

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 (FAR Council) is implementing Section 8301(e) of the Act by excluding procurement of commercial items from certain certification requirements. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: September 19, 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 90-30, FAR case 94-804.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes in the acquisition process as a result of Federal Acquisition Streamlining Act 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). FAR case 94-804 originated because Section 8301(e) excludes procurements of commercial items from the certification requirement of the Procurement Integrity Act which requires that contractor employees certify that they are familiar with the Act, and that they will report violations of the Act.

B. Regulatory Flexibility Act

The changes may 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 elimination of the certification for commercial items will have a beneficial impact on small entities by reducing the paperwork burden. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The final changes do not impose increased record keeping or information collection requirements on members of the public under the Paperwork Reduction Act which would require the approval of OMB under 44 U.S.C. 3501, *et seq.* This final rule reduces paperwork burden by excluding commercial products from certain certification requirements of the Procurement Integrity Act. A correction reflecting the reduction in paperwork burden was approved by OMB on November 30, 1994, under Control No. 9000-0103.

D. Public Comments

Fourteen substantive comments were received from 11 commenters in response to the proposed rule published in the **Federal Register** on December 1, 1994 (59 FR 61740). The Federal Acquisition Streamlining Act Implementation Team fully considered all comments received. The team's analysis and disposition of the comments may be obtained from the FAR Secretariat.

List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: July 17, 1995.

Capt. Barry L. Cohen, SC, USN,
Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, 48 CFR Parts 3 and 52 are amended as set forth below:

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

1. The authority citation for 48 CFR Parts 3 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).

3.104-9 [Amended]

2. Section 3.104-9 is amended in paragraph (b)(1)(iii) by removing the word "Certify" and inserting in its place "Except in the case of a contract for the procurement of commercial items, certify".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 52.203-8 is amended by revising the date of the provision to read "(SEPT 1995)"; at the end of the introductory text of paragraph (b) by removing the colon and inserting a period in its place and adding a new sentence to read as follows:

52.203-8 Requirement for Certificate of Procurement Integrity.

* * * * *

REQUIREMENT FOR CERTIFICATE OF PROCUREMENT INTEGRITY (SEPT 1995)

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(b) * * * The certification in paragraph (b)(2) of this provision is not required for a procurement of commercial items.

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4. Section 52.203-9 is amended by revising the date of the clause to read "(SEPT 1995)"; at the end of the introductory text of paragraph (c) by removing the colon and inserting a period in its place and adding a new sentence to read as follows:

52.203-9 Requirement for Certificate of Procurement Integrity—Modification.

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REQUIREMENT FOR CERTIFICATE OF PROCUREMENT INTEGRITY—MODIFICATION (SEPT 1995)

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(c) * * * The certification in paragraph (c)(2) of this clause is not required for a modification which procures commercial items.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 3

[FAC 90-30; FAR Case 94-803; Item III]

RIN 9000-AG16

Federal Acquisition Regulation; Whistleblower Protections for Contractor Employees (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) as a result of the enactment of Sections 6005 and 6006 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: September 19, 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 90-30, FAR case 94-803.

SUPPLEMENTARY INFORMATION:

A. Background

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

This rule, FAR case 94-803, implements Sections 6005 and 6006 of the Federal Acquisition Streamlining Act, whistleblower protections for contractor employees. These protections are now virtually identical for contractors employed by both DOD and civilian agencies.

A new subpart is being added to FAR Part 3 which states that these protections apply to contractor employees on all Government contracts. In implementing these sections, guidance found at page 222 of (DOD) Conference Report 103-712 was considered which states: "The conferees direct that the regulations implementing this provision should establish procedures and standards that are as similar as practicable to the procedures and standards already established in Department of Defense regulations." However, unlike DOD FAR Supplement (DFARS) subpart 203.71 (which implemented the former, and now repealed 10 U.S.C. 2409a), a clause which must be included in all contracts is not being mandated. It is noted that, unlike 10 U.S.C. 2409a, neither Section 6005 nor 6006 contains any language which mandates the inclusion of a specific clause in contracts to enforce the prohibitions of the law. Enforcement of this law, like so many other laws, is not dependent on the presence of a clause in the contract. Furthermore, by not prescribing a clause for all contracts, the physical size of the contract document can be reduced and thereby further the acquisition streamlining effort.

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 during the past four years under 10 U.S.C. 2409a, DOD processed less than 70 cases, half against large contractors. Contractor employee whistleblower actions are not expected to increase significantly as a result of the enactment of Sections 6005 and 6006 of Pub. L. 103-355.

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

Forty-one substantive comments were received from 14 commenters in response to the proposed rule published in the **Federal Register** on December 1, 1994 (59 FR 61738). The Federal Acquisition Streamlining Act Implementation Team fully considered all comments received, and the most significant are discussed below. The team's analysis and disposition of the comments may be obtained from the FAR Secretariat.

Comment: A commenter stated that the rule (3.905) raises significant due process concerns as it does not allow the contractor to present or cross-examine witnesses.

Response: Disagree. While it is true that the regulation does not provide for the cross examination of witnesses, administrative due process does not include the right to cross examine witnesses. Administrative due process only provides for notice and the opportunity to be heard. The regulation provides both for notice and the opportunity to be heard by the head of an agency prior to the making of a decision. Comment not accepted.

Comment: A commenter recommended that the rule's reference to "a substantial" violation of law be changed to "any" violation, thereby, including minor violations of law in the rule's coverage.

Response: Disagree. The Federal Acquisition Streamlining Act specifically states that the disclosure

which is the subject of the reprisal must be "a substantial violation of law." Consequently, disclosure of minor violations of law which lead to some reprisal are not covered by Sections 6005 and 6006 of the Act. Comment not accepted.

Comment: Commenters were concerned that 3.904(b) created an unnecessary jurisdictional issue when it indicated that complaints had to be filed within 180 days of discovery of the reprisal.

Response: Agree. Federal Acquisition Streamlining Act does not contain a 180-day filing period. It was proposed to help ensure that the Inspector General (IG) received complaints in a timely fashion so that they could conduct a thorough investigation. The proposed language may have been used to argue that an employee's complaint filed on the 181st day was late and could not be investigated. Again, Sections 6005 and 6006 of the Act do not contain this statute of limitation and the final rule will be changed by deleting 3.904(b) and redesigning 3.904(c) as 3.904(b). Comment accepted.

Comment: A commenter believes that the 30 days provided for the contractor to submit a written response to the IG's report may be too restrictive. Since the statute does not fix a period of time for the contractor's response, the commenter recommended that 3.905(d) provide authority for the IG to set a reasonable period of time for the response appropriate to the nature and complexity of the issues and the facts.

Response: Disagree in part. contractor's written response is made to the head of the agency, not the IG. Agree that there is some need to express how the parties may request an extension of time to file a written response. FAR 3.905(d) will be amended by adding the sentence: "Extensions of time to file a written response may be granted by the head of the agency or designee."

Finally, in 3.905 (b), (c), (d), (e) and 3.906 (a), (b) and (c), the words "or designee" were added after the reference to the "head of the agency" to clarify that the head of the agency may delegate duties under Sections 6005 and 6006.

List of Subjects in 48 CFR Part 3

Government procurement.

Dated: July 17, 1995.

Capt. Barry L. Cohen, SC, USN,

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

Therefore, 48 CFR Part 3 is amended as set forth below:

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

1. The authority citation for 48 CFR Part 3 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. Subpart 3.9, consisting of sections 3.900 through 3.906, is added to read as follows:

Subpart 3.9—Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.

3.901 Definitions.

3.902 Applicability.

3.903 Policy.

3.904 Procedures for filing complaints.

3.905 Procedures for investigating complaints.

3.906 Remedies.

3.900 Scope of subpart.

This subpart implements 10 U.S.C. 2409 and 41 U.S.C. 251, *et seq.*, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).

3.901 Definitions.

Authorized official of an agency means an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract.

Authorized official of the Department of Justice means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

Inspector General means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DOD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

3.902 Applicability.

This subpart applies to all Government contracts.

3.903 Policy.

Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

3.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act; and

(5) The specific nature and date of the reprisal.

3.905 Procedures for investigating complaints.

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other reasons does not merit further investigation, the Inspector General shall advise the complainant that no further action on the complaint will be taken.

(b) If the Inspector General determines that the complaint merits further investigation, the Inspector General shall notify the complainant, contractor, and head of the contracting activity. The Inspector General shall conduct an investigation and provide a written report of findings to the head of the agency or designee.

(c) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor alleged to have committed the violation; and

(3) The head of the contracting activity.

(d) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(e) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

3.906 Remedies.

(a) If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or more of the following actions:

(1) Order the contractor to take affirmative action to abate the reprisal.

(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(b) Whenever a contractor fails to comply with an order, the head of the agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(c) Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law, and this subpart, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to Chapter 7 of Title 5, United States Code.

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