

PART 29—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority for part 29 is revised to read as follows:

Authority: 41 U.S.C. 701 *et seq.*; 49 U.S.C. 322(a); E.O. 12549, 3 CFR, 1986 Comp., p. 189.

2. Section 29.100 is revised as set forth at the end of the common preamble.

3. Sections 29.105 and 29.110 are amended as set forth at the end of the common preamble.

4. Sections 29.200, 29.215, 29.220, and 29.225, and Appendices A and B to Part 29 are revised as set forth at the end of the common preamble.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 22, 28, 44, and 52

[FAC 90-28; FAR Case 94-801]

RIN 9000-AG22

Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics)

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

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to reflect the policy of ensuring that suspensions, debarments, and other exclusions from procurement and nonprocurement activities receive reciprocal Government-wide effect as directed by Executive Order (E.O.) 12689, dated August 16, 1989, and Section 2455, Uniform Suspension and Debarment, of the Act. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: August 25, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Julius Rothlein, Ethics Team Leader, at (703) 697-4349 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 FAC 90-28, FAR case 94-801.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes 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.

FAR case 94-801 originated because Section 2455 of Public Law 103-355 was enacted to remedy the current situation where suspensions, debarments, and other exclusions from procurement and nonprocurement activities do not have reciprocal Government-wide effect. The concept of reciprocity for procurement and nonprocurement suspension and debarment actions is not new. Since August 1989 there has been an effort to do by executive order (*i.e.*, E.O. 12689), what section 2455 now prescribes by law. That earlier effort was worked on by a committee known as the "Interagency Committee on Debarment and Suspension." This Interagency Committee is made up of 16 of the Federal executive agencies that impose nonprocurement suspensions and debarments. By October 1994 the agencies in an ad hoc group reached agreement on the language that would implement the concept of reciprocity and be consistent with the principles of the *National Performance Review*. The language in FAR 9.401, Applicability, has been coordinated with the ad hoc group of agencies. The changes to the procurement and nonprocurement rules implement Section 2455 and E.O. 12689 by ensuring that suspensions, debarments, and other exclusions from procurement and nonprocurement activities have reciprocal Government-wide effect.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because only a very small percentage of Federal contractors are debarred or suspended.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Public Comments

A proposed rule was published on December 20, 1994, at 59 FR 65623. Ten substantive comments were received from six commenters. The FASA Implementation Team fully considered all comments received. However, no changes to the case were considered necessary as a result of the public comments. The team's full analysis and disposition of the comments may be obtained from the FAR Secretariat. The most significant comment and its disposition follows:

Comment: One commenter recommended the deletion of the category "proposed for debarment" from the FAR procurement procedures, in order to ensure consistency with the nonprocurement rule which does not place that category on the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

Response: Disagree. The agencies do not believe there is a need to change the rule so that the effect of a proposed debarment is the same under both debarment and suspension systems. The request to make the two rules the same on this matter misconstrues the purpose and effect of the reciprocity effort.

The purpose of the proposed reciprocity rule is to ensure that, once one agency takes action to exclude a person and that person is placed on the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs*, all agencies will honor that determination. In deciding whether to take an action to exclude a person, the agency considers whether a person's present responsibility is affected such that the person poses a risk to the

Federal Government. It was not the intent that the decision to give reciprocity would require the agencies to change the two debarment and suspension systems and establish identical procedures for excluding persons under both the FAR and the Common Rule.

Finally, to ensure uniformity with the Nonprocurement Common Rule (published at 59 FR 65607, December 20, 1994), other technical changes were made to section 9.401.

List of Subjects in 48 CFR Parts 9, 22, 28, 44, and 52

Government procurement.

Dated: May 30, 1995.

Capt. Barry L. Cohen, SC, USN,

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

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 90-28 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-28 is effective August 25, 1995.

Eleanor R. Spector,

Director, Defense Procurement.

Ada M. Ustad,

Associate Administrator for Acquisition Policy, General Services Administration.

Tom Luedtke,

Deputy Associate Administrator for Procurement, NASA, May 18, 1995.

Therefore, 48 CFR Parts 9, 22, 28, 44, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 9, 22, 28, 44, 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

2. Section 9.105-1(c)(1) is revised to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) * * *

(1) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained in accordance with subpart 9.4.

* * * * *

3. Section 9.207(a)(9) is revised to read as follows:

9.207 Changes in status regarding qualification requirements.

* * * * *

(a) * * *

(9) The source is on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (see subpart 9.4); or

* * * * *

4. Section 9.401 is revised to read as follows:

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C. 6101, note), and Executive Order 12689, any debarment, suspension or other Government-wide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Government-wide exclusion initiated on or after August 25, 1995 under this subpart shall also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

5. Section 9.403 is amended by removing the definition *Parties Excluded from Procurement Programs* and adding, in alphabetical order, the definitions *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* and *Nonprocurement Common Rule* to read as follows:

9.403 Definitions.

* * * * *

List of Parties Excluded from Federal Procurement and Nonprocurement Programs means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

Nonprocurement Common Rule means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan

guarantees, subsidies, insurance, payments for specified use, and donation agreements.

* * * * *

6. Section 9.404 is amended—

- by revising the section heading to read as set forth below;
- by revising paragraphs (a)(1), (b) introductory text, (c)(5), (d) introductory text, (d)(3); and
- in paragraph (c)(3) by removing the word “consolidated”. The revised text reads as follows:

9.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(a) * * *

(1) Compile and maintain a current list of all parties debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

* * * * *

(b) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs shall indicate—

* * * * *

(c) * * *

(5) Establish procedures to provide for the effective use of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, except as otherwise provided in this subpart; and

* * * * *

(d) Information on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs is available as follows:

* * * * *

(3) A telephone inquiry service to answer general questions about entries on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs is also available by calling GSA at (202) 501-4873 or 501-4740. The inquiry will be answered within one working day.

9.405 [Amended]

7. Section 9.405 is amended—

- in paragraph (b) by removing the phrase “Parties Excluded from Procurement Programs” and inserting in its place “List of Parties Excluded from Federal Procurement and Nonprocurement Programs”;
- in paragraph (d)(1) by removing the phrase “Procurement Programs” and inserting in its place “Federal

Procurement and Nonprocurement Programs”.

9.405-2 [Amended]

8. Section 9.405-2 is amended—

- in the third sentence of paragraph (b) introductory text by removing the phrase “parties’ inclusion on the list of Parties Excluded from Procurement Programs” and inserting in its place “party’s inclusion on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs”;
- in paragraphs (b)(2) and (b)(3) by removing the phrase “list of Parties Excluded from Procurement Programs” and inserting in its place “List of Parties Excluded from Federal Procurement and Nonprocurement Programs”.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1025 [Amended]

9. Section 22.1025 is amended in the first sentence by removing the phrase

“lists of Parties Excluded from Federal Procurement or” and inserting in its place “List of Parties Excluded from Federal Procurement and”.

PART 28—BONDS AND INSURANCE

28.203-7 [Amended]

10. Section 28.203-7 is amended in paragraphs (c) and (d) by removing the phrase “list entitled Parties Excluded from Procurement Programs” and inserting in its place “List of Parties Excluded from Federal Procurement and Nonprocurement Programs”.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.202-2 [Amended]

11. Section 44.202-2 is amended in paragraph (a)(13) by removing the phrase “Consolidated List of Debarred, Suspended, and Ineligible Contractors” and inserting in its place “List of Parties Excluded from Federal Procurement and Nonprocurement Programs”.

44.303 [Amended]

12. Section 44.303 is amended in paragraph (c) by removing the phrase “list of Parties Excluded from Procurement Programs” and inserting in its place “List of Parties Excluded from Federal Procurement and Nonprocurement Programs”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.209-6 [Amended]

13. Section 52.209-6 is amended by revising the date in the heading of the clause to read “(AUG 1995)” and in paragraphs (c) introductory text, (c)(2), and (c)(3) by removing the phrase “Procurement Programs” and inserting in its place “Federal Procurement and Nonprocurement Programs”.

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