

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 23 and 52**

[FAR Case 1998-020]

RIN 9000-AJ21

**Federal Acquisition Regulation;
Hazardous Material Safety Data**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to revise the language that provides policies and procedures for contractor submission of Material Safety Data Sheets (MSDSs).

DATES: Interested parties should submit comments in writing on or before March 5, 2002 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.1998-020@gsa.gov.

Please submit comments only and cite FAR case 1998-020 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Laura Smith, Procurement Analyst, (202) 208-7279. Please cite FAR case 1998-020.

SUPPLEMENTARY INFORMATION:**A. Background**

The Occupational Safety and Health Act of 1970 (OSHA) and the Federal Hazard Communication Standard (29 CFR 1910.1200) provide protection for most of this nation's employees against the hazards of exposure to domestically produced or imported chemicals. This protection is provided by requiring the manufacturer or importer of chemicals to label their products and to develop and distribute detailed MSDSs that evaluate and discuss the impact of

hazardous materials used in the nation's workplaces. The manufacturer or importer is required to provide a copy of the MSDS with initial shipments of the product and whenever revisions to the product require revising the MSDS. OSHA excludes public sector employees from the protection provided by the Federal Hazard Communication Standard. FED-STD 313 was originally developed to extend to Federal employees the protection provided by OSHA laws and regulations to private sector employees.

The current Federal Standard is FED-STD-313D, Material Safety Data, Transportation Data and Disposal Data for Hazardous Materials Furnished to Government Activities, dated April 3, 1996, including Change Notice 1, dated March 21, 2000. The standard establishes the requirement for the preparation and submission of MSDSs by Government contractors who provide hazardous materials to the Government. The standard includes in its definition of hazardous materials any item or chemical that—

1. Is a health hazard or physical hazard as defined by OSHA in 29 CFR 1910.1200;

2. Is reportable or potentially reportable or noticeable as inventory under the reporting requirements of the Hazardous Chemical Reporting (40 CFR part 302), or as an environmental release under the reporting requirements of the Toxic Chemical Release Reporting; Community Right to Know (40 CFR part 372);

3. When being transported or moved, is a risk to public safety or an environmental hazard; and

4. Is a special nuclear source, or by-product material as defined in 10 CFR part 40 or is regulated or referred to as radioactive.

FAR Subpart 23.3, Hazardous Material Identification and Material Safety Data, and FAR 52.223-3, Hazardous Material Identification and Material Safety Data, implement Federal Standard 313 requirements in Government contracts that require the delivery of hazardous materials. The FAR policies and procedures ensure that the Government has notice of hazardous materials that will be supplied under Government contract and receives MSDSs necessary for employee safety and health programs and information necessary for the safe handling, storage, use, transportation and environmentally acceptable disposal of hazardous materials. These policies and procedures also ensure that Federal agencies that have facilities that are required by Executive order to meet reporting and notice requirements under

the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) have the necessary information to make those reports or provide essential information in emergencies.

The Councils initiated this case at the request of industry to consider changes to FAR Subpart 23.3 and FAR 52.223-3. Industry's concerns with the existing FAR text include—

1. The definition of "hazardous material;"

2. The requirement to comply with any future revisions to Federal Standard 313 after contract award without an equitable adjustment;

3. Requiring from contractors information over and above information required by the Federal Hazard Communication Standard. (The FAR Council is analyzing the differences between the OSHA standard and FED STD 313. This analysis will be complete prior to promulgation of a final rule. The FAR Council requests comments whether further changes to FED STD 313 are needed to make it more in line with the Federal Hazard Communication Standard);

4. Ambiguous wording (e.g., term of contract);

5. Virtually unlimited Government rights in the MSDS information and data without any protection for trade secrets or other proprietary data; and

6. Liability issues.

The Councils are proposing the following revisions to the FAR to address industry's concerns:

1. Removing the automatic inclusion of future Federal Standard 313 revisions into the contract. FAR 52.223-3(a) defines "hazardous material" as any material defined as hazardous under the latest version of Federal Standard 313 including revisions adopted during the term of the contract. The Councils agree with industry that the phrase "term of the contract" was ambiguous and that it is difficult to anticipate future changes and their cost impact. This rule modifies the clause to require the contractor to comply with only the version of the Federal Standard in effect at the time of award of the contract. The contracting officer may modify the contract to address subsequent revisions to FED-STD-313, and make an equitable adjustment, if appropriate.

2. Conforming FAR policy for proprietary information and information protected as trade secrets to policies provided in the Federal Hazard Communication Standard and Environmental Protection Agency (EPA) regulation at 40 CFR part 350.

3. Deleting FAR 52.223-3(f) that states that "neither the requirements of this clause nor any act or failure to act by the Government shall relieve the contractor of any responsibility or liability for the safety of the Government, contractor, or subcontractor personnel or property."

Additionally, the rule—

(a) Removes the solicitation provision requirements from FAR 52.223-3 and establishes a separate provision at FAR 52.223-XX;

(b) Clarifies that the rule applies if hazardous materials are expected to be delivered under the contract or incorporated into end items to be delivered under the contract (if certain conditions are met); and

(c) Makes a number of editorial changes.

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule simply provides additional guidance on the current requirement at FAR Subpart 23.3 and the FAR clause at 52.223-3 for contractors to submit MSDSs if they provide hazardous materials to the Government. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR parts 23 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 1998-020), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. Accordingly, the FAR Secretariat has submitted a request for approval of a new information collection requirement concerning OMB Control Number 9000-00XX, FAR case 1998-020, Hazardous Material Safety Data, to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average .268 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.

The annual reporting burden is estimated as follows:

Respondents: 37,000.

Responses per respondent: 1.45.

Total annual responses: 53,600.

Preparation hours per response: .268

Total response burden hours: 14,350.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than March 5, 2002 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVP), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-00XX, FAR Case 1998-020, Hazardous Material Safety Data, in all correspondence.

List of Subjects in 48 CFR parts 23 and 52

Government procurement.

Dated: December 28, 2001.

Victoria Moss,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 23 and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 23 and 52 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 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

2. Revise Subpart 23.3, consisting of sections 23.300 through 23.303, to read as follows:

Subpart 23.3—Hazardous Material Identification and Material Safety Data

Sec.

23.300 Scope of subpart.

23.301 General.

23.302 Procedures.

23.303 Solicitation provision and contract clause.

23.300 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for acquisitions, other than for ammunition and explosives, that require the furnishing of data involving hazardous materials as defined in Federal Standard 313, Material Safety Data, Transportation Data and Disposal Data for Hazardous Materials Furnished to Government Activities; and

(b) Applies if hazardous material is expected to be—

(1) Delivered under the contract; or

(2)(i) Incorporated into end items to be delivered under the contract; and
(ii) Incorporation into the end items does not eliminate their hazardous nature throughout the life cycle of the end items.

(c) Agencies may prescribe special procedures for ammunition and explosives.

23.301 General.

(a) Federal Standard 313, issued and maintained by GSA—

(1) Includes criteria for identification of hazardous materials; and

(2) Establishes requirements for the preparation and submission of Material Safety Data Sheets (MSDSs) by contractors that provide hazardous materials to the Government.

(b) Agencies must obtain MSDSs on hazardous materials delivered under Government contracts to—

(1) Provide for safe handling, storage, use, transportation, and environmentally acceptable disposal of hazardous materials; and

(2) Apprise employees, in accordance with regulations issued by the Occupational Safety and Health Administration (OSHA), of—

(i) All hazards to which they may be exposed;

(ii) Relative symptoms and appropriate emergency treatment; and

(iii) Proper conditions and appropriate protective measures for safe use and handling.

(c) OSHA Standards (29 CFR 1910.1200) or Environmental Protection Agency regulations (40 CFR part 350), as applicable, provide policy when the MSDS indicates that the specific chemical identity of the hazardous material is being withheld as a trade secret.

23.302 Procedures.

The contracting officer must—
 (a) Require the apparently successful offeror or quoter to submit MSDSs before contract award; and
 (b) Provide the safety officer or other designated individual with a copy of all MSDSs received.

23.303 Solicitation provision and contract clause.

(a) Insert the provision at 52.223-XX, Hazardous Materials, in solicitations that include the clause at 52.223-3, Hazardous Material Identification and Material Safety Data.
 (b)(1) Insert the clause at 52.223-3, Hazardous Material Identification and Material Safety Data, in solicitations and contracts if the contract will require the delivery of—
 (i) A hazardous material; or
 (ii) An end item that includes a hazardous material that does not lose its hazardous nature throughout the life cycle of the end item.
 (2) If the agency awarding the contract is not the Department of Defense, use the clause with its Alternate I.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Add section 52.223-XX to read as follows:

52.223-XX Hazardous Materials.

As prescribed in 23.303(a), insert the following provision:
 Hazardous Materials (Date)
 (a) *Definition. Hazardous material*, as used in this provision, means any material defined as hazardous in the version of Federal Standard 313, Material Safety Data, Transportation Data and Disposal Data for Hazardous Materials Furnished to Government Activities, in effect on the date of issuance of the solicitation.
 (b) The offeror or quoter shall—

(1) Submit a list of hazardous materials to be—
 (i) Delivered under the contract; or
 (ii)(A) Incorporated into end items to be delivered under the contract; and
 (B) Incorporation into the end items does not eliminate their hazardous nature throughout the life cycle of the end items; and
 (2) Properly identify the hazardous materials and include any applicable identification numbers, such as the National Stock Numbers or the Special Item Numbers.

HAZARDOUS MATERIALS	
(If none, insert "None")	Identification Nos.

(c) *Material Safety Data Sheets.* (1) The apparently successful offeror or quoter shall submit on or before the date specified by the Contracting Officer a Material Safety Data Sheet (MSDS) meeting the requirements of the version of Federal Standard 313 in effect on the date of issuance of the solicitation, for all hazardous materials identified in paragraph (b) of this provision, even if the apparently successful offeror or quoter is not the actual manufacturer.
 (2) Failure to submit the MSDS prior to award may result in the apparently successful offeror or quoter being considered nonresponsible.
 (End of provision)
 4. Revise section 52.223-3 to read as follows:

52.223-3 Hazardous Material Identification and Material Safety Data.

As prescribed in 23.303 (b)(1), insert the following clause:

Hazardous Material Identification and Material Safety Data (Date)
 (a) *Definition. Hazardous material*, as used in this clause, means any material defined as hazardous in the version of Federal Standard 313, Material Safety Data, Transportation Data and Disposal Data for Hazardous Materials Furnished to Government Act, in effect at the time of award of the contract.—
 (b) *Hazardous material identification.* The Contractor shall—
 (1) Update the list of hazardous materials provided under FAR 52.223-XX, Hazardous Materials. This list must be updated during performance of the contract whenever the

Contractor determines that any other hazardous material will be—
 (i) Delivered under the contract; or
 (ii)(A) Incorporated into an end item to be delivered under the contract; and
 (B) Incorporation into the end item does not eliminate its hazardous nature throughout the life cycle of the end item; and
 (2) Provide the updated list to the Contracting Officer.
 (c) *Material Safety Data Sheets (MSDSs).* The Contractor shall—
 (1) Promptly notify and submit a revised MSDS to the Contracting Officer whenever there is a change in the composition of an item(s) that renders incomplete or inaccurate any MSDS previously submitted under FAR 52.223-XX, or this clause;
 (2) Submit an MSDS if the Contractor determines that any other material to be delivered under this contract is hazardous, even if the Contractor is not the actual manufacturer;
 (3) Submit any revised or new MSDS consistent with the version of Federal Standard 313 in effect at the time of award of the contract; and
 (4) Make MSDSs available to the Government when using any hazardous materials in areas where Government employees may be exposed, including MSDSs for hazardous materials not included on the list of hazardous materials (see paragraph (b)(1) of this clause).
 (d) The requirements of this clause shall not relieve the Contractor from complying with applicable Federal, State, and local laws, codes, ordinances, and regulations (including the obtaining of licenses and permits) concerning hazardous material.
 (End of clause)
Alternate I (Date) As prescribed in 23.303(b)(2), add the following paragraph (e) to the basic clause:
 (e) The Contractor shall—
 (1) For items that are shipped to consignees identified by mailing address as agency depots, distribution centers, or customer supply centers, place one copy of the MSDS in—
 (i) Each shipping container; or
 (ii) A weather resistant envelope affixed to the outside of each shipping container; and
 (2) For other consignees—
 (i) Include a copy of the MSDS with the packing list or other suitable shipping document accompanying each shipment; or
 (ii) If authorized in writing by the Contracting Officer, transmit the MSDSs to consignees in advance of shipment.

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