

contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources under this solicitation.

(End of provision)

16. Section 52.216-28 is added to read as follows:

52.216-28 Multiple Awards for Advisory and Assistance Services.

As prescribed in 16.506(g), insert the following provision:

Multiple Awards for Advisory and Assistance Services (Oct 1995)

The Government intends to award multiple contracts for the same or similar advisory and assistance services to two or more sources under this solicitation unless the Government determines, after evaluation of offers, that only one offeror is capable of providing the services at the level of quality required.

(End of provision)

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48 CFR Part 32

[FAC 90-33; FAR Case 94-765; Item IV]

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: Final rule.

SUMMARY: This final 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.

EFFECTIVE DATE: October 1, 1995.

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 FAC 90-33, 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.

This notice announces amendments 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 civilian agencies.

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.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this 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 this rule will impact only upon the small percentage of small businesses whose request for an advance, partial, or progress payment is based upon fraud.

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.

D. Public Comments

The proposed rule was published in the Federal Register on May 12, 1995, at 60 FR 25794. Six comments were received. The most important point noted was the inapplicability of the coverage to the National Aeronautics and Space Administration and the

United States Coast Guard. These agencies are normally subject to Title 10 of the United States Code; however, this statutory language specifically applied these statutory provisions to just the Department of Defense. The changes made to the Federal Property and Administrative Services Act (41 U.S.C. 225) apply to all agencies subject to that Act. This coverage has been appropriately modified.

One commentor proposed the addition of the following language to the coverage: "If payments are suspended and it ultimately is determined that no fraud existed, the contractor shall be entitled to any damages that resulted from such suspension of payment." This recommendation was not accepted. Under these statutes, the Government is acting in its role as sovereign, not under its contractual authority. The statutes do not provide the accused with a remedy for incorrect or unproved accusations. Any remedy would be determined by the Constitution and other law and statutes.

List of Subjects in 48 CFR Part 32

Government procurement.

Dated: September 20, 1995.

Edward C. Loeb,

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

Therefore, 48 CFR Part 32 is 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. Sections 32.006 through 32.006-5 are added to read as follows:

Sec.

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

32.006-1 General.

32.006-2 Definitions.

32.006-3 Responsibilities.

32.006-4 Procedures.

32.006-5 Reporting.

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

32.006-1 General.

(a) Under Title 10 of the United States Code, the statutory authority implemented by this section is available only to the Department of Defense; this statutory authority is not available to the National Aeronautics and Space Administration or the United States Coast Guard. Under the Federal Property and Administrative Services Act (41 U.S.C. 255), this statutory

authority is available to all agencies subject to that Act.

(b) 10 U.S.C. 2307(h)(2) and 41 U.S.C. 255, as amended by the Federal Acquisition Streamlining Act of 1994, Public Law 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. This authority does not apply to commercial interim payments under subpart 32.2, or performance-based payments under subpart 32.10.

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

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

(e) 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—

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).)

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; and

(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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48 CFR Part 32

[FAC 90-33; FAR Case 94-761, Item V]

RIN 9000-AG34

Federal Acquisition Regulation; Assignment of Claims

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 Section 2451 of the Federal Acquisition Streamlining Act of 1994 to implement revisions which expand the authority to prohibit setoffs against assignees when contractors assign a contract to a financial institution. 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. John Galbraith, Finance/Payment Team Leader, at (703) 697-6710, in reference to this FAR case. For general information, contact the FAR