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Section 3-301. "Each Federal agency shall, to the maximum extent practicable, include. . . ."

Each Federal agency, shall, to the maximum extent practicable, include in competitive acquisition solicitations that will result in the award of a contract expected to exceed \$100,000 (including all options), the certification described in sections 3-303 and 4-404 of the E.O. relating to the requirement for the contractor's facilities to file a Form R. If the contract is expected to exceed \$100,000, the prospective Federal contractor must complete the certification in order to be eligible for the award of the contract.

EPA believes that the E.O. should be read to require the prospective Federal contractor to certify in its response to the solicitation that its covered facilities meeting the applicability requirements detailed in EPCRA section 313 on the date of issuance of E.O. 12969, will file (and continue to file for the life of the contract) a Form R, for each toxic chemical manufactured, processed, or otherwise used at each facility used in the performance of the contract. Offerors who believe that all of the facilities that will be used in the performance of the contract are currently exempt from the reporting requirements of EPCRA section 313 and PPA section 6607 must certify to this effect in its response to the solicitation and must certify that, should such an exemption cease to apply for a subject facility, they will timely file the appropriate Form R(s) during the life of the contract.

The requirements for the certifications described above (and a model of which is presented in Unit III.) should be included in all competitive acquisition solicitations issued October 30, 1995 expected to result in a contract with a Federal contractor exceeding \$100,000, including all options, and will be incorporated into the resultant Federal contract by a contract clause.

The certification must be completed by the offeror on behalf of all of its facilities that will provide supplies or services in the performance of the Federal contract. Because offerors may own or operate more than one facility, there may be situations where some of its facilities are subject to the filing and reporting requirements of the E.O. while others are exempt. In these cases, the offeror would not be able to certify that it is exempt under paragraph (b) of the model certification described below in Unit III. unless all of its facilities that will provide supplies or services in the performance of the contract meet at least one of the criteria for exemption in paragraph (b) of the certification.

The certification requirement applies to all prime Federal contracts and firsttier subcontracts for non-commercial supplies and services where the contract or subcontract is expected to exceed \$100,000. The prime Federal contractor shall include in all competitive solicitations and resulting subcontracts (for first-tier subcontracts) for noncommercial items that are expected to exceed \$100,000, a certification and contract clause such as the models presented in Unit III below. As stated previously, a separate contract clause and certification are not required in contracts for the acquisition of commercial items because these contracts will contain the clause set forth in 48 CFR 52.212-4.

The certification requirement shall also apply to competitive section 8(a) solicitations and contract awards expected to exceed \$100,000 (including all options) that are expected to exceed \$100,000 which are under section 8(a) of the Small Business Act, 15 U.S.C. 637(a).

Section 3-302. "The Federal contractors to the.  $\ldots$ "

The certification requirement should apply only to those offerors (prospective prime contractors and first-tier subcontractors) who own or operate facilities to be used in performance of the proposed contract having Standard Industrial Classification Code (SIC) designations of major groups 20 through 39 as described in EPCRA section 313(b)(1) as they existed on the date of issuance of E.O. 12969. SIC Code major group designations 20 through 39 represent the manufacturing sector and include establishments engaged in the mechanical or chemical transformation of materials or substances into new products. These establishments are usually described as plants, factories and mills. It is important to note that assembly plants also are normally included within major groups 20 through 39.

Section 3-303. "Each Federal agency shall find that. . ."

The reporting requirements of E.O. 12969 are not applicable to a facility within a SIC code major group designation 20 through 39, if any of the criteria in clauses (a) through (c) of section 3-303 apply to the facility. Accordingly, if a prospective Federal contractor can certify that each of its covered facilities that will be used in the performance of the contract meets at least one of the criteria in clauses (a) through (c), none of the contractor's facilities would be required to submit data pursuant to E.O. 12969 and the offeror can certify to this effect. However, the Federal contractor would notify the contracting officer if circumstances change such that, for example, a covered facility supporting the contract is no longer exempt. The solicitation and contract should reflect this requirement and the requirement that the Federal contractor then ensure that its covered facility(ies) supporting the contract file the information required by E.O. 12969.

Persons who are unsure of the applicability of these criteria should review the implementing regulations found at 40 CFR part 372, as well as EPA's "Toxic Chemical Release Inventory Reporting Form R and Instructions" (Revised 1994 Version, EPA 745k–95–051).

On November 30, 1994 (59 FR 61448), EPA issued a final rule establishing an alternate threshold under the authority of EPCRA section 313(f)(2) (40 CFR part 372). Starting with the 1995 reporting year, facilities that exceed the manufacture, process, or otherwise use threshold established under EPCRA section 313(f)(1) do not have to file a Form R if the facility manufactures, processes, or uses 1 million pounds or less per year of the toxic chemical and the facility estimates that its total reportable amount of the toxic chemical in waste streams is 500 pounds or less. (The total reportable amount of the toxic chemical in waste streams includes the quantity released to the environment; the quantity recycled, combusted for energy recovery, treated or disposed onsite; and the quantity transferred off-site for recycling, combustion for energy recovery, treatment, disposal or other release.) Facilities meeting the alternate threshold criteria are able to submit a much shorter form to EPA indicating that the facility met the requirements of the alternate threshold.

Because the alternate threshold of 1 million pounds was established under the authority of EPCRA section 313(f)(2), a prospective Federal contractor with facilities that use the alternate threshold should certify consistent with section 3303(c), that is, the reporting thresholds established under EPCRA section 313(f) have not been met.

Section 3-304. "Each Federal agency shall require. . . ."

See section 2-204.

Section 3-305. "Each Federal agency may amend. . . . "

This provision is self-explanatory. The decision to amend existing contracts rests solely with each Federal agency.