

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Chapter 1

**Federal Acquisition Circular 97-11;
Introduction**

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

ACTION: Summary presentation of final and interim rules, and technical amendments and corrections.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 97-11. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, may be located on the Internet at <http://www.arnet.gov/far>.

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 97-11 and specific FAR case number(s). Interested parties may also visit our website at <http://www.arnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Review of FAR Representations	96-013	Linfield.
II	Very Small Business Concerns (Interim)	98-013	Moss.
III	Variation in Quantity	98-612	Moss.
IV	Electronic Funds Transfer	91-118	Olson.
V	Waiver of Cost or Pricing Data for Subcontracts	98-302	De Stefano.
VI	Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts.	94-610	O'Neill.
VII	Recruitment Costs Principle	98-001	Nelson.
VIII	Compensation for Senior Executives (Interim)	98-301	Nelson.
IX	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. 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.

Federal Acquisition Circular 97-11 amends the Federal Acquisition Regulation (FAR) as specified below:

Item I—Review of FAR Representations (FAR Case 96-013)

This final rule amends FAR parts 1, 4, 12, 14, 26, 27, 32, 41, and 52 to reduce certain contractual requirements for representations or other affirmations that place an unnecessary burden on offerors or contractors.

Item II—Very Small Business Concerns (FAR Case 98-013)

This interim rule amends Federal Acquisition Regulation (FAR) Parts 5, 8, 12, 19, and 52 to implement the Small Business Administration's Very Small Business Pilot Program (13 CFR parts 121 and 125). The rule provides for the set-aside of certain acquisitions between \$2,500 and \$50,000 for very small business (VSB) concerns. The pilot VSB program is limited to buying activities and VSBs located in 10 geographic regions specified by the Small Business Administration and will run through September 30, 2000.

Item III—Variation in Quantity (FAR Case 98-612)

This final rule revises the prescription in 11.703(a) for the clause at 52.211-16, Variation in Quantity, to require use of the clause only in solicitations and contracts where a variation in quantity is authorized. This change makes the clause prescription consistent with language in FAR 11.701(a).

Item IV—Electronic Funds Transfer (FAR Case 91-118)

This final rule amends FAR Parts 13, 16, 32, and 52 to address the use of electronic funds transfer (EFT) for Federal contract payments, and to facilitate implementation of Public Law 104-134 which mandates payment by EFT in most situations. The final rule mainly differs from the interim rule by removing references to the "phase one" time period, which ended on January 1, 1999; by implementing applicable provisions of the Department of the Treasury's final rule at 31 CFR part 208 which addresses the "phase two" time period beginning January 2, 1999; by addressing the situation where contractors furnish EFT information by registering in the Central Contractor Registration database; and by permitting agencies to collect EFT banking information at various time periods ranging from prior to award (as a condition of award) to after award (concurrent with the initial invoice).

Item V—Waiver of Cost or Pricing Data for Subcontracts (FAR Case 98-302)

Section 805 of Public Law 105-261 clarifies that waivers of requirements for submittal of prime contractor cost or pricing data do not automatically waive requirements for subcontractors to submit cost or pricing data. Although this is consistent with the current requirements of FAR 15.403-1(c)(4), the final rule clarifies the requirement to provide rationale supporting any waiver of subcontracts.

Item VI—Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts (FAR Case 94-610)

The interim rule published as Item III in FAC 97-01 is converted to a final rule with minor changes. The final rule makes changes to the definition of "building service contract" at FAR 22.1202, and paragraphs (c) and (j) of the clause at 52.222-50, Nondisplacement of Qualified Workers.

Item VII—Recruitment Costs Principle (FAR Case 98-001)

This final rule amends FAR 31.205-1, Public relations and advertising costs, and FAR 31.205-34, Recruitment costs, to remove excessive wording and details for streamlining purposes.

Item VIII—Compensation for Senior Executives (FAR Case 98-301)

This interim rule revises FAR section 31.205-6(p) to implement Section 804 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261). Section 804 revises the definition of "senior executive" at 10 U.S.C. 2324(1)(5) and at 41 U.S.C. 256(m)(2) to be "the five most highly compensated employees in management positions at each home office and each segment of the contractor." This change applies to costs of compensation incurred after January 1, 1999, regardless of the date of contract award.

Item IX—Technical Amendments

Amendments are being made at FAR 1.106, 25.402, 52.219-8, 53.228, and 53.301-1418 in order to update references and make editorial changes.

Dated: February 25, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97-11 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 97-11 are effective May 3, 1999, except for Items II, VIII, and IX, which are effective March 4, 1999.

Eleanor R. Spector,

Director, Defense Procurement.

Edward C. Loeb,

Acting Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Tom Luedtke,

Acting 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 1, 4, 12, 14, 26, 27, 32, 41, and 52

[FAC 97-11; FAR Case 96-013; Item I]

RIN 9000-AH97

Federal Acquisition Regulation; Review of FAR Representations

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 on a final rule amending the Federal Acquisition Regulation (FAR) to remove or reduce certain requirements for representations and other statements from offerors and contractors.

EFFECTIVE DATE: May 3, 1999.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Paul Linfield, Procurement Analyst, at (202) 501-1757. Please cite FAC 97-11, FAR case 96-013.

SUPPLEMENTARY INFORMATION:**A. Background**

This case was initiated in response to requests from industry to eliminate representations required by the FAR that place an unnecessary burden on offerors or contractors. A proposed rule was published in the **Federal Register** on May 7, 1998 (63 FR 25382), with comments requested by July 6, 1998. Comments were received from 4 respondents and were considered in formulation of the final rule. The final rule is not substantively different from the proposed rule. This rule—

1. Deletes the clause at 52.214-17, *Affiliated Bidders*;
2. Reduces the information collection requirements associated with the clauses at 52.204-5, *Women-Owned Business*; 52.212-3, *Offeror Representations and Certifications—Commercial Items*; 52.214-21, *Descriptive Literature*; 52.228-9, *Cargo Insurance*; and 52.241-1, *Electric Service Territory Compliance Representation*; and

3. Makes editorial changes to the clauses at 52.226-1, *Utilization of Indian Organizations and Indian-Owned Economic Enterprises*; 52.227-15, *Representation of Limited Rights Data and Restricted Computer Software*; 52.228-8, *Liability and Insurance—Leased Motor Vehicles*; and 52.232-12, *Advance Payments*.

The FAR uses many different terms to express affirmation by the contractor, such as "state," "represent," "affirm," "declare," "warrant," and "certify."

41 U.S.C. 425, as amended by Section 4301(b)(1) of Public Law 104-106, restricts the inclusion of nonstatutory certification requirements in the FAR. This law was apparently enacted in response to industry perception that a certification requires a high level of attention within the company, may entail personal accountability of the signing official, and is more likely to be subject to criminal prosecution. Changes were made to the FAR under FAR case 96-312 to comply with this statute.

As has already been established in FAR case 96-312, all other forms of contractual affirmation (e.g., statements, representations, affirmations, declarations, or warranties) are not certifications subject to the statutory restrictions of 41 U.S.C. 425 (see GAO Decision B-278404.2). The other terms of affirmation, despite subjective shades of meaning, are essentially synonymous and are not intended to imply gradations in the level of contractual requirement.

Moreover, the implied difference in level of review for certifications as opposed to other forms of affirmation does not indicate a difference in the Government expectation of truthfulness or accuracy. The Government relies on information provided by the contractor, whether the contractor says "I certify," "I represent," "I state," or simply checks a block. If the information turns out to be false, then the Government may take action under the False Statements Act and may assert its right to other remedies.

Because the use of multiple terms of affirmation other than "certification" may convey unintended differences of meaning, it is our goal in the future to use more simple and consistent terminology. However, some of the terminology changes in the proposed rule were interpreted as a substantive change to the requirements of the clause, implying a reduction in the effectiveness of the commitment by the contractor. Therefore, in the final rule, we do not make any changes to the FAR clauses at 52.216-2, 52.216-3, 52.222-43, 52.222-44, and 52.229-3 because the only proposed change was