SUMMARY: This document serves to
introduce the final rules which follow
and which comprise Federal
Acquisition Circular (FAC) 90-32. The
Federal Acquisition Regulatory Council
has agreed to issue FAC 90-32 to amend
the Federal Acquisition Regulation
(FAR).

DATES: For effective dates, see
individual documents following this
one.

FOR FURTHER INFORMATION CONTACT: The
team leader or FAR Staff Analyst whose
name appears 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 90-32 and FAR case
number(s).

SUPPLEMENTARY INFORMATION: Federal
Acquisition Circular 90-32 amends the
Federal Acquisition Regulation (FAR) as
specified below:

Item	Subject	FAR case	Team leader
I	Truth in Negotiations Act and Related Changes	94-720 & 94-721.	Al Winston (703) 602-2119.
II	Protests, Disputes and Appeals	94-730	Craig Hodge (703) 274-8940.
III	Acquisition of Commercial Items	94-790	Lawrence Trowel (703) 695-3858.
IV	Whistleblower Protections for Contractor Employees (Ethics).	94-803	Jules Rothlein (703) 697-4349.
V	Small Business	94-780	Victoria Moss (202) 501-4764.
VI	Publicizing Contract Actions	95-606	Ralph DeStefano (202) 501-1758.
VII	Subcontractor Payments	94-762	John Galbraith (703) 697-6710.
VIII	Reimbursement of Protest Costs	94-731	Craig Hodge (703) 274-8940.

Case Summaries

For the actual revisions and/or
amendments to these FAR cases, refer to
the specific item number and subject set
forth in the documents following these
item summaries.

Item I—Truth in Negotiations Act and
Related Changes (FAR Cases 94-720
and 94-721)

This final rule is issued pursuant to
the Federal Acquisition Streamlining
Act of 1994 (FASA), Pub. L. 103-355 to
implement those portions of FASA that
make specific changes to the Truth in
Negotiations Act (TINA) or that impact
other areas of the FAR that affect
contract pricing.

This rule implements Sections 1201
through 1210 and Sections 1251 and
1252 of the FASA. A new exception is
added to the requirement for the
submission of “cost or pricing data” for
commercial items; the approval level for
waivers is changed, and prohibitions are
placed on acquiring “cost or pricing
data” when an exception applies. The
coverage includes a clear explanation of
adequate price competition as required
by the FASA.

Coverage has been included that
addresses (1) “information other than
cost or pricing data,” (2) exceptions
based on established catalog or market
price, (3) interorganizational transfers of
commercial items at price, and (4) price
competition when only one offer has
been received.

The new policy also expands the
exception based on adequate price
competition and provides for a special
exception for commercial items. A new
section addressing “information other
than cost or pricing data” is created and
a Standard Form 1448 is provided for
use by contractors.

The new policy at FAR 15.804-
1(b)(1)(ii) recognizes circumstances
when it can be determined that
adequate price competition exists even
though only one offeror has responded
to the Government’s requirement.

In addition, this rule finalizes, with
changes, the interim rule in FAC 90-22
that made TINA requirements for
civilian agencies substantially the same
as those for the Department of Defense
(increasing the threshold for submission
of “cost or pricing data” to \$500,000
and adding penalties for defective
pricing). Provisions were also included
that increase the threshold for cost or
pricing data submission every 5 years
beginning October 1, 1995.

Although the instruction to amend
contracts without consideration to
update the cost or pricing data threshold
has been removed from the FAR, the
statutory authority and requirement to
update the threshold remain in effect.
Accordingly, contracting officers shall,
if requested by a prime contractor,
modify contracts to change the
threshold in the contract to the cost or
pricing data threshold in paragraph
15.804-2(a)(1), without requiring

consideration. The contract
modification shall be accomplished by
inserting into the contract the current
version of the clauses 52.215-23, Price
Reduction for Defective Cost or Pricing
Data—Modifications, and 52.215-25,
Subcontractor Cost or Pricing Data—
Modifications, or 52.215-24,
Subcontractor Cost or Pricing Data, as
applicable. These new contract clauses
shall apply only to contract
modifications and subcontracts for
which agreement on price occurs after
the contracting officer has inserted the
new clauses.

Item II—Protests, Disputes, and
Appeals (FAR Case 94-730)

This final rule implements
requirements of the Federal Acquisition
Streamlining Act of 1994 pertaining to
protests, disputes, and appeals.

The primary changes included in this
rule are new definitions of “day,”
“filed,” and “protest.” Most of the
adjustments merely reflect current
practice, except for the definition of
“day,” which changes from a presumed
“working day” to a presumed “calendar
day.” Agencies are now clearly allowed
to take corrective action to include
payment of costs to the protester and are
allowed to stay contract performance in
the face of a likely protest. Both agency
and GAO protests must now be filed
within fourteen calendar days of
discovery of protest grounds, instead of
the former ten working days. There is

also an explicit warning that, in the event of a conflict between the FAR and GAO protest procedure regulations, the GAO regulations govern. The period of time for submission of the agency administrative report has been adjusted from the former 25 working days to 35 calendar days. Agencies are required to prepare a protest file for prospective, non intervening offerors to review, and to suspend performance of the contract if the protest is filed within ten days of award or five days of debriefing, where the debriefing is required. GAO decisions are normally due out within 125 days, and attorney fees are generally capped at \$150 an hour, except for small businesses.

There is also an explicit statement that, in case of conflict with the FAR, GSBICA rules govern questions of GSBICA protest procedure. The GSBICA now has more GAO-like suspension standards and time periods. Agencies are required to reimburse the judgment fund for costs awarded the protester. Protest costs are limited at the GSBICA as they are with GAO protests, such as with the attorney fee cap. Settlements are now generally to be made public information.

In the disputes area, the claims certification threshold begins at \$100,000. Claims must be filed within six years of accrual, except for Government claims involving fraud. Small claims now reach disputes of \$50,000, and accelerated claims have a threshold of \$100,000.

Item III—Acquisition of Commercial Items (FAR Case 94-790)

This final rule implements Title VIII of the Federal Acquisition Streamlining Act of 1994. The rule encourages the acquisition of commercial end items and components by Federal Government agencies as well as contractors and subcontractors at all levels. The most significant revisions are in the following FAR parts:

Part 2 has been amended to incorporate the definitions of “commercial item,” “component,” “commercial component” and “non developmental item.”

Part 10 has been completely revised by establishing the requirement for market research as the first step in the acquisition process. Market research is an essential element in the later steps of describing the agency’s need, developing the overall acquisition strategy and identifying terms and conditions unique to the item being acquired.

Part 11 has been completely revised to address the process of describing agency needs. It contains some of the language

on specifications and standards formerly found in FAR Part 10, but takes a more streamlined approach. In addition, the revised Part 11 establishes the Government’s order of precedence for requirements documents and addresses the concept of market acceptance. Part 11 also contains coverage on Delivery or Performance Schedules, Liquidated Damages, Priorities and Allocations, and Variations in Quantity taken from the current Part 12 with only minor editorial revisions. The current Part 12 coverage on Suspension of Work, Stop Work Orders, and Government Delay of Work has been moved to Subpart 42.13 with only minor editorial revisions.

Part 12 has been completely revised to address the acquisition of commercial items.

—Subpart 12.1 states that the policies in the revised Part 12 are applicable to all acquisitions of commercial items above the micro-purchase threshold. The requirements of other parts of the FAR apply to commercial items to the extent they are not inconsistent with Part 12.

—Subpart 12.2 identifies special requirements for the acquisition of commercial items.

—Subpart 12.3 establishes standard provisions and clauses for use in the acquisition of commercial items. It is essential that contracting officers be allowed to tailor solicitations and contracts to meet the needs of the particular acquisition and the marketplace for that item. Subpart 12.3 gives contracting officers broad authority to tailor solicitations and contracts, a practice itself that is consistent with commercial practices.

—A new form, the Standard Form (SF) 1449, Solicitation/Contract/Order for Commercial Items, is established. The most significant element is the addition of acceptance blocks at the bottom of the form that will allow suppliers of commercial items to utilize the SF 1449 to document receipt of the supplies or services by the Government, avoiding the need for preparation of separate receipt/acceptance forms.

—Subpart 12.5 identifies the applicability of certain laws to the acquisition of commercial items. It contains the list of laws determined to be inapplicable to executive agency prime contracts for acquisition of commercial items. This list has been expanded to also include those laws that have been revised in some manner to modify their applicability to commercial items. Agency unique laws determined to be inapplicable to

prime contracts are not addressed in this rule and may be addressed separately by the respective agencies. This subpart also contains the list of laws determined to be inapplicable to subcontracts for commercial items. This list has been expanded to also include those laws that have been revised in some manner to modify their applicability to subcontracts for commercial items.

—Subpart 12.6 identifies two streamlined procedures for the evaluation and solicitation of contracts for commercial items. These procedures may be used at the discretion of the contracting officer.

Part 52 has been amended to include several new provisions and clauses to be used in all solicitations and contracts for the acquisition of commercial items:

—Section 52.212-1, Instructions to Offerors—Commercial Items, contains solicitation instructions for the acquisition of commercial items.

—Section 52.212-2, Evaluation—Commercial Items, contains evaluation information that has been simplified and tailored to meet the requirements of commercial items.

—Section 52.212-3, Offeror Representations and Certifications—Commercial Items, includes, in one provision, the certifications and representations required to comply with laws or Executive orders.

—Section 52.212-4, Contract Terms and Conditions—Commercial Items, contains the terms and conditions believed to be consistent with customary commercial practice.

—Section 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, implements provisions of law or Executive Orders applicable to Government acquisitions of commercial items or commercial components. The clause at 52.212-5 represents the minimum number of clauses required to implement statutes and Executive orders. Certain clauses may apply depending upon the circumstances; the contracting officer will indicate which of these clauses apply for the specific acquisition.

—Section 52.244-6, Subcontracts for Commercial Items and Commercial Components, implements the preference for the acquisition of commercial items or nondevelopmental items as components of items to be supplied under Federal contracts. This clause will be used in all solicitations and contracts for supplies and services other than commercial items.

Item IV—Whistleblower Protections for Contractor Employees (Ethics) (FAR Case 94-803)

The final rule published as Item III of FAC 90-30 added FAR Subpart 3.9, Whistleblower Protections for Contractor Employees, to implement Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994.

The rule contained an effective date of September 19, 1995, but did not discuss the subject of applicability. The rule applies to all contracts in existence as of September 19, 1995, for reprisals to Government contractor employees occurring on or after that date.

Some existing Department of Defense contracts contain a clause addressing whistleblower protections based on a prior statute, 10 U.S.C. 2409a. The remedies provided by FAR Subpart 3.9 do not apply to contracts otherwise covered by the provisions of 10 U.S.C. 2409a.

Item V—Small Business (FAR Case 94-780)

This final rule implements Sections 7101(a) 7106, and 10004 of the Federal Acquisition Streamlining Act (FASA) of 1994. Section 7101(a) of FASA deletes Sections 15(e) and (f) of the Small Business Act (15 U.S.C. 631, et seq.). Those sections established the priority for award of set-asides and provided the statutory basis for a procurement preference for concerns located in Labor Surplus Areas (LSA). Based on this deletion, this rule removes the LSA set-aside program and LSA subcontracting program from the FAR.

Section 7106 of FASA revises Sections 8 and 15 of the Small Business Act to accommodate a Governmentwide goal of 5 percent for women-owned small businesses. This rule deletes existing, separate coverage relating to women-owned businesses and revises existing coverage to place women-owned small businesses on an equal footing with small disadvantaged businesses. In connection with this revision, the Standard Forms 294 and 295 are revised and streamlined.

Section 10004 of FASA, which requires the collection of specified data through the Federal Procurement Data System, is being implemented by FAR case 94-701. This rule augments that coverage by providing a solicitation provision to collect the information on women-owned businesses as required by that FAR case.

Item VI—Publicizing Contract Actions (FAR Case 95-606)

This final rule amends FAR sections 5.207(b)(4) and (b)(6). The amendment

deletes the requirement for the Federal Information Processing Standard (FIPS) Number in Commerce Business Daily synopses and, in lieu thereof, requests Government Printing Office (GPO) Billing Account Code Information.

Item VII—Subcontractor Payments (FAR Case 94-762)

This final rule implements Sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994. The rule amends FAR Parts 28, 32, and 52 to reflect: statutory requirements related to providing information to subcontractors and prospective subcontractors concerning bonds under the Miller Act; that while the Government does not have privity with subcontractors, and does not serve as a collection agent for them, the Government properly has an interest in the financial capability, managerial competence, and business ethics of companies doing business with the Government; that the contracting officer should be informed about both sides of the argument in a dispute between the prime contractor and its subcontractor in order to exercise good business judgment; and finally, when an assertion raises a creditable question concerning the accuracy of a contractor certification, the contracting officer must decide whether the certification is inaccurate in any material respect, and, if so, bring the matter to the attention of the appropriate authorities, in accordance with agency regulations.

Item VIII—Reimbursement of Protest Costs (FAR Case 94-731)

This final rule implements Sections 1016, 1403, and 1435 of the Federal Acquisition Streamlining Act of 1994. The primary effect of this rule is to allow the Government to seek reimbursement for protest costs it has paid a protester, such as the protester's attorney fees, where that protest has been sustained based upon the awardee's misrepresentation. In addition to any other remedies available, the Government may collect this debt by offsetting the amount against any payment due the awardee under any Government contract the awardee might have.

Dated: September 7, 1995.

Edward C. Loeb,
Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Federal Acquisition Circular
[Number 90-32]

Federal Acquisition Circular (FAC) 90-32 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 below, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-32 is effective October 1, 1995. FAC Items I, and V through VIII, are applicable for solicitations issued on or after October 1, 1995.

Item II—Where this rule repeats a GSBCA rule that went into effect earlier, the date of the GSBCA rule and its applicability provision prevail; otherwise, this rule is applicable to protests or claims filed on or after October 1, 1995.

Item III—For solicitations issued on or after October 1, 1995: Use of the new policies, provisions and clauses is optional for solicitations issued before December 1, 1995, and mandatory for solicitations issued on or after December 1, 1995.

Item IV—Effective September 19, 1995.

Dated: September 7, 1995.

Roland A. Hassebrock,
Col, USAF Director, Defense Procurement (Acting).

Dated: September 6, 1995.

Ida M. Ustad,
Associate Administrator for Acquisition Policy, General Services Administration.

Dated: September 7, 1995.

Tom Luedtke,
Deputy Associate Administrator for Procurement, National Aeronautics and Space Administration.
[FR Doc. 95-22775 Filed 9-15-95; 8:45 am]

BILLING CODE 6820-EP-P

48 CFR Parts 1, 4, 14, 15, 16, 31, 33, 36, 45, 46, 49, 52, and 53

[FAC 90-32; FAR Cases 94-720 and 94-721; Item I]

RIN 9000-AG19; 9000-AG30

Federal Acquisition Regulation; Truth in Negotiations Act and Related Changes

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

ACTION: Final rules.