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 policies and procedures for contractor submission of Material Safety Data Sheets (MSDSs).

DATES: Interested parties should submit comments in writing on or before May 3, 2004, 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

This rule revises the policies and procedures for the submission of material safety data sheets (MSDS) by government contractors who provide hazardous materials to the government. Because this rule differs significantly from the proposed rule that was published in the **Federal Register** at 67 FR 632, January 4, 2002, it is being published as a second proposed rule. The differences between the two proposed rules are as follows:

- FAR 23.301(a)(3). This second proposed rule adds a website where contractors can obtain a copy of Federal Standard No. 313 (FED–STD 313). (*See* comment #2e.)
- FAR 23.301(b)(2). The Councils have revised FAR 23.301(b)(2) of the proposed rule (1) to indicate that the information listed is not all-inclusive, and (2) to better describe the type of information.
- FAR 52.223–3(a) and (c): This second proposed rule adds the requirement that contractors must comply with certain changes to the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard (HCS) that occur after contract award. (*See* comment #2b.)

The first proposed rule required that once the contractor had submitted an MSDS, the contractor was only required to revise the MSDS if the composition of the hazardous material changed, and the change rendered the MSDS incomplete or inaccurate.

This second proposed rule adds a second condition for when the contractor must submit a revised MSDS. The contractor also must submit a revised MSDS if the contractor ''has knowledge, or reasonably should have knowledge, of * * * New information on the health hazards of a chemical or ways to protect the employee that renders the MSDS incomplete or inaccurate.''

The Councils have made several editorial changes.

Seven respondents submitted comments on the proposed rule. A discussion of their comments is provided below:

1. FAR Definition of Hazardous Material

a. *Comment:* The rule is correct by having the FAR definition for ''hazardous'' match the definition in FED–STD 313.

Councils' Response: Concur.

b. *Comment:* The Councils should ''adopt for government use the existing commercial approach to hazard communication that has developed under the Federal Hazard Communication. If a particular program had additional requirements, those needs would be addressed by the Request for Proposal and subsequent negotiations. This ensures that program needs are met without any unnecessary burden being placed on the contractor.'' In other words, the definition of ''hazardous material'' should be limited to the definition of ''hazardous chemical'' as defined in OSHA's HCS, 29 CFR 1910.1200, so that contractors only routinely have to comply with the regulation that is used in the commercial sector, *i.e.*, OSHA's HCS. To comply with other government regulations would be an unnecessary burden on contractors.

Councils' Response: Do not concur. It is also necessary for contractors to comply with the other documents cited in FED–STD 313 that regulate hazardous material. FAR 52.223–3(a) of the proposed rule states that a hazardous material is any material defined as hazardous in FED–STD 313. The definition of ''hazardous material'' in FED–STD 313 is broader than the definition in OSHA's HCS. Paragraph 3.2 of FED–STD 313 indicates that an item or chemical is hazardous if it falls within one of the following four categories:

1. Health or physical hazard that is regulated by OSHA under 29 CFR 1910.1200.

2. Environmental hazard that is regulated by the Environment Protection Agency (EPA) under 40 CFR 302 and 40 CFR 372.

3. When being transported or moved, is a risk to public safety or an environmental hazard that is regulated by the Department of Transportation (DoT) under 49 CFR 100–180 or certain other organizations.

4. Special nuclear source, by-product material, or radioactive and regulated by the Department of Energy (DoE) under 10 CFR or by certain other organizations.

Information is needed on an item that is hazardous during any period of its life cycle. OSHA's HCS addresses chemicals that are hazardous only during ''normal use'' of the chemical. Thus, it would be appropriate to limit FED–STD 313 to the requirements of OSHA's HCS if the government were only concerned with the safety and health of employees during the ''normal use'' of the hazardous chemical in the workplace. However, the government is responsible for managing an item throughout the item's life cycle. This may include storage of the item for extended periods of time, transporting the item, and eventual disposal of the item. To manage the item appropriately, the government must obtain health and safety information if the item exhibits a hazardous nature during any period of its life cycle, not only during the period of ''normal use.'' Therefore, it is appropriate and administratively more efficient to include all the regulatory requirements for hazardous materials in one document (FED–STD 313) rather than address and ''negotiate'' these requirements separately with each procurement.

The Councils also question the argument that the broader definition places an unnecessary burden on the contractor. The regulations cited in FED–STD 313 that apply to government contractors also apply to contractors in the commercial sector. FED–STD 313 is simply the means used to convey these regulatory requirements to contractors under government contracts.

c. *Comment:* The statement at FAR 23.300(b)(2)(ii) and elsewhere seems ''to negate the OSHA ''article'' rule * * *. The words seem to imply if an element of an article * * * has a ''hazardous nature'' an MSDS must be provided. This would be a great burden on manufacturers.'' The OSHA definition of articles or its equivalent should be incorporated into the FAR to clarify that if an item is an ''article'' as defined in OSHA's HCS, an MSDS is not required.

Councils' Response: Do not concur. Under OSHA's HCS (29 CFR 1910.1200(c)), items which are not hazardous during ''normal use'' are termed ''articles'' and are exempt from the requirements for submission of MSDSs. In contrast, the proposed rule (at FAR 23.300(b)(2) and elsewhere) states that if an item is hazardous during any point in the life cycle of the item (*e.g.*, disposal or storage), not just during the period of ''normal use,'' an MSDS is required. Therefore, even though an item may be deemed an ''article'' and not be hazardous under the criteria of OSHA regulations, the same item may be deemed hazardous under other agency regulations cited in FED–STD 313 (*e.g.*, EPA, DoT, etc.).

d. *Comment:* The rule should expand the coverage at FAR 23.300(b) and elsewhere relating to the language ''hazardous materials are expected to be delivered under the contract or incorporated into end items,'' specifically in the areas of carcinogenic and environmental pollutants (*i.e.*, Cadmium and Hexavalent Chromium).

Councils' Response: Do not agree. Since no language was provided by the respondent, the Councils are not clear as to what specific issue is being raised. The plating of many weapon systems does contain cadmium and chromium. While these chemicals are not hazardous during normal use, they become hazardous if the plated part is stripped and re-plated. If the respondent is implying that the rule should be revised to ensure that these chemicals are included in the definition of hazardous material during the de-plating process, the Councils believe that the existing definition for hazardous material in FED–STD 313 and the language in the proposed rule (FAR 23.300(b)(2), FAR 23.303(b)(1)(ii), FAR 52.223–XX(b)(1)(ii)(B), and FAR 52.223–3(b)(1)(ii)(B)) cover this situation.

2. FED–STD No. 313

a. *Comment:* Agree with the government's clarification that the universe of hazardous materials subject to this standard are those materials defined as hazardous at the time of award and that the rule eliminates the ''automatic inclusion of future revisions of FED–STD 313 into a contract without an equitable adjustment * * *.''

Councils' Response: Partially concur. The definition of hazardous material is in FED–STD 313, and includes references to various agency regulations, *e.g.*, OSHA, EPA, DoT, DoE, etc. The Councils agree that, during contract performance, contractors should comply with the version of FED–STD 313 that is in effect at a fixed point in time, *i.e.*, contract award. However, the Councils believe that contractors should comply with certain changes to OSHA's HCS which is cited in FED–STD 313, even if the change occurs after contract award, for the reasons cited in Councils' response to comment #2b.

For the reasons cited below, the Councils do not think it is equitable for the Contractor to comply with the provision re: automatic inclusion of future FED–STD 313 revisions for the reasons cited below.

1. Hard to quantify future changes to FED–STD 313. The current FAR at 52.223–3(a) indicates that the contractor would have to comply with any revised FED–STD 313 without equitable adjustment. This provision appears to impose an undue risk on the contractor since future changes may be hard to predict and quantify during negotiations of the original contract price. Therefore, the proposed rule revised FAR 52.223–3(a) to state that the contractor would be required to comply with FED–STD 313 that is in effect at the time of contract award. Should there be a change to FED–STD 313 subsequent to contract award, the contracting officer would modify the contract with appropriate consideration.

2. Changes to FED–STD 313 not published for public comment. Changes to FED–STD 313 are currently not published in the **Federal Register** to provide the general public the opportunity to comment, although draft changes are circulated to selected interested parties.

b. *Comment:* If the automatic inclusion of future FED–STD 313 revisions into a contract is removed, ''contractors at government work sites where hazardous materials are in use would not have to concern themselves with any changes to FED–STD 313, no matter how important those changes could be to the protection of workers, property and the environment at that work site.''

Councils' Response: Partially concur. The Councils do not think it is equitable for the Contractor to comply with all changes to FED–STD 313 that occur after award for the reasons cited in Councils' response to comment #2(a). On the other hand, it is particularly important that the Government require Contractors to comply with changes to OSHA's HCS because (1) approximately 80 percent of hazardous materials fall within the scope of OSHA's HCS; and (2) the government must obtain current information via MSDSs for the safety and health of government employees in the workplace and to fulfill its obligations under certain statutory and Executive order mandates as they relate to the HCS. 29 U.S.C. 668(a) requires Federal agencies ''to establish and maintain an effective and comprehensive occupational safety and health program consistent with the standards. * * *'' Executive Order 12196, Occupational safety and health programs for Federal employees, October 1, 1980, further requires all Federal agencies to comply with all OSHA standards, including the HCS.

The Deputy Associate Solicitor of Occupational Safety and Health concluded in a 1985 opinion that private sector entities are not required to supply MSDSs to Federal agencies, only to other private sector entities. The same conclusion was reached upon an examination of the applicable regulations and laws. The HCS at 29 CFR 1910.1200(g)(6) and (7) states that it is the responsibility of chemical manufacturers, importers, and distributors to provide MSDSs to employers. The government is specifically excluded from the definition of employer in the enabling legislation (Occupational Safety and Health Act, 29 U.S.C. 651, *et seq.*): ''The term ''employer'' means a person engaged in a business affecting commerce who has employees, but does not include the United States * * *'' (29 U.S.C. 652(5)).

Therefore, to comply with the requirements of the HCS as do employers in the private sector, the government must have the same access to information (MSDSs) as private sector employers directly regulated under OSHA's HCS. To facilitate government compliance, the Councils revised FAR 52.223–3(a) and (c) to accommodate certain changes to OSHA's HCS that may occur after contract award. This change to the rule, while substantive

and requiring public comment, should not be viewed as major by industry since (1) contractors now must comply with this requirement in the private sector, and (2) for pricing purposes, in contrast to changes to the entire FED–STD 313, contractors should have earlier insight into changes contemplated by OSHA during its rule-making process.

c. *Comment:* A new subpart under FAR 23.302 should be added ''to require the contracting officer to keep abreast of changes to FED–STD 313 and modify the contract, as appropriate, to address any definitional changes.''

Councils Response: Do not concur. The functional community, not the contracting officer, should be responsible for monitoring FED–STD 313 changes since they have the technical expertise and the internal management system to detect changes although historically changes to FED–STD 313 are infrequent.

d. *Comment:* FAR 23.301(a)(2) should be changed to read ''Established additional information on the MSDS required by the Government'' to clarify that FED–STD 313 does not establish the requirement for MSDSs, but asks for additional information that is required by EPA, DoT, and others.''

Councils' Response: Do not concur. The Councils recognize that the regulatory agencies are the original source for the information requirements, but FED–STD 313 does establish the MSDS requirement for Government contracts.

e. *Comment:* The rule should be revised to indicate where the reader can obtain FED–STD 313.

Councils' Response: Concur. The proposed rule had removed the address where FED–STD 313 could be purchased. The Councils have added a website at FAR 23.301(a)(3) where individuals can obtain a free electronic copy.

3. MSDSs/Updated List

a. *Comment:* The requirement at FAR 23.302 for the apparently successful offeror or quoter to submit MSDSs to the contracting officer (CO) should be changed to require two copies, ''one to the PCO for file (or ACO) and one for the safety officer,'' to preclude the CO from having to copy and redistribute. For the same reason, the respondent suggests that two copies of the updated list be provided.

Councils' Response: Do not concur. The Councils do not recommend any change because ''safety officer'' is not always the terminology used for the central point of contact but differs among agencies; requiring one extra copy would increase the paperwork burden unnecessarily on contractors, including small businesses; the Councils are not aware of any internal problems with the current procedure; and agencies can always supplement the FAR coverage if they deem it appropriate.

b. *Comment:* The requirement at FAR 52.223–XX(c) to submit MSDSs prior to award should be changed to ''within X days after award.'' Otherwise, contract award may be held up. Given the ''uncertainties in final materials for developmental programs, it will be very difficult, if not impossible,'' to require a vendor to submit MSDSs prior to contract award.

Councils' Response: Do not concur. This is not a new requirement since it is located in the current FAR at 52.223–3(d). The Councils concluded that there should be no changes after examining the historical basis for this requirement. The FAR originally had required the contractor to submit MSDSs after contract award but at least 5 days before delivery of the hazardous material. Because the contractor was permitted to provide them after award, certain government users were not always obtaining the information timely or at all, as noted in the DoD IG Audit Report No. 83–137, Hazardous and Toxic Materials in the Department of Defense, dated June 3, 1983. To alleviate this problem, DAR Case 1986–002, Safety and Occupational and Health provisions, revised the wording to require that the apparently successful offeror submit the MSDSs prior to contract award.

The Councils recognize that there may be situations, especially when subcontractors are involved, when the contractor cannot determine prior to contract award if the deliverable will be hazardous or contain hazardous material. FAR 52.223–3(c)(2) of the proposed rule allows for this situation by indicating that the contractor may submit an MSDS after award if the contractor later determines that any other hazardous material will be delivered under the contract.

c. *Comment:* A significant problem with the proposed FAR revision is its expansion to situations where original equipment and parts manufacturers will be required to prepare, rather than pass on, MSDSs * * * the expertise of some contractors does not reside in the preparation of the MSDSs.

Councils' Response: Do not concur. The preparer of the MSDS is the manufacturer or importer of the hazardous material. If the prime contractor will obtain hazardous material from a subcontractor, then the prime contractor is responsible for flowing down this technical requirement to the subcontractor.

The Councils recognize that there may be situations when non-hazardous chemicals obtained from subcontractors take on different chemical characteristics when mixed during the performance period of the prime contract. In this situation, the prime contractor is responsible for preparing the MSDS, not only because the information is needed for the safety and health of its employees in the workplace, but also because the information is required by regulatory agencies. The FAR and FED–STD 313 are only a means used to enforce the same regulatory requirements on contractors under Government contracts that are imposed on private sector contracts.

d. *Comment:* When the prime contractor obtains the MSDSs from a subcontractor, the subcontractor who manufactures the hazardous material should be responsible for the accuracy of the MSDS, not the prime contractor. In addition, the contractor delivering the aircraft has no way of knowing what specific formulations are used by the many subtier suppliers. Suppliers are free to switch among the qualified products at any time. The contractor will now be required to have the subcontractor submit an MSDS with each part, and, quite possibly, different MSDSs for the same spare part over the life of the program, imposing significant costs and burdens on the subcontractor.

Councils' Response: Partially concur. The Councils concur that the preparer of the MSDS, who may or may not be the contractor furnishing the material to the government, is responsible for the accuracy of the technical data in the MSDS. This is currently stated in paragraph 3.3 of FED–STD 313.

The Councils also agree that one stock number may have multiple products, each with a different MSDS, and, therefore a different package of MSDSs may be required for each individual aircraft or other end item. The Councils view the administration effort to keep track of this effort as a contractor management issue with any associated costs being passed on to the Government.

e. *Comment:* ''The proposed rule could be read to require updates * * * of all hazardous materials information previously provided to the government customer at the time of initial award for the entire period of the contract performance, often many years.''

Councils' Response: Partially concur. FAR 52.223–3(c)(1) of the proposed rule states:

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 * * *.''

The issue centers on the situation when the subcontractor, not the prime contractor, is the manufacturer of the hazardous material, and therefore the subcontractor is the preparer of the MSDS. The prime contractor is concerned that, based on the above language, after submission of the MSDS to the government, the prime contractor is responsible for submitting a revision should new health hazard information necessitate a change to the MSDS. The problem is when the prime contract continues for some time after the subcontract is completed. In this situation, the prime contractor may not become aware of a change. The Councils believe that the respondent has a valid point.

Based on an historical examination of FED–STD 313, the Committee concluded that the intent of the language in the FAR (and FED–STD 313) was to reflect the requirement of OSHA' HCS (29 CFR 1910.1200(g)(6) and (7)), *i.e.*, preparer only provides a revised MSDS upon subsequent shipments. Therefore, if the preparer found new health hazard information after supplying the material, no action from the preparer is required for already delivered quantities, but the preparer would need to include the new information in a revised MSDS for any future deliveries. If, however, the preparer supplied the wrong information, then the preparer has the responsibility to correct that. The prime contractor, in turn, would need to furnish a revised MSDS to the Government if the prime contractor receives one from the preparer.

The Councils recommend revising FAR 52.232–3(c)(1) to indicate that the contractor shall submit a revised MSDS only if the ''contractor has knowledge, or reasonably should have knowledge, of'' certain information that would render the MSDS incomplete or inaccurate.

f. *Comment:* The government should accept electronic versions of MSDSs as an acceptable substitute for paper MSDSs.

Councils' Response: Partially concur. The FAR currently provides that any written information can be provided electronically (see FAR 2.101 definition of ''In writing,'' ''writing,'' or ''written''). Paragraph 4.2.3.3 of FED–STD 313 states that ''electronic transmission of the MSDSs may be accepted, depending on the receiving agencies capabilities.'' However, the government is not ready at this time to accept electronic versions of MSDSs directly into the MSDS repository (Hazardous Material Information System (HMIS)) for hazardous materials procured by certain Federal agencies, including DoD and GSA. Currently, government personnel re-key, from a paper copy of the MSDS, the required data elements into a standard format. The HMIS program office is currently revising the HMIS so that the system will be able to accept and validate MSDSs electronically. The HMIS program office is currently requesting input from both the government and industry in developing a MSDS standard in eXtensible Markup Language (XML). Once this system is in place, revisions to the FAR will be considered. Go to *https://www.denix.osd.mil/denis/Public/Library/MSDS/HMIS/hmis.html* for more information on the initiative to develop an MSDS XML standard.

4. Liability/Proprietary Data/Patent Rights

a. *Comment:* Agrees with deleting FAR 52.223–3(f) relating to liability.

Councils' Response: Concur. Paragraph (f), as presently written in the FAR, and as suggested by one of the respondents, expressly shifts liability from the government to the contractor when the government acts or fails to act. For instance, it appears that under the current FAR coverage, the contractor could be liable for an injury from a hazardous material provided under contract with an MSDS, because the government failed to act, and did not pass on the MSDS information to an employee. The Councils concluded that this interpretation of increased contractor liability and responsibility for acts or failure to act by the government was not intended, and the paragraph should be removed. The rule does not eliminate the contractor's responsibility or associated liability to comply with statutes, codes, ordinances and regulations, and all other normal responsibilities under the contract. The change to this contract clause also does not relieve the contractor of liability for any of the contractor's acts or omissions.

b. *Comment:* Do not advocate diluting the importance of this provision (FAR 52.223–3(f)) in our contracts. Suggest the following language:

''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 personnel (civilian and military), the environment, contractor, or subcontractor personnel or property.''

Councils' Response: Do not concur. *See* the Councils' response to comment #4a.

c. *Comment:* Paragraph (f) should not be deleted since it placed responsibility or liability upon the contractor * * * if those responsibilities are not addressed elsewhere, they should be addressed in 52.223–3. The following language is suggested:

''If any act or failure to act by the government results in the contractor being unable to comply with the requirements of this clause, then the contractor shall be relieved of any responsibility or liability for the safety of government, contractor, or subcontractor personnel or property.''

Councils' Response: Do not concur for the reasons cited in the Councils' response to comment 4a. The Councils also do not agree with adding the suggested language. First, there are remedies in the contract for situations when government action or inaction results in the contractor being unable to comply with the contract. Second, the words offered could be misinterpreted as suggesting that action or inaction by the government relieves the contractor of all responsibility or liability under the contract.

d. *Comment:* FAR policy for proprietary and trade secret information should be conformed to other Federal regulations.

Councils' Response: Partially concur. No specifics were provided. The Councils concur that FAR policy should be consistent with other regulations but the Councils also believe that this issue has already been addressed in the proposed rule by the language added at FAR 23.301(c).

e. *Comment:* The rule should be changed to state ''that any items given that have patent or protected data be recognized as so (sic) and given protection so that it is not given out under a FOIA request. Without such protection, the clause would contradict FAR part 27.1 and would leave the government liable for violation of patent or data rights.''

Councils' Response: Do not concur. The Councils are not clear as to what concerns are being raised by the respondent but the rule is consistent with the FAR (including FAR 27.1), OSHA and EPA regulations, and the Freedom of Information Act. FAR 23.301(c) of the rule provides policy as to the treatment of trade secrets, etc., especially in times of emergency when limited release of the data is required.

5. Other Comments

a. *Comment:* The FAR and DFARS coverage ''should be coordinated and be the same since the DFARS does not currently modify the FAR where MSDS is furnished.''

Councils' Response: Partially concur. The respondent did not provide specifics as to how the DFARS should be modified. The Councils do not agree that the DFARS coverage should be the same as the FAR, but do agree that if DoD needs to further supplement the FAR relating to MSDSs, a separate DFARS case will be opened.

b. *Comment:* In FAR 23.302, the phrase ''The contracting officer must * * *'' should be changed to ''The contracting officer shall * * *.''

Councils' Response: Concur.

c. *Comment:* The phrase ''even if the contractor is not the actual manufacturer'' should be deleted at 52.223-XX(c)(1) and 52.223–3(c)(2). It ''is not needed based on the prior part of each sentence.''

Councils' Response: Do not concur. The sentence in the contract clause states that the contractor must submit a MSDS if any material to be delivered under this contract is hazardous, even if the Contractor is not the actual manufacturer. This phrase is in the current FAR at 52.232–3(d). When the proposed rule established a separate solicitation provision at FAR 52.223–XX, the phrase was retained in both the new solicitation provision and the contract clause at FAR 52.223–3. The prime contractor is responsible for all the requirements in the contract. In the situations where a subcontractor is the actual manufacturer, and therefore preparer of the MSDS, the prime contractor is responsible for flowing down the requirement to the subcontractor. Although this phrase may not be necessary, it is not incorrect. The Councils have decided to retain the phrase after examining its historical basis. The phrase was added under DAR Case 1986–002 to emphasize this basic concept because at that time government personnel were experiencing difficulty in obtaining the MSDS, especially when a subcontractor was the manufacturer of the hazardous material. Removing this phrase at this point may be erroneously perceived as a change in policy.

d. *Comment:* The following paragraph FAR 23.301(b)(2)(iv) should be added to the language in the proposed rule:

(iv) ''Proper disposal of hazardous materials (waste) to protect our environment.''

Councils' Response: Do not concur. The concept that MSDSs are required for proper disposal of hazardous materials is already covered under FAR 23.301(b)(1) of the proposed rule.

This is not a significant regulatory action and, therefore, was not 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

We estimate the annual total burden hours as follows:

Burden hours associated with the requirements of FAR 52.223-XX, Hazardous Materials. The provision requires all offerors to identify and list all hazardous materials that it would deliver under the contract meeting the stated criteria, but would require MSDSs only from the apparently successful offeror. For the majority of respondents, the information required is associated with the OSHA regulations and, therefore, will be readily available and not need to be compiled.

Respondents: 37,000.

Responses per respondent: 1.56.

Total annual responses: 57,860.

Preparation hours per response: .255.

Total response burden hours: 14,773.

Burden hours associated with the requirements of FAR 52.223–3, Hazardous Materials Identification and Material Safety Data. This clause requires the contractor to notify and submit revised MSDSs whenever a change in the composition of an item renders incomplete or inaccurate previously submitted MSDSs. For civilian agencies, additional copies are required in advance or with each shipment or in or on each shipping container. This second proposed rule requires the contractor to submit a new or revised MSDS if (1) there are changes to the OSHA definition of Hazardous Chemical that occur after contract award, or (2) The contractor has knowledge or reasonably should have knowledge of new information that renders the MSDS incomplete or inaccurate. Again, for the majority of respondents, the information required will be readily available and would not need to be compiled and much of the burden is associated primarily with the additional copies of MSDSs.

Respondents: 10,000 (subset of total respondents identified above).

Responses per respondent: 22.

Total annual responses: 220,000.

Preparation hours per response: .05.

Total response burden hours: 11,000.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than May 3, 2004, to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVA), 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 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.

Requesters may obtain a copy of the justification from the General Services

Administration, FAR Secretariat (MVA), 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: February 27, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

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

1. The authority citation for 48 CFR parts 23 and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(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.

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 No. 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 No. 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; and

(3) Can be obtained via the Internet at: *http://www.dsp.dla.mil* under ''Online Specs.'' Select ''Quick Search'' and enter FED-STD for ''Document ID'' and 313 for ''Document Number.''.

(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 information, such as—

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

(ii) Signs and symptoms of exposure 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 shall—

(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 No. 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 No. 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 No. 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, except that when the term in Federal Standard No. 313 references a chemical

defined by the Occupational, Safety and Health Administration (OSHA) as hazardous in 29 CFR 1910.1200, Hazard communication, the term includes any changes to the OSHA regulation definition that occur after contract award.

(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) For any MSDS previously submitted under FAR 52.223–XX or this clause, promptly notify and submit a revised MSDS to the Contracting Officer whenever the Contractor has knowledge, or reasonably should have knowledge, of—

(i) New information on the health hazards of a chemical or ways to protect the employee that renders the MSDS incomplete or inaccurate; or

(ii) A change in the composition of an item(s) that renders the MSDS incomplete or inaccurate.

(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) 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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