

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 32**

[FAR Case 94-765]

RIN 9000-AG54

**Federal Acquisition Regulation; Fraud
Remedies**

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

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act) to implement requirements for fraud remedies. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before July 11, 1995 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th and F Streets, NW, Room 4037, Washington, DC 20405.

Please cite FAR case 94-765 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. John Galbraith, Finance/Payment Team Leader, at (703) 697-6710 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-765.

SUPPLEMENTARY INFORMATION:**A. Background**

The Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) (the Act) provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network (FACNET). In order

to promptly achieve the benefits of the provisions of the Act, the government is issuing implementing regulations on an expedited basis. We believe prompt publication of proposed rules provides the public the opportunity to participate more fully in the process of developing regulations.

This notice announces FAR revisions developed under FAR case 94-765. 10 U.S.C. 2307 has contained a statutory requirement titled "Action in Case of Fraud" applicable to only the Department of Defense. Section 2051(e) of the Act added this statutory requirement to the Federal Property and Administrative Services Act (41 U.S.C. 255) applicable to the civilian agencies. This case proposes for FAR 32.006 substantially the same policy and language used by DOD in its implementation at Defense Federal Acquisition Regulations Supplement (DFARS) 232.173.

The statutes at 10 U.S.C. 2307 and 41 U.S.C. 255 provide that if the Government official concerned with coordinating the Government's remedies for a particular case of fraud finds that an advance, partial, or progress payment is based on fraud, that official must recommend the head of the agency reduce or suspend further payments to that contractor. The statutes further provide due process requirements, standards for the amount of suspension or reduction, and other policy and procedural requirements. It should be noted that the authority of the head of the agency to act and the rights of the accused are statutory and are not based on contractual agreement. However, in any situation in which the contractor bases a request for payment in fraud, the Government has contractual and legal rights which the contracting officer may exercise to stop or recover payments. The authority provided by these statutes is in addition to those contractual and legal rights and remedies.

The Department of Defense implemented the statute in part by placing acquisition policy and procedures in the DFARS. However, primary responsibility for implementation of the statute will fall on the agency's fraud remedy coordination official who, in the DOD, is outside the procurement function. Thus, the content of DFARS 232.173 is primarily informational, for the convenience of interested contracting officers and contractors. The DOD also provided a clause at 252.232-7006, "Reduction or Suspension of Contract Payments Upon Finding of Fraud." This clause was also informational in that it notified potential offerors and contractors of the existence of the

statutory remedy and that the Government's exercise of the sovereign remedy for fraud was not an excusable delay contractually.

The proposed FAR coverage follows the existing DFARS with minor differences. The statutory reporting requirements for civilian agencies are slightly different from those for DOD. Also, the FAR coverage does not include a contract clause. The statutory remedy originates in the sovereignty of the United States, not from agreement with the contractor; therefore, no clause is necessary to implement the remedy. Also, if a contractor's request for advance, partial or progress payment is based in fraud, the contractor has no contractual right to the payment; therefore, the agency head's suspension or reduction of payment is not an excusable delay.

A number of points should be noted concerning the details of the coverage:

- The very high level of approval stated in section 32.006-1(b) reflects a specific requirement of the statutes.
- The term "remedy coordination official" is defined by the statutes; however, the agency determines who this official is, what other duties are assigned, where the official is located, and what non-FAR regulations or agency policies are also applicable to the official.
- The proceedings under this subsection are in addition to any contractual or legal rights and remedies the Government may have and are separate from any civil or criminal proceedings.
- The statute provides a limited due process right for the contractor to be notified and submit information prior to the proposed action which is reflected in section 32.006-4(e).

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94-765) because of the clarity and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption, above) on or before June 12, 1995. The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

This proposed rule is not expected 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 rule is not expected to impact 20 percent or more of those small businesses who contract with the Federal Government. The rule will have a significant economic impact only on those small businesses whose request for advance, partial, or progress payment is based upon fraud. While no precise numbers are available, we expect that the number of small businesses who attempt to defraud the Federal Government is extremely small. Moreover, for those affected entities, the economic impact of this rule flows directly from 10 U.S.C. 2307(e)(5) and 41 U.S.C. 255, which state that the contractor must be afforded an opportunity to submit matters to the head of the agency in response to the proposed reduction or suspension of payment. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 94-765), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule falls within the exception provided under 5 CFR 1320.3(c), *i.e.*, matters pertaining to the conduct of a Federal criminal investigation or prosecution, or during the disposition of a particular criminal matter.

List of Subjects in 48 CFR Part 32

Government procurement.

Dated: May 9, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Part 32 be amended as set forth below:

PART 32—CONTRACT FINANCING

1. The authority citation for 48 CFR Part 32 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).

2. Section 32.006 through 32.006-5 is added to read as follows:

32.006 Reduction or suspension of contract payments upon finding of fraud.

32.006-1 General.

(a) 10 U.S.C. 2307(h)(2) and 41 U.S.C. 255, as amended by the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provide for a reduction or suspension of further payments to a contractor when the agency head determines there is substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud.

(b) The agency head may not delegate his or her responsibilities under these statutes below Level IV of the Executive Schedule.

(c) Authority to reduce or suspend payments under these statutes is in addition to other Government rights, remedies, and procedures.

(d) In accordance with these statutes, agency head determinations and decisions under this section may be made for an individual contract or any group of contracts affected by the fraud.

32.006-2 Definitions.

As used in this section—

(a) *Remedy coordination official* means the person or entity in the agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities. (See 10 U.S.C. 2307(h)(10) and 41 U.S.C. 255(g)(9)).

(b) *Substantial evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

32.006-3 Responsibilities.

(a) Agencies shall establish appropriate procedures to implement the policies and procedures of this section.

(b) Government personnel shall report suspected fraud related to advance, partial, or progress payments in accordance with agency regulations.

32.006-4 Procedures.

(a) In any case in which an agency's remedy coordination official finds substantial evidence that a contractor's request for advance, partial, or progress payments under a contract awarded by that agency is based on fraud, the remedy coordination official shall recommend that the agency head reduce or suspend further payments to the contractor. The remedy coordination official shall submit to the agency head a written report setting forth the remedy coordination official's findings that support each recommendation.

(b) Upon receiving a recommendation from the remedy coordination official under paragraph (a) of this subsection, the agency head shall determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(c) If the agency head determines that substantial evidence exists, the agency head may reduce or suspend further payments to the contractor under the affected contract(s). Such reduction or suspension shall be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

(d) In determining whether to reduce or suspend further payment(s), as a minimum, the agency head shall consider—

(1) A recommendation from investigating officers that disclosure of the allegations of fraud to the contractor may compromise an ongoing investigation;

(2) The anticipated loss to the Government as a result of the fraud;

(3) The contractor's overall financial condition and ability to continue performance if payments are reduced or suspended;

(4) The contractor's essentiality to the national defense, or to the execution of the agency's official business;

(5) Assessment of all documentation concerning the alleged fraud, including documentation submitted by the contractor in its response to the notice required by paragraph (e) of this subsection.

(e) Before making a decision to reduce or suspend further payments, the agency head shall, in accordance with agency procedures—

(1) Notify the contractor in writing of the action proposed by the remedy coordination official and the reasons therefor (such notice must be sufficiently specific to permit the contractor to collect and present evidence addressing the aforesaid reasons); and

(2) Provide the contractor an opportunity to submit information within a reasonable time, in response to the action proposed by the remedy coordination official.

(f) When more than one agency has contracts affected by the fraud, the agencies shall consider designating one agency as the lead agency for making the determination and decision.

(g) The agency shall retain in its files the written justification for each—

(1) Decision of the agency head whether to reduce or suspend further payments; and

(2) Recommendation received by an agency head in connection with such decision.

(h) Not later than 180 calendar days after the date of the reduction or suspension action, the remedy coordination official shall—

(1) Review the agency head's determination on which the reduction or suspension decision is based; and

(2) Transmit a recommendation to the agency head as to whether the reduction or suspension should continue.

32.006-5 Reporting.

(a) In accordance with 41 U.S.C. 255, the head of an agency other than the Department of Defense, shall prepare a report for each fiscal year in which a recommendation has been received pursuant to 32.006-4(a). Reports within the Department of Defense shall be prepared in accordance with 10 U.S.C. 2307.

(b) In accordance with 41 U.S.C. 255 and 10 U.S.C. 2307, each report shall contain—

(1) Each recommendation made by the remedy coordination official;

(2) The actions taken on the recommendation(s), with reasons for such actions; and

(3) An assessment of the effects of each action on the Government.

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