

with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor; or

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a)(1) and (2) of this section, the contracting officer finds the prime contractor is not in compliance, the contracting officer may—

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the contracting officer determines that a certification referred to in paragraph (a)(3) of this section is inaccurate in any material respect, the contracting officer shall initiate administrative or other remedial action.

32.112-2 Subcontractor requests for information.

(a) In accordance with Section 806(a)(1) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355, upon the request of a subcontractor or supplier under a Federal contract for a non-commercial item, the contracting officer shall promptly advise the subcontractor or supplier as to—

(1) Whether the prime contractor has submitted requests for progress payments or other payments to the Federal Government under the contract; and

(2) Whether final payment under the contract has been made by the Federal Government to the prime contractor.

(b) In accordance with 5 U.S.C. 552(b)(1), this subsection does not apply to matters that are—

(1) Specifically authorized under criteria established by an Executive order to be kept classified in the interest of national defense or foreign policy; and

(2) Properly classified pursuant to such Executive order.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Section 52.228-12 is added to read as follows:

52.228-12 Prospective Subcontractor Requests for Bonds.

As prescribed in 28.106-4(b), use the following clause:

Prospective Subcontractor Requests For Bonds (Oct 1995)

In accordance with Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been furnished to the Government pursuant to the Miller Act, the Contractor shall promptly provide a copy of such payment bond to the requester.

(End of clause)

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48 CFR Parts 32, 33, and 52

[FAC 90-32; FAR Case 94-731; Item VIII]

RIN 9000-AG52

Federal Acquisition Regulation; Reimbursement of Protest Costs

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

ACTION: Final rule.

SUMMARY: The Federal Acquisition Regulatory Council is promulgating this final rule to allow the Government to seek reimbursement for protest costs it has paid a protester where the protest has been sustained based upon the awardee's misrepresentation. In addition to any other remedies available, the Government may collect this debt by offsetting the amount against any payment due the awardee under any Government contract the awardee might have. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Craig Hodge, Protests/Disputes Team Leader at (703) 274-8940 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 90-32, FAR case 94-731, Reimbursement of Protest Costs.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994 (the Act), Pub. L. 103-355,

provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements.

This case presents FAR amendments developed under FAR Case 94-731, Reimbursement of Protest Costs. Sections 1016, 1403, and 1435 of the Act provide that agencies may be required to pay protest and offer preparation costs to protesters under certain circumstances. Often as the result of discovery during a protest, misrepresentations may be detected that could not have been reasonably known to the agency's evaluators. A protest may be sustained where the award has been induced by a material misrepresentation by the awardee. Such situations often involve proposed "key personnel."

The agency is without effective remedy in such cases. Theoretically, the agency could ask the Department of Justice to file a lawsuit against the offeror making the misrepresentations. However, due to the heavy workload of the Justice attorneys, this is not a practical alternative. This FAR change will not adversely affect any substantive right of an offeror. Under the language, the Government remedy is to offset such costs on the same or an unrelated contract. If the offeror believes that the offset is not justified, it may appeal the action to the agency, or under the Contract Disputes Act to either a Board of Contract Appeals or the Court of Federal Claims.

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 within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the vast majority of contracts do not involve protests where misrepresentation is detected through discovery.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed 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 in the Federal Register at 60 FR 15450, March 23, 1995. During the public comment period, seven comments were received. Some commenters were concerned that the proposed rule might be in conflict with the Debt Collection Act. However, based on *Cecile Ind. v. Department of Defense*, 995 F.2d 1052 (Fed. Cir. 1993), we do not believe that the Debt Collection Act applies. If it does, the final rule would comply with the Debt Collection Act. Some commenters felt the clause lacked adequate due process. In response, more procedural guidance has been supplied. In particular, the rule provides for a review by the head of the contracting activity, if requested, before there is any final decision. In addition, actions taken under the clause in this rule may be reviewed by courts or boards under the Contract Disputes Act, like any other contract administration decision.

Several commenters suggested the clause was not necessary because the Government already has adequate remedies for contractor misrepresentation. The drafting team agreed that there are additional remedies. For example, the rule now provides that the contracting officer should consider referring contractor misrepresentations to the agency debaring official. However, these remedies do not always prove adequate in the context of misrepresentations discovered as the result of bid protests.

One commenter recommended clarification of whether the agency head or the contracting officer is responsible for issuing the demand letter. The final rule states that this is the responsibility of the contracting officer.

List of Subjects in 48 CFR Parts 32, 33, and 52

Government procurement.

Dated: September 7, 1995.

Edward C. Loeb,

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

Therefore, 48 CFR Parts 32, 33, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 32, 33, 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 32—CONTRACT FINANCING

2. Section 32.602 is amended by adding paragraph (h) to read as follows:

§ 32.602 General.

* * * * *

(h) Reimbursement of costs, as provided in 33.102(b), 33.104(h)(1), and 33.105(g)(1), paid by the Government where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

3. Section 32.603 is revised to read as follows:

§ 32.603 Applicability.

Except as otherwise specified, this subpart applies to all debts to the Government arising in connection with contracts and subcontracts for the acquisition of supplies or services, and debts arising from the Government's payment of costs, as provided in 33.102(b), 33.104(h)(1), and 33.105(g)(1), where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

4. Section 32.605(b) is amended by inserting the phrase "including reimbursement of protest costs," between the words "contract debts," and "the contracting officer".

PART 33—PROTESTS, DISPUTES, AND APPEALS

5. Section 33.102 is amended by adding paragraph (b)(3) to read as follows:

§ 33.102 General.

* * * * *

(b) * * *
(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO or GSBICA under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the

contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

* * * * *

6. Section 33.104 is amended by adding paragraph (h)(7) to read as follows:

33.104 Protests to GAO.

* * * * *

(h) * * *
(7) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

7. Section 33.105 is amended by adding paragraph (g)(5) to read as follows:

33.105 Protests to GSBICA.

* * * * *

(g) * * *
(5) If the Government pays costs, as provided in paragraph (g)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.233-3 is amended by adding paragraph (f) to read as follows:

52.233-3 Protest after Award.

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Protest After Award (Oct 1995)

* * * * *

(f) If, as the result of the Contractor's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this contract is sustained, and the Government pays costs, as provided in FAR 33.102(b)(2), 33.104(h)(1), or 33.105(g)(1), the Government may require the Contractor to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the Contractor under any contract between the Contractor and the Government.

(End of clause)

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