

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 9, 14, 15, 31, and 52

[FAR Case 2001-014]

RIN 9000-AJ10

**Federal Acquisition Regulation;
Contractor Responsibility, Labor
Relations Cost, and Costs Relating to
Legal and Other Proceedings—
Revocation**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comment.

SUMMARY: The Federal Acquisition Regulations Council (FAR Council) published in the **Federal Register** at 65 FR 80255, December 20, 2000, a final rule addressing contractor responsibility and costs incurred in legal and other proceedings. The FAR Council is reconsidering its position and requests public comments on this proposed rule revoking the December 20, 2000, final rule. In an interim FAR rule (under FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and other Proceedings, that is being published today) the FAR Council is staying the final rule.

DATES: Interested parties should submit comments in writing on or before June 4, 2001 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.2001-014@gsa.gov

Please submit comments only and cite FAR case 2001-014 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 Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAR case 2001-014.

SUPPLEMENTARY INFORMATION:

A. Background*1. The Final Rule*

The FAR Council published a proposed rule amending FAR Parts 9 and 31 in the **Federal Register** at 64 FR 37360, July 9, 1999. In response to the proposed rule, the Councils received more than 1500 letters. After reviewing the public comments, the FAR Council decided to republish the proposed rule with certain changes.

The FAR Council published a revised proposed rule amending FAR parts 9, 14, 15, 31, and 52 in the **Federal Register** at 65 FR 40830, June 30, 2000. Over 300 public comments were received.

The final rule, which was published in the **Federal Register** at 65 FR 80255 on December 20, 2000, had an effective date of January 19, 2001, 30 days from date of publication.

The final rule included the following revisions:

FAR Part 9

Added language stating that a satisfactory record of integrity and business ethics includes satisfactory compliance with the law including tax, labor and employment, environmental, antitrust, and consumer protection laws (FAR 9.104-1(d)).

Required contracting officers to consider all relevant credible information but stated that the greatest weight must be given to offenses adjudicated within the past three years.

FAR Part 14 and 15

Directed contracting officers to notify offerors if the offerors were excluded based on a nonresponsibility determination.

FAR Part 31

At FAR 31.205-21, made unallowable those costs incurred for activities that assist, promote, or deter unionization.

At FAR 31.305-47, made unallowable those costs incurred in civil or administrative proceedings brought by a government where the contractor violated, or failed to comply with a law or regulation.

FAR Part 52

At FAR 52.209-5, amended the previous certification to require offerors to certify to additional violations (violations of tax, labor and employment, environmental, antitrust, or consumer protection laws) adjudicated within the last three years. It was a check-the-box certification. An offeror would have to provide additional detailed information only

upon the request of the contracting officer.

At 52.212-3(h), made an equivalent change for the certification for commercial items.

2. The Stay

In the interim rule published today, under FAR case 1999-010, the FAR Council is staying the final rule. The FAR Council determined that the 30-day effective date did not give contractors, and the Government, sufficient time to meet the new obligations and responsibilities imposed by the final rule.

The FAR Council intends the stay will last for 270 days from April 3, 2001 or until finalization of this proposed rule, whichever, is sooner.

3. Reconsideration

The FAR Council is reconsidering its position and requests public comments on this proposed rule that revokes the December 20, 2000, final rule.

The FAR Council realizes that there was strong controversy about the merits of the two proposed rules (there were 1800 comments). The typical FAR rule generates about one percent of that amount. The two proposed rules were the most controversial ever published by the FAR Council. Adverse comments were made by individuals within the Government itself, as well as by the public.

After the publication of the final rule, the FAR Council has continued to receive information that the rule is not in the best interests of industry or the Government, the way it was written.

The FAR Council wants to be responsive to the needs of the contracting community, and is therefore continuing a dialog about the rule.

The FAR Council is reassessing the advantages and disadvantages of the changes made by the December 20, 2000, final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule. In this regard, it is not clear to the FAR Council that there is a justification for including the added categories of covered laws in the rule and its implementing certification, that the rule provides contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation, or that the final rule is justified from a cost benefit perspective.

The rule has only been in effect since January 19, 2001. There has not been time for the public to be in a position of reliance upon the rule's existence.

The requirement that contractors must be responsible is statutory. Offerors must have a satisfactory record of

integrity and business ethics. Contracting officers will continue to have the authority and duty to make responsibility decisions. Agency debarment officials will continue to have the authority and duty to make determinations whether to suspend and debar a contractor.

The final rule was one way the Government could assure itself that its contractors will have integrity. There are other ways to arrive at the assurance. For example, the agencies responsible for enforcement of the specific laws cited in the final rule may cite a pattern of violation as cause for debarment or suspending the violator.

The FAR Council is inviting comments on two rules. On this proposed rule, FAR case 2001-014, comments are invited on the revocation of the December final rule. On the interim rule, FAR case 1999-010 (also published today), comments are requested on the length of the stay.

This is a significant rule and was subject to Office of Management and Budget 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 FAR Council does 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 proposed rule will eliminate FAR revisions implemented under FAR Case 1999-010 published in the **Federal Register** on December 20, 2000, (65 FR 80255), that did not have a significant economic impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis is not required. We invite comments from small businesses and other interested parties. We will consider comments from small entities concerning the affected FAR parts in accordance with 5 U.S.C. 610. Small entities must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001-014).

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the FAR changes to Parts 9 and 52 decrease the information collection requirements that the Office of Management and Budget (OMB) approved under OMB Control Number 9000-0094.

The FAR Council estimates that the annual reporting burden for OMB Control Number 9000-0094 applies to

only 89,995 respondents, of which approximately 50,000 would be affected by the modified certification requirement. The 39,995 subcontractors that respond to inquiries from the prime contractor regarding debarment, suspension, or proposed debarment are not affected by the modified certification requirements. The total estimated responses of 500,000 per year is not affected by the modified certification requirements.

The FAR Council estimates that the modified certification requirement would reduce the total burden by 505,000 hours, changing the total from 596,667 to 91,667. This is based on an estimate of 50,000 respondents and 500,000 responses per year. The FAR Council estimates that the modified certification would take an average of 1 hour less for each of the 50,000 initial responses and .3 hours less for each of the 450,000 subsequent responses that year, for a total of 185,000 hours less to respond to the modified certification requirements. The FAR Council further estimates that in many acquisitions, the contracting officer only would have requested additional information if the otherwise apparently successful offeror had certified affirmatively. However, the FAR Council estimates, in some source selections, the contracting officer would have requested such information from all offerors in the competitive range that certified affirmatively. Therefore, we estimate a reduced burden of 140,000 hours for providing additional information. This is based on a burden estimate of 4 hours per initial response and 1 hour per subsequent response, for a total of 140,000 hours for providing additional information. The FAR Council further estimates an additional reduction of 180,000 annual recordkeeping hours based on an estimated average of 6 hours per year for recordkeeping for each of the 30,000 respondents to respond to the request for additional information.

The revised annual reporting burden is estimated as follows:

Respondents: 89,995.

Responses per respondent: 12.22.

Total annual responses: 1,100,000.

Average hours per response: .083.*

Total burden hours: 91,667 hours.

* Average hours per response is calculated by dividing total burden hours by total annual responses.

The Paperwork Reduction Act does not apply to FAR Part 31 cost principles changes because the changes do not impose information collection requirements that require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 4, 2001 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW., Room 4035, Washington, DC 20405.

Public comments are particularly invited on 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.

List of Subjects in 48 CFR Parts 9, 14, 15, 31, and 52

Government procurement.

Dated: March 29, 2001.

Al Matera.

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 9, 14, 15, 31, and 52 as stayed effective April 3, 2001 be further amended as set forth below:

1. The authority citation for 48 CFR parts 9, 14, 15, 31, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

9.103 [Amended]

2. Amend section 9.103 in paragraph (b) by removing the third sentence; and removing paragraph (c) and redesignating paragraph (d) as paragraph (c).

3. In section 9.104-1, revise paragraph (d); remove paragraph (e); and redesignate paragraphs (f), (g), and (h) as (e), (f), and (g) to read as follows:

9.104-1 General standards.

* * * * *

(d) Have a satisfactory record of integrity and business ethics;

* * * * *

9.104-3 [Amended]

4. In section 9.104-3, remove paragraph (c); and redesignate paragraphs (d) and (e) as (c) and (d) respectively.

PART 14—SEALED BIDDING

5. Revise section 14.404–2(i); remove paragraph (j); and redesignate paragraphs (k), (l), and (m) as (j), (k), and (l), respectively, to read as follows:

14.404–2 Rejection of individual bids.

* * * * *

(i) Low bids received from concerns determined to be not responsible pursuant to subpart 9.1 shall be rejected (but if a bidder is a small business concern, see 19.6 with respect to certificates of competency).

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PART 15—CONTRACTING BY NEGOTIATION

6. Revise section 15.503(a)(1); remove paragraph (a)(2); and redesignate paragraph (a)(3) as (a)(2) to read as follows:

15.503 Notification to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive range*. The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.

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PART 31—CONTRACT COST PRINCIPLES AND PROCEDURE**31.205–21 [Amended]**

7. Amend section 31.205–21 by removing the paragraph designation “(a)”, and by removing paragraph (b) in its entirety.

8. Amend section 31.205–47 in paragraph (a) by adding, in alphabetical order, the definition “Fraud” (which was removed in the December 20, 2000, final rule (65 FR 80255) and stayed

effective April 3, 2001; and by removing paragraph (b)(3) and redesignating paragraphs (b)(4) through (b)(6) as (b)(3) through (b)(5), respectively; and revising paragraph (b)(2); to read as follows:

31.205–47 Costs related to legal and other proceedings.**(a) Definitions.**

* * * * *

Fraud, as used in this subsection, means—

(1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

(2) Acts which constitute a cause for debarment or suspension under 9.406–2(a) and 9.407–2(a) and

(3) Acts which violate the False Claims Act, 31 U.S.C., sections 3729–3731, or the Anti-Kickback Act, 41 U.S.C., sections 51 and 54.

(b) * * *

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**52.209–5 [Amended]**

9. In section 52.209–5—

a. Revise the date of the provision to read “(Mar 1996)”;

(b) In paragraph (a)(1)(i)(B), remove “the three-year” and add “a three-year” in its place; and add “and” at the end of the paragraph;

c. In paragraph (a)(1)(i)(C), at the end of the paragraph, remove “; and” and add a period in its place; and

d. Remove paragraphs (a)(1)(i)(D) and (E); remove paragraph (a)(1)(ii), and redesignate paragraph (a)(1)(iii) as (a)(1)(ii).

10. In section 52.212–3—

a. Revise the date of the provision;

b. Revise paragraph (h); and

c. Remove paragraph (i). The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Oct. 2000)

* * * * *

(h) *Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549)*. The offeror certifies, to the best of its knowledge and belief, that—

(1) The offeror and/or any of its principals [] are, [] are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency; and

(2) [] Have, [] have not, within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offerors; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and [] are, [] are not presently indicted for, or otherwise criminally or civilly charged by a Government entity with, commission of any of these offenses.

(End of provision)

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