justification shall be posted within 30 days after contract award.

(c) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed.

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 5. Amend section 24.203 by adding after the second sentence and at the end of paragraph (b) new sentences to read as follows:

24.203 Policy.

* * * * *

(b) * * * Other exemptions include agency personnel practices, and law enforcement. * * * A Freedom of Information Act guide and other resources are available at the Department of Justice website under FOIA reference materials: *http://www.usdoj.gov/oip*.

[FR Doc. E9–555 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

[FAC 2005–30; FAR Case 2006–023; Item V; Docket 2007–0001; Sequence 8]

RIN 9000–AK75

Federal Acquisition Regulation; FAR Case 2006–023, SAFETY Act: Implementation of DHS Regulations

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 (Councils) have agreed to convert the interim rule that published in the **Federal Register** at 72 FR 63027, November 7, 2007 to a final rule. The final rule amends the Federal Acquisition Regulation (FAR) to implement the Department of Homeland Security (DHS) regulations on the SAFETY Act.

DATES: Effective Date: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2006–023.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 72 FR 63027, November 7, 2007. Seven respondents submitted comments on the interim rule. All respondents generally supported the concepts of the FAR interim rule, but provided suggestions to improve clarity and better achieve the implementation of the SAFETY Act.

1. Definitions.

a. Pre-qualification designation notice (50.201 and associated clauses). In the definition ''pre-qualification designation notice'' one respondent suggested that the word ''successful'' prior to ''offeror'' be deleted because the interim rule allows all offerors to submit streamlined SAFETY Act applications, not just the successful offeror.

Response: The Councils have accepted this suggestion and the definition of ''pre-qualification designation notice'' has been modified throughout the final rule.

b. ''Block designation and ''block certification.'' One respondent was concerned that there is no definition of the terms ''block designation'' and block certification.''

Response: These definitions were embedded within the definition of ''SAFETY Act designation'' and ''SAFETY Act certification.'' These terms are now separately defined, to make it easier to locate the definitions.

2. General (50.203(a)).

The respondent suggested that because SAFETY Act protections extend to purchasers and users of technologies that the phrase in 50.203(a)(2) be amended to reflect this.

Response: Paragraph (a)(2) of the interim rule reads as follows:

''(2) Provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain.''

Risk management and litigation management are addressed in section 864 and 863 of the SAFETY Act respectively, and in 6 CFR 25.5 and 25.7 of the DHS regulations. The required amount of liability insurance purchased by the seller must provide protection for contractors, subcontractors, suppliers, vendors, and customers of the Seller, as well as contractors, subcontractors, suppliers, and vendors of the customer, to the extent of their potential liability for involvement in the manufacture, qualification, sale, use, or operation of the QATT. See Section 864 of the SAFETY Act. Accordingly, the phrase, ''and others in the supply and distribution chain,'' accurately reflects this required coverage. Therefore, no change has been made to the rule as a result of this comment.

3. Policy (50.204).

a. Benefits to the Government. The respondent thought that because the SAFETY Act also benefits the Government with respect to its potential liability, the requiring activities should not only encourage contractors to submit SAFETY Act applications, but also support these applications.

Response: The subject of any benefit the Government may ultimately enjoy with respect to a decreased liability is one that cannot be addressed in the context of this FAR case. The implications are too far reaching and would require a thorough analysis of many of the Government's waivers of sovereign immunity. However, to the extent that one of the criteria for the Department of Homeland Security (DHS) to determine whether to issue a designation is a determination made by a Federal, State, or local official that the technology is appropriate for preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might cause, the FAR case has been amended to specifically reflect this possibility in 50.204(a) by changing the paragraph to read:

50.204 Policy.

(a) Agencies should—

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections and, if appropriate, formally relay this determination to DHS for purposes of supporting contractor application(s) for SAFETY Act protections in relation to criteria (b)(viii) of 6 CFR 25.4, *Designation of Qualified Anti-Terrorism Technologies*;

b. Authorities and responsibilities. One respondent wanted to clarify that determination of whether the SAFETY Act is applicable is within the exclusive purview and discretion of DHS. The respondent therefore recommended that the policy at 50.204(a)(1) should be revised to replace ''should'' with ''shall consult with DHS to...''

Response: It is not necessary in every circumstance to consult with DHS to determine whether the SAFETY Act is applicable. The procedures make it clear that in questionable cases the agency shall consult with DHS (50.205–1(a)).

c. Soliciting contingent offer. Another respondent thought that the language of 50.204(b) concerning not soliciting offers contingent upon SAFETY Act designation or certification before contract award was incongruous with normal acquisition procedures to solicit offers before award.

Response: ''Before contract award'' refers to ''SAFETY Act designation or certification'' not to ''shall not solicit offers.'' This can be clarified by adding a connecting word as follows:

''Agencies shall not solicit offers contingent upon SAFETY Act award designation or certification occurring before contract award, unless...''

d. Responsibility to take action. One respondent requested that the policy should address another responsibility, the responsibility to take action once the determinations are made.

Response: The additional language requested by the respondent is not appropriate in the Policy section. These actions are addressed under FAR 50.205 procedures.

4. SAFETY Act considerations (50.205–1).

a. SAFETY Act Applicability (50.205–1(a)).

i. Several respondents questioned the use of the phrase ''requiring activity'' and some thought it reasonable to include a definition for ''requiring activities.''

Response: The use of this phrase is consistent with other uses in the FAR and defining the term is outside the scope of this case.

ii. One respondent wondered if the statement that ''Requiring activities shall review requirements to identify potential technologies'' means that all requirements must be so reviewed. This respondent considered that it would be helpful if the FAR provided some guidance as to the types of requirements that must be so reviewed, and points to the summary of items at the beginning of FAC 2005–021, which provided examples of the goods and services to which FAR Subpart 50.2 applies.

Response: The Councils do not agree that it is advisable to provide such a list in the regulations. Any such list would never be complete, and could imply that technologies not on the list would not be covered by the SAFETY Act. There are some limited examples in the definition of Qualified Anti-Terrorism Technology (QATT), particularly of services and analyses that may be considered technology. In addition, examples of QATT are to be found on the SAFETY Act website identified at FAR 50.203(c) (e.g., see SAFETY Act 101 Briefing and Active Procurement List).

iii. One respondent recommended that the requiring activity's determination of the existence of a block designation or certification through discussions with DHS, must be mandatory (*i.e.*, change ''should'' to ''shall''). In the same sentence, the respondent recommended changing ''address through preliminary discussions'' to ''ascertain through discussions''. The respondent considered that this change will ensure that if a block designation or certification exists, it will be used in the procurement process.

Response: The Councils do not concur with the change from ''should'' to ''shall'' because the FAR does not direct requiring activities.

However, the Councils do concur with the change from ''address through preliminary discussions'' to ''ascertain through discussions,'' as being more precise. The existence of block designation or certification must be ascertained at this time, not at some time in the future. Therefore, these discussions are not preliminary.

iv. One respondent recommended that the discussion not be limited to ''block designations'' or ''block certifications.'' The respondent stated that DHS regulations provide coverage for ''designated technology,'' ''certified technology,'' and for Developmental Testing and Evaluation Designation for any technology that is being developed. Each of these additional technology designations should be ''on the table'' when a Federal agency is considering whether a technology is appropriate for SAFETY Act coverage.

Response: The block designations and block certifications are checked first because they are broader in scope, covering a class of technologies. There may be a block designation or block certification already in effect that can cover the planned acquisition.

Although ''designated technology'' and ''certified technology'' are specific to a particular technology, these designations are still ''on the table.'' FAR 50.205–1(a)(2) directs the agencies to proceed to 50.205–2, pre-qualification designation notice, if a block designation or block certification does not exist.

With regard to the ''developmental testing and evaluation designation,'' the DHS regulations established this category to cover an anti-terrorism technology that is being developed, but that requires additional developmental testing and evaluation (6 CFR 25.4(f)). However, the determination to use this type of designation is one that DHS may apply to a technology at its sole discretion. The pre-qualification designation notice process does not expressly include permitting a developmental testing and evaluation designation, but rather is limited to stating presumptively or affirmatively that a technology is a QATT. Therefore, while a developmental testing and evaluation designation may result from any application, the FAR language accurately reflects the different streamlined application process and streamlined review times made available to various vendors.

v. One respondent also suggested that the language in 50.205–1(a)(1), ''the requiring activity shall inform the contracting officer to notify offerors'', should be rewritten as ''the requiring activity shall request that the contracting officer notify offerors.''

Response: The Councils have accepted this suggestion as being simpler and clearer.

b. Early consideration of the SAFETY Act.

i. One respondent recommended a cross reference to 7.105(b)(19) be placed in 50.205(b).

Response: The Councils concur.

ii. The same respondent also requested that the regulations should provide guidance on the lead time required for SAFETY Act coverage determinations.

Response: The regulation states at 50.205–1(b) that processing times for issuing determinations on all types of SAFETY Act applications vary depending on many factors, including the influx of applications to DHS and the technical complexity of individual applications. This statement continues to be true, and more specific guidance is not possible.

c. Reciprocal waiver of claims (d). One respondent supported the statement in the rule that the Government is not a customer from which a contractor must request a reciprocal waiver.

Response: None required.

5. Prequalification Designation Notice (PQDN) (50.205–2).

a. PQDN after contract award. One respondent thought that the Pre-Qualification Designation Notices (PQDNs) were not limited to any particular time in the acquisition cycle and therefore, thought that PQDNs should also be available after contract award.

Response: In reviewing the DHS regulations on the issuance of PQDNs,

there is nothing to indicate that the procedure relates to anything other than the future procurement of a technology. See 6 CFR 25.6(g)(2). Further, the time periods of seeking a PQDN and a contractor then applying under the streamlined rules versus simply having the contractor apply for SAFETY Act protections would not justify such a procedure. It would be far simpler for contractors to apply for SAFETY Act protections themselves. The period for an expedited review is 60 days. The review period for a PQDN is also 60 days. When added together, this is equal to the 120 days for an entire SAFETY Act application. Of course, DHS may issue Block Designations and/or Certifications and, therefore, if contractors or requiring activities are interested in having DHS consider whether to issue a Block Designation or Certification, then they should write the Under Secretary of Science and Technology of DHS for this purpose.

b. Specification changes after PQDN. One respondent thought that the FAR case needed to be clarified with respect to specifications or statements of work changing after a PQDN had been issued.

Response: To the extent, that there may be confusion based on the wording in the interim rule, 50.205–2(a) has been amended to read:

(a) Requiring activity responsibilities. (1) If the requiring activity determines that the technology to be acquired may qualify for SAFETY Act protection, the requiring activity is responsible for requesting a pre-qualification designation notice from DHS. Such a request for a pre-qualification designation notice should be made once the requiring activity has determined that the technology specifications or statement of work are established and are unlikely to undergo substantive modification. DHS will then ...

c. Mandatory. With regard to the same paragraph (50.205–1(a)(1)), the respondent requested that the language should be mandatory, changing ''the requiring activity is responsible for requesting'' to ''the requiring activity shall request.''

Response: The FAR provides direction to the contracting officer and the contracting chain of command in an agency. The requiring activities do not look to the FAR for direction.

d. Streamlined methodology for technology already being sold to Government. Several respondents felt that there should be a streamlined methodology to apply and obtain SAFETY Act protections if contractors are already selling existing technologies to the Government.

Response: The DHS rules for applying for SAFETY Act protection do not provide for a *streamlined* methodology to apply and obtain SAFETY Act protection outside of the acquisition process. The FAR cannot provide for any additional methodology without DHS changing its rules on the manners in which to seek SAFETY Act protections. It should be emphasized though that contractors may, like any sellers of technologies, submit an application for SAFETY Act protections at any time. While the timelines for a traditional application are longer, the timelines are not expected to exceed an additional two months.

6. Contingent offers (50.205–3 and Alt I to 52.250–3 and 52.250–4).

a. Market research (50.205–3(a)(3)). One respondent thought the language in 50.205–3(a)(3) was unclear because this subparagraph did not specifically state who would perform the ''market research.'' The respondent thought the requirement for market research should be deleted because it would be difficult for contracting officers to obtain reliable information and because market research will be subjective and can result in widely divergent and inequitable implementation of the contingent and presumptive SAFETY Act clauses. Prior to submission of an offer, a company may not be in a position to make a categorical decision as to whether to supply technology without SAFETY Act coverage.

Response: FAR Part 10 clearly requires that the market research be performed by the contracting officer. Therefore, no change is required to this subparagraph.

It is Government policy to allow contingent offers only if market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections. With regard to subjectivity and widely divergent implementation, it is believed that the direction in FAR Part 10 provides enough guidance so as to protect against such a situation. However, it is recognized, as with any process, different employees will pursue a matter differently. This cannot be avoided.

b. Block certification. One respondent would prefer that the regulations not limit contracting officers from authorizing offers contingent on obtaining a SAFETY Act certification unless a block certification applies to the solicitation. (Also at 50.205–4(b).)

This respondent also recommended that the wording should be ''applies to the technology'' rather than ''applies to the solicitation.''

Response: DHS would not grant SAFETY Act certification unless a block certification existed, or unless the offeror already has applied for a SAFETY Act designation. Otherwise, DHS would first grant a designation, and subsequently grant a certification after the technology is proven, or simultaneously grant a designation and a certification, if requested by the applicant. In any event, a SAFETY Act designation will be part of any SAFETY Act protections conferred to a contractor. In virtually every circumstance, the Government will consider that to be sufficient protection to proceed to award.

The Councils have changed the wording at 50.205–3(b) and 50.205–4(b) to read ''applies to the class of technology to be acquired under the solicitation.''

c. No conditions. Several respondents suggested, with respect to accepting contingent offers, that no conditions or very limited conditions should be placed on a contracting officer's ability to accept contingent offers.

Response: Without analyzing the long-standing precedent of the Government not accepting contingent offers of any kind, the conditions placed on the acceptance of an offer contingent upon an offeror obtaining SAFETY Act designation or certification are very reasonable. The dual nature of the SAFETY Act application processes and the source selection processes makes it inherently risky for the Government to accept contingent offers. However, in light of the importance of using the SAFETY Act effectively, it was deemed worthwhile to accept the risk of permitting contingent offers, but only if certain conditions applied. Accordingly, this case had to mitigate the Government's risk in allowing contingent offers by including such conditions.

d. Right of the Government to award. Several respondents were concerned that paragraphs (f)(2) and (f)(3) of Alternate I to 52.250–3 and 50.250–4 are in conflict with each other, or at best, unclear.

Response: The Councils have rewritten paragraphs (f)(2) and (f)(3) to clarify that the right of the Government to award prior to resolution of the offeror's application for SAFETY Act designation would be an award on another offer, not the contingent offer.

7. Provision prescriptions (50.206).

a. 52.250–2, SAFETY Act Coverage Not Applicable.

i. One respondent recommended clarifying the coverage in FAR 50.206(a)(2) by adding before the period in the sentence the following phrase: ''and no block designation or block

certification applies to the technology to be acquired. See 50.205–1(a).''

Response: It would not be possible to get to this point if there were a block designation or block certification. The first consideration to be checked under the procedures at FAR 50.205–1(a) is whether or not there is a block designation or block certification. It is only if one does not exist that the agency would enter into discussions with DHS as to whether this technology might be a good candidate for a PQDN.

ii. The respondent also considered this clause prescription to be unclear, questioning whether 52.250–2 would be included if the agency based its determination of non-applicability of the SAFETY Act on its own, without DHS consultation, and wanting the FAR to make this clear. The respondent also reiterates that inclusion of a list of examples of items to which the SAFETY Act may be applicable would be helpful in determining whether to include the provision in the solicitation.

Response: The Councils consider that the FAR has made it very clear that this clause would only be used after consultation with DHS—either as specified in FAR 50.206(a)(1) or (a)(2). As stated in section 4.a, there are various sources of examples of products that may be suitable for SAFETY Act protection. However, whenever there is any possibility of applicability, DHS must be consulted.

b. 52.250–3, SAFETY Act Block Designation/ Certification. One respondent stated that it would be helpful to provide information on how to ascertain whether or not DHS has issued a block designation or certification.

Response: When DHS grants a block designation or block certification, it will be listed on the SAFETY Act website (see 50.203(c)). Even though there are currently no block designations or certifications, DHS has been requested to provide a place on the website now, so that it can be verified that there are currently no block designations or block certifications. The website is currently operational.

c. 52.250–3 and -4, Alternate II. One respondent recommended revision of 50.206(b)(3) and (c)(3) so that contracting officers can only increase the 15 day time period for submission of SAFETY Act applications, not decrease it. For some companies, it may not be feasible to submit an application in less than 15 days.

Response: The Councils concur and have revised the text accordingly.

8. ''SAFETY Act Coverage not applicable'' (52.250–2).

Two respondents thought that this provision should be eliminated. One respondent thought that the provision at 52.250–2 could lead to unintended consequences by not specifically limiting the provision to the products or services being acquired under the solicitation. The respondent felt that the wording of the provision might lead potential SAFETY Act applicants to believe that their technologies would never be appropriate for SAFETY Act protection. The respondent believed that this provision conflicts with the SAFETY Act, which confers exclusive authority on DHS to determine whether SAFETY Act application should be approved or denied. Another respondent stated that an offeror should still be precluded from seeking SAFETY Act coverage. If the provision is not removed, the respondent suggested narrowing of the applicability of the statements of inapplicability.

Response: Offerors should be informed if DHS has advised the agency that the SAFETY Act is not applicable or has denied approval of a pre-qualification designation notice. However, to the extent that the wording of the provision might cause some confusion, the Councils have reworded the provision as follows:

''The Government has determined that for purposes of this solicitation the product(s) or service(s) being acquired by this action are neither presumptively nor actually entitled to a pre-determination that the products or services are qualified anti-terrorism technologies as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444. This determination does not prevent sellers of technologies from applying for SAFETY Act protections in other contexts. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See Federal Acquisition Regulation subpart 50.2.''

9. SAFETY Act Prequalification Designation Notice (52.250–4). One respondent suggested that the language in 52.250–4(d) be amended to more accurately reflect the difference between a determination granting a SAFETY Act application and solicitation specifications.

Response: The language in 52.250–4(d) has been amended to more accurately reflect these differences. This amended language is set forth as follows:

(d) All determinations by DHS are based on factors set forth in the SAFETY Act, and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, state, local, or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for technologies submitted for DHS review are based on the factors identified in 6 CFR Section 25.4(b).

10. Alternate II to 52.250–3 and 52.250–4.

a. Insurance requirements and ''good faith''. One respondent suggested that the contractor should have the flexibility to negotiate the insurance requirements based on DHS's grant of a designation or certification.

One respondent wanted the insurance requirement in the FAR removed for a different reason, as well as the requirement that the offeror pursues its application in ''good faith.'' The respondent is concerned that DHS has the exclusive statutory and regulatory authority for implementing the SAFETY Act, including establishment and enforcement of requirements for securing designation or certification, and provides consequences if the company does not agree to the insurance requirements. Furthermore, only DHS can address the question of whether a seller is pursuing an application in ''good faith.''

Response: The respondent's comment cannot be addressed through regulations in the FAR. The insurance required by DHS is based in statute and the implementing DHS regulations. Any flexibility with regard to DHS's required amounts of insurance is a part of DHS's analysis when reviewing a particular SAFETY Act application and is not a subject of negotiation during a contract award.

Although the Councils concur that DHS is the agency that imposes the insurance requirements and can determine if an application is being pursued in good faith, nevertheless, it would be irresponsible to award a contract to an offeror with a presumption that designation will be received, if these conditions are not met.

b. Limited scope of SAFETY Act applications. Paragraph (f)(2) of Alternate II to 52.250–3 and 52.250–4 requires the offeror to file a SAFETY Act designation (or SAFETY Act certification) application, limited to the scope of the applicable block designation (or certification) or pre-qualification designation notice, in order to be eligible for award. The respondent was concerned that this limitation could have harsh results, precluding award where an offeror's technology may provide a more robust solution than definitively required. The

respondent considered that the potential exclusion of technologies outweighs the need to expedite the procurement process.

Response: Alternate II puts the Government in the unusually risky position of awarding a contract presuming that SAFETY Act coverage will be granted after award, and agreeing to negotiate an equitable adjustment if that does not occur. The Government only agrees to this alternate when certain conditions are met, including the fact that DHS has already issued a block designation or a block certification, or a pre-qualification designation notice for the solicited technology. Considering the risk involved in these circumstances, the Government cannot afford the additional risk that would be generated if the offeror then proposes a technology that is outside or beyond the scope of the technologies that have been already block designated or certified by DHS or reviewed and either affirmatively or presumptively endorsed by DHS as technologies that meet the criteria of the SAFETY Act. Without these assurances in advance, the Government cannot afford the risk of presuming that SAFETY Act designation or certification will be granted after contract award.

c. Before or after award. One respondent questioned why the clause at FAR 52.250–4, Alternate II, paragraph (f)(1) addresses submission of proposals presuming SAFETY Act coverage ''before or after'' award, but the heading at 50.205–4 states ''presuming SAFETY Act designation or certification after contract award.''

Response: At the time proposals are submitted, it is not yet known if SAFETY Act coverage will be received before or after award. If SAFETY Act coverage is received before award, there is no issue. However, if award must be made and SAFETY Act coverage has not yet been granted, then the special conditions must apply because award must be made based on the presumption that SAFETY Act coverage will be granted after award.

11. SAFETY Act—Equitable Adjustment (52.250–5).

a. Several respondents suggested that as part of the equitable adjustment clause at 52.250–5 the contractor should be allowed to stop work unilaterally.

Response: This suggestion is contrary to long standing Government procurement law and procedures and therefore, will not be considered further as part of this case. The contractor is not forced to submit an offer.

b. One respondent had a concern that under Alternate II, award can be made and delivery required, prior to receipt of SAFETY Act coverage. The respondent suggested modification of 52.250–5 to allow delayed delivery, without penalty, until SAFETY Act coverage is granted.

Response: This suggestion is inconsistent with the reasons for using this Alternate. The reason for proceeding to award under this alternate is based on a presumption of receiving SAFETY Act coverage after award. Therefore, the risk would have to be weighed against the urgency to award a contract. If delay would be acceptable, then there is no need to accept the risk of awarding a contract based on a contingency. In this case, it would be better to use Alternate I instead of Alternate II, and not make the award until the issue of SAFETY Act coverage is resolved.

c. One respondent wanted clarification of the meaning of ''a dispute in accordance with the ''Disputes'' clause of this contract.''

Response: The Councils consider that ''in accordance with the 'Disputes' clause of this contract'' in paragraph (d)(3) of the clause is sufficiently clear.

12. Comments on Subpart 50.1.

a. One respondent made the statement that the changes in FAR 50.102–3 to the procedures for an Agency to exercise the authority under paragraph 1A of E.O. 10789 would reduce the number of indemnifications granted.

Response: This may well be true. However, these procedures implemented as part of this rule reflect the transfer and delegation of certain functions to, and other responsibilities vested in, the Secretary of DHS, which stem directly from Executive Order 13286 and therefore, cannot be changed by this case.

b. The respondent also commented on other sections in Subpart 50.1.

Response: The interim rule republished existing language because of the massive renumbering of the sections. Renumbering is not a substantive change. The intention of this rulemaking was to take comments solely relating to the Safety Act. Therefore, comments on sections containing existing language where only the numbering was changed are outside the scope of this case.

13. *SAFETY Act Block Designation/Certification (52.250–3).* Two respondents suggested that the SAFETY Act Certification is not a certification provided by the contractor and thus the provisions of the case should be placed in Section L of contracts and not Section K.

Response: This comment is accepted and the appropriate changes will be made in the clause matrix. A SAFETY Act Certification is a certification issued by DHS, not by the offerors.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule imposes no burdens on businesses. Instead, it allows businesses to more easily take advantage of a Department of Homeland Security regulation published June 8, 2006, at 6 CFR part 25. The Department of Homeland Security certified in their rule that there would be no significant impact on a substantial number of small entities. The Councils did not receive any comments on the Regulatory Flexibility Act or a perceived burden on small business.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply. These changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 1640–0001 through 1640–0006, under applications made to OMB by the Department of Homeland Security.

List of Subjects in 48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

Government procurement.

Dated: December 24, 2008.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 which was published in the **Federal Register** at 72 FR 63027 on November 7, 2007, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 continues 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 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

■ 2. Amend section 50.201 by—
■ a. Adding, in alphabetical order, the definitions ''Block certification'' and ''Block designation'';
■ b. Amending the definition ''Pre-qualification designation notice'' by removing the word ''successful''; and
■ c. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation''.
■ The added and revised text reads as follows:

50.201 Definitions.

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.8 and 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

■ 3. Amend section 50.203 by adding a sentence to the end of paragraph (c) to read as follows:

50.203 General.

* * * * *

(c) * * * Included on this website are block designations and block certifications granted by DHS.

■ 4. Amend section 50.204 by revising paragraph (a)(1); and amending paragraph (b) by removing the word ''certification'' and adding ''certification occurring'' in its place. The revised text reads as follows:

50.204 Policy.

(a) * * *

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections and, if appropriate, formally relay this determination to DHS for purposes of supporting contractor application(s) for SAFETY Act protections in relation to criteria (b)(viii) of 6 CFR 25.4, Designation of Qualified Anti-Terrorism Technologies;

* * * * *

■ 5. Amend section 50.205–1 by revising the introductory text of paragraph (a) and paragraph (a)(1); and amending paragraph (b) by removing the word ''possible'' and adding ''possible (see FAR 7.105(b)(19)(v))'' in its place. The revised text reads as follows:

50.205–1 SAFETY Act Considerations.

(a) *SAFETY Act applicability.* Requiring activities should review requirements to identify potential technologies that prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might cause, and may be appropriate for SAFETY Act protections. In questionable cases, the agency shall consult with DHS. For acquisitions involving such technologies, the requiring activity should ascertain through discussions with DHS whether a block designation or block certification exists for the technology being acquired.

(1) If one does exist, the requiring activity should request that the contracting officer notify offerors.

* * * * *

■ 6. Amend section 50.205–2 by adding a new sentence after the first sentence in paragraph (a)(1) to read as follows:

50.205–2 Pre-qualification designation notice.

(a)(1) * * * Such a request for a pre-qualification designation notice should be made once the requiring activity has determined that the technology specifications or statement of work are established and are unlikely to undergo substantive modification. * * *

* * * * *

■ 7. Amend section 50.205–3 by revising paragraph (b) to read as follows:

50.205–3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.

* * * * *

(b) Contracting officers shall not authorize offers contingent upon obtaining a SAFETY Act certification (as opposed to a SAFETY Act designation), unless a block certification applies to the class of technology to be acquired under the solicitation.

■ 8. Amend section 50.205–4 by revising paragraph (b) to read as follows:

50.205–4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.

* * * * *

(b) Contracting officers shall not authorize offers presuming that SAFETY Act certification will be obtained (as opposed to a SAFETY Act designation), unless a block certification applies to the class of technology to be acquired under the solicitation.

50.206 [Amended]

■ 9. Amend section 50.206 in paragraphs (b)(3) and (c)(3) by removing the word ''alter'' and adding the word ''increase'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.250–2 by revising the date of the provision and the provision to read as follows:

52.250–2 SAFETY Act Coverage Not Applicable.

* * * * *

SAFETY ACT COVERAGE NOT APPLICABLE (FEB 2009)

The Government has determined that for purposes of this solicitation the product(s) or service(s) being acquired by this action are neither presumptively nor actually entitled to a pre-determination that the products or services are qualified anti-terrorism technologies as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444. This determination does not prevent sellers of technologies from applying for SAFETY Act protections in other contexts. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See Federal Acquisition Regulation subpart 50.2.

(End of provision)

■ 11. Amend section 52.250–3 by—
■ a. Revising the date of the provision;
■ b. In paragraph (a) by—
■ 1. Adding, in alphabetical order, the definitions ''Block certification'' and ''Block designation''; and
■ 2. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation'';
■ c. Revising paragraph (d);
■ d. Amending paragraph (e) by removing the word ''room'' and adding the word ''Room'' in its place;
■ e. In Alternate I by revising the date of the alternate and paragraphs (f)(2) and (f)(3); and
■ f. In Alternate II by revising the date of the alternate; and amending paragraph (f)(2)(iii) by removing the

word ''any'' and adding ''the offeror's'' in its place.

■ The added and revised text reads as follows:

52.250–3 SAFETY Act Block Designation/ Certification.

* * * * *

SAFETY ACT BLOCK DESIGNATION/ CERTIFICATION (FEB 2009)

(a) * * *

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

* * * * *

(d) All determinations by DHS are based on factors set forth in the SAFETY Act and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, State, local or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for technologies submitted for DHS review are based on the factors identified in 6 CFR 25.4(b).

* * * * *

Alternate I (FEB 2009). * * *

(f)(1) * * *

(2) If an offer is submitted contingent upon receipt of SAFETY Act designation (or SAFETY Act certification, if a block certification exists) prior to contract award, then the Government may not award a contract based on such offer unless the offeror demonstrates prior to award that DHS has issued a SAFETY Act designation (or SAFETY Act certification, if a block certification exists) for the offeror's technology.

(3) The Government reserves the right to award the contract based on a noncontingent offer, prior to DHS resolution of the offeror's application for SAFETY Act designation (or SAFETY Act certification, if a block certification exists).

Alternate II (FEB 2009). * * *

* * * * *

■ 12. Amend section 52.250–4 by—

■ a. Revising the date of the provision;

■ b. In paragraph (a) by—

■ 1. Adding, in alphabetical order, the definitions ''Block certification'' and ''Block designation'';

■ 2. Removing from the definition ''Pre-qualification designation notice'' the word ''successful''; and

■ 3. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation'';

■ c. Revising paragraph (d);

■ d. In Alternate I by revising the date of the alternate and paragraphs (f)(2) and (f)(3); and

■ e. In Alternate II by revising the date of the alternate; and amending paragraph (f)(2)(iii) by removing the word ''any'' and adding ''the offeror's'' in its place.

■ The added and revised text reads as follows:

52.250–4 SAFETY Act Pre-qualification Designation Notice.

* * * * *

SAFETY ACT PRE-QUALIFICATION DESIGNATION NOTICE (FEB 2009)

(a) * * *

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

* * * * *

(d) All determinations by DHS are based on factors set forth in the SAFETY Act and its implementing regulations. A determination by DHS to issue a SAFETY Act designation, or not to issue a SAFETY Act designation for a particular Technology as a QATT is not a determination that the Technology meets, or fails to meet, the requirements of any solicitation issued by any Federal, State, local or tribal governments. Determinations by DHS with respect to whether to issue a SAFETY Act designation for Technologies submitted for DHS review are based on the factors identified in 6 CFR 25.4(b).

* * * * *

Alternate I (FEB 2009). * * *

(f)(1) * * *

(2) If an offer is submitted contingent upon receipt of SAFETY Act designation prior to contract award, then the Government may not award a contract based on such offer unless the offeror demonstrates prior to award that DHS has issued a SAFETY Act designation for the offeror's technology.

(3) The Government reserves the right to award the contract based on a noncontingent offer, prior to DHS resolution of the offeror's application for SAFETY Act designation.

Alternate II (FEB 2009). * * *

* * * * *

■ 13. Amend section 52.250–5 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a) by—

■ 1. Adding the definitions ''Block certification'' and ''Block designation'' in alphabetical order; and

■ 2. Revising the definitions ''SAFETY Act certification'' and ''SAFETY Act designation''.

■ The added and revised text reads as follows:

52.250–5 SAFETY Act—Equitable Adjustment.

* * * * *

SAFETY ACT—EQUITABLE ADJUSTMENT (FEB 2009)

(a) * * *

* * * * *

Block certification means SAFETY Act certification of a technology class that the Department of Homeland Security (DHS) has determined to be an approved class of approved products for homeland security.

Block designation means SAFETY Act designation of a technology class that the DHS has determined to be a Qualified Anti-Terrorism Technology (QATT).

* * * * *

SAFETY Act certification means a determination by DHS pursuant to 6 U.S.C. 442(d), as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 441(b) and 6 U.S.C. 443(a), as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act.

* * * * *

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