and this guidance, military departments as defined in 5 U.S.C. 102, are covered under the auspices of the Department of Defense.

Section 2-204. "Toxic chemical means.

In passing EPCRA, Congress established a list of 320 chemicals and chemical categories by combining the Maryland Chemical Inventory Report List of Toxic or Hazardous Substances and the New Jersey Environmental Hazardous Substance List. Recognizing that the chemical list should be dynamic, Congress authorized EPA to add (or delete) a chemical or category through rulemaking at any time if the chemical meets (or does not meet) the statutory criteria listed in EPCRA section 313(d)(2). EPA may undertake to add or delete a chemical on its own initiative, or when petitioned by a State Governor or the public.

E.O. 12969 defines the universe of subject chemicals as those chemicals on the list described in section 313(c) of EPCRA, as it existed on the effective date of the E.O. Thus, E.O. 12969 could be read to effectively "freeze" on August 8, 1995, the list of toxic chemicals and chemical categories required to be reported by Federal contractors' covered facilities. However, E.O. 12969 is not intended to restrict EPA's authority under section 313(d) and (e) of EPCRA to add or delete chemicals by rulemaking from the list of chemicals as it existed on August 8, 1995. Consequently, EPA believes a reasonable reading of the E.O. is to permit the list of subject toxic chemicals to be modified to exclude those chemicals that are deleted and, similarly, to include those chemicals that are added, by EPA rulemaking pursuant to EPCRA section 313(d) and

If E.O. 12969 were read to "freeze" the list of chemicals for which the covered facilities of a Federal contractor must submit Form Rs, those facilities would not be permitted to stop reporting for a chemical that EPA, under the authority of EPCRA section 313(d) and (e), deletes from the list on the ground that the chemical does not meet the statutory criteria for listing. EPA does not believe that E.O. 12969 is intended to result in such a situation.

In addition, if E.O. 12969 were read to "freeze" the list, Federal contractors would not be required to certify that their subject facilities will file the Form Rs for those chemicals that EPA adds to the list of toxic chemicals subsequent to August 8, 1995. However, the covered facilities of Federal contractors would nonetheless be required to file Form Rs on these added chemicals to comply

with their EPCRA section 313 and PPA section 6607 reporting requirements. EPA believes that all toxic chemicals and chemical categories that are currently on or subsequently added to the list of toxic chemicals, based on the statutory listing criteria, potentially can affect human health or the environment. As such, EPA believes that certification by Federal contractors for these chemicals and chemical categories is appropriate and desirable because filing a Form R provides the public with important information on these toxic chemicals.

Accordingly, EPA interprets E.O. 12969 as requiring Federal agencies to require prospective Federal contractors (and first-tier subcontractors as defined below) to provide a certification, such as the model certification described below, for all toxic chemicals currently listed or added to the EPCRA 313 list, until such time as EPA deletes a toxic chemical through rulemaking, using the statutory criteria of EPCRA section 313(d)(2).

Section 2-206. "Federal contractor means. . . ."

For the purposes of E.O. 12969 and this guidance, a Federal contractor is that entity that has submitted the successful bid or proposal in response to a competitive acquisition solicitation, and that has one or more facilities that will be used in the performance of the contract located in any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States has jurisdiction. A prospective Federal contractor (otherwise referred to in this guidance as an "offeror") is the entity that submits a bid or proposal in response to a competitive acquisition solicitation.

To the extent that an offeror or a Federal contractor has a facility that will provide the supplies or services in the performance of the contract but the facility is located outside of the above identified areas, that facility is not affected by E.O. 12969. When an offeror or Federal contractor is located outside the above identified areas, but has facilities that will provide the supplies or services that are located in the United States or its territories, the facilities are covered under E.O. 12969. Therefore, the prospective Federal contractor should be required to supply the certification for such covered facilities. EPA believes it is appropriate that the applicability of E.O. 12969 be determined based on where the

facility(ies) providing the supplies or services under contract are located.

Also, EPA believes it appropriate and consistent with E.O. 12969 to require Federal agencies to apply the provisions of the E.O. to a first-tier subcontractor through the prime Federal contractor (i.e., first-tier subcontractors should certify to the prime contractor). For purposes of E.O. 12969, a first-tier subcontractor is an entity that is a supplier, distributor, vendor, or firm that furnishes supplies or services directly to or for the prime Federal contractor. Both prospective Federal prime contractors and first-tier subcontractors would certify only for those facilities that will provide the supplies or services in the performance of the contract. To the extent that a prime contractor (or offeror) is not subject to the provisions of E.O. 12969, no prospective or actual subcontracts awarded under the prime contract will be subject to the provisions of E.O. 12969.

EPA believes that the provisions of E.O. 12969 apply to offerors, Federal contractors, and first-tier subcontractors that will be or are providing commercial items under contract. Since passage of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), Federal agencies have been working to streamline the acquisition of commercial items, and EPA supports these efforts. In this regard, the final rule for the acquisition of commercial items includes a contract clause (See Federal Acquisition Regulations (FAR), 48 CFR 52.212-4, published September 18, 1995; 60 FR 48206) which will be included in contracts for commercial items:

(q) Other compliances. The Contractor shall comply will all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

This language will be included in the contract by a new Standard Form 1449-Solicitation/Contract Order for Commercial Items.

Because EPA interprets E.O. 12969 to apply to the acquisition of commercial items, EPA believes that where the resulting contract includes the clause 52.212-4, the contractor must comply with E.O. 12969. Therefore, in contracts for the acquisition of commercial items, EPA does not believe that an additional solicitation certification or contract clause is necessary to implement E.O. 12969. Thus, solicitation certifications and contract clauses such as the models presented in Unit III. of this document need not be included in solicitations or Federal contracts for commercial items.