

New FAR Provisions Mandate Consideration of the SAFETY Act in Federal Procurements

A long-awaited Interim Rule addressing the incorporation of the Support Anti-terrorism by Fostering Effective Technologies (SAFETY) Act (6 U.S.C. §§ 441-444) into the Federal Acquisition Regulations (FAR) was issued on November 7, 2007 at 72 Fed. Reg. 63027 ([found here](#)). The revisions to the FAR are designed to integrate the benefits of the SAFETY Act into the Federal acquisition system so that there is a greater and more predictable synchronization between the award of federal homeland security contracts and the issuance of SAFETY Act coverage for the technology that is the subject of those contracts.

The SAFETY Act, which was passed by Congress in 2002, eliminates or dramatically reduces the tort liability related to acts of terrorism for companies providing Department of Homeland Security (DHS) approved anti-terrorism products or services. The benefits of the SAFETY Act are intended to ensure that the threat of unlimited tort liability does not deter companies from deploying their anti-terrorism products or services.

Overall, although the language could be clarified in some areas, the Interim Rule significantly advances the goal of integrating the SAFETY Act into the acquisition process and is a positive achievement. If agency officials, contracting officers and DHS' Office of SAFETY Act Implementation truly embrace the opportunity to consider SAFETY Act issues during the acquisition planning process, the end result will be positive for both the government and industry alike and will help achieve the purpose of the SAFETY Act. Key aspects of the Interim Rule include the following:

Agencies Must Consider Whether the Procured Technology May Be Appropriate for SAFETY Act Coverage

To integrate the SAFETY Act into the acquisition process, the Interim Rule creates a new FAR Subpart 50.2, which requires agencies to determine whether the technology they are procuring may be appropriate for SAFETY Act coverage. If there is any doubt, the procuring agency must consult with DHS. If, after consultation with DHS, it is determined that SAFETY Act protection is not appropriate, the procuring agency must include a clause in its Request for Proposal or Solicitation stating that SAFETY Act coverage is not applicable.

If it is determined that the technology is appropriate for SAFETY Act coverage, it must then be determined whether the technology is the subject of a "Block designation or certification." DHS has previously stated in its regulatory comments that Block designation/certifications "are intended to recognize technology that . . . is based on established performance standards or defined technical characteristics . . . [and] that no additional technical analysis will be required in evaluating [such technology] . . ." 71 Fed. Reg. 33157. If a Block designation/certification exists, it creates a streamlined procedure for providing SAFETY Act coverage for qualified Sellers of such categories of technologies.

If the Agency Believes SAFETY Act Coverage is Appropriate but No Block Designation or Certification Exists, the Procuring Agency Must Apply for a Pre-Qualification Decision from DHS

The procuring agency must request a SAFETY Act pre-qualification decision from DHS by completing the pre-qualification form available on the SAFETY Act website, www.safetyact.gov, when it believes

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the Technology may be appropriate for SAFETY Act coverage. Upon submittal of a request for pre-qualification designation, DHS will evaluate the request and issue a determination. In its determination, DHS can do one of three things:

- Make an “affirmative determination” that the product or service will be awarded SAFETY Act coverage if the technology that is the subject of the procurement satisfies the technical criteria for SAFETY Act designation as a Qualified Anti-Terror Technology (QATT).
- Make a “presumptive determination” that the product or service could be awarded SAFETY Act coverage if the technology is a “good candidate” for SAFETY Act designation as a QATT. In order to ultimately avail itself of this presumptive determination, the contractor must file a SAFETY Act application within 15 days after submittal of its proposal; must pursue its application in good faith, and must agree to obtain the amount of insurance that DHS will require upon award of SAFETY Act Designation; or
- Make a determination that the technology being procured is not a QATT and not appropriate for SAFETY Act coverage.

Regardless of the determination made by DHS, the Contracting Officer (CO) must include information about the agency’s pre-qualification request in any pre-solicitation notice, and must indicate either that the request is under review, has been denied, or has been granted. The Interim Rule provides specific clauses for inclusion in the solicitation depending on the determination by DHS. The clauses also include definitions and descriptions that mirror those in the SAFETY Act implementing regulations, such as the definitions of an Act of Terrorism and QATT.

We offer a few comments about this language and approach. First, a DHS determination that the technology being procured is not appropriate for SAFETY Act coverage (whether that determination is made at the outset of the process or when DHS denies a pre-qualification designation request), may lead to unintended consequences. For instance, a seller of such technology might conclude that its technology will never be an appropriate candidate for SAFETY Act coverage, even though DHS’ “denial” was only in the context of a particular procurement. More important, such seller might conclude it cannot assume the liability risk of any deployments without SAFETY Act coverage and consequently decide not to deploy its technology to other homeland security markets that could benefit from such technology. Second, the regulations are vague as to whether DHS determinations that a seller’s technology is “affirmatively” or “presumptively” covered by the SAFETY Act is limited to the procurement at issue or will apply more broadly to sales of the technology in other markets.

Offers Contingent Upon the Award of SAFETY Act Coverage Are Permitted In Limited Circumstances

The Interim Rule makes clear that COs may authorize the submittal of offers contingent upon receipt of SAFETY Act coverage prior to contract award only if the following three conditions are met:

- DHS has issued a pre-qualification designation notice, Block designation, or Block certification;
- To the contracting officer’s knowledge, the government has not provided advance notice to potential offerors so that these offerors could have obtained SAFETY Act coverage before the release of the solicitation; and
- 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.

FAR 50.205-3. If the submission of contingent proposals is permitted, offerors also are permitted to submit an alternate offer that is not contingent upon SAFETY Act coverage. The extent of evidence required to meet the above “contracting officer’s knowledge” requirement is unclear and seems to set a highly subjective standard.

Contracts May Be Awarded Under the Presumption That SAFETY Act Coverage Will Be Granted; If it is not, A Contractor May Seek an Equitable Adjustment

When it is necessary for the procuring agency to award a contract prior to the issuance of SAFETY Act

coverage for technology that is the subject of a pre-qualification designation notice or a Block designation/certification, the agency can only do so if it meets certain criteria. These include the following: (1) meeting the contingent offer criteria discussed above; and (2) receiving approval from the chief of the Agency contracting office. If the agency awards a contract with the presumption that the contractor will receive SAFETY Act coverage and DHS ultimately denies coverage, the Interim Rule provides the contractor with the ability to request an equitable adjustment. Based on the lack of SAFETY Act coverage, the CO either may make an equitable adjustment to the contract price based on evidence of a resulting increase or decrease in contractor's costs, and/or to other terms and conditions. Alternatively, at the sole option of the government, the agency may terminate the contract for convenience. Although the inclusion of an equitable adjustment provision seems positive and significant, it remains to be seen what impact it will have in situations where SAFETY Act coverage is denied.

Other important aspects of the Interim Rule include the following:

- Acquisition Planning – Requires procurement officials to consider SAFETY Act issues as early in the acquisition cycle as possible, including during the creation of written acquisition plans and in all industry outreach efforts. FAR 7.105; FAR 50.205-1.
- Evaluation Process – The regulations prohibit an agency from requiring an offeror to obtain SAFETY Act coverage. The regulations further explicitly provide that inclusion of the SAFETY Act into a procurement “is not a determination that the technology meets, or fails to meet, the requirements of a solicitation.” FAR 50.204(d).
- Reciprocal Waiver of Claims – For contractors with SAFETY Act coverage, the Interim Rule makes it clear that reciprocal waivers required to satisfy the SAFETY Act are not applicable for Federal government customers. This change eases the burden for many contractors who do business with the Federal government and find the government unlikely to agree to such waivers.

The Interim Rule is a positive step in the long-standing efforts to synchronize SAFETY Act coverage awards with the issuance of federal homeland security contracts. As with any significant regulatory activity, further clarification will be necessary and beneficial. Comments to this Interim Rule will be considered if made by January 7, 2008 and a Final Rule will eventually be issued. McKenna Long & Aldridge intends to submit comments and we solicit your views.

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