

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 9, 14, 15, 31, and 52**

[FAR Case 1999-010]

RIN 9000-AI40

**Federal Acquisition Regulation;
Contractor Responsibility, Labor
Relations Costs, and Costs Relating to
Legal and Other Proceedings**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) published in the *Federal Register* at 64 FR 37360, July 9, 1999, a proposed rule for public comment related to contractor responsibility and costs incurred in legal and other proceedings. The comment period lasted 120 days. In response to the proposed rule, more than 1500 letters were received. As a result of the review of those responses, the Federal Acquisition Regulatory Council (FAR Council) has decided to publish a revised proposed rule.

DATES: Interested parties should submit comments in writing on or before August 29, 2000 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.1999-010@gsa.gov.

Please submit comments only and cite FAR case 1999-010 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAR case 1999-010.

SUPPLEMENTARY INFORMATION:**A. Background**

The CAAC and DARC published a proposed rule amending FAR Parts 9 and 31 in the *Federal Register* at 64 FR

37360, July 9, 1999, requesting comments from the public. The proposed rule attempted to clarify what constitutes a "satisfactory record of integrity and business ethics" for a federal contractor.

The comment period for the proposed rule closed on November 8, 1999. In response to the proposed rule, the CAAC and DARC received more than 1500 letters. After reviewing the comments, the FAR Council decided to republish the proposed rule with certain changes (as listed below). The FAR Council intends this revised proposal to clarify the existing requirement that federal contractors must have a satisfactory record of integrity and business ethics. They considered all of the public comments in preparing this revised proposal.

1. FAR Part 9, Contractor Responsibility.

a. *Integrity and business ethics.* The initial rule sought to clarify contractor responsibility considerations by adding examples of what may be considered "an unsatisfactory record of integrity and business ethics." Specifically, it emphasized that contracting officers could regard a prospective contractor's lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws as indicating an unsatisfactory record of integrity and business ethics.

Many members of the public expressed concerns about the proposed rule. They suggested—

(1) The language in the rule was vague and subjective, raising a risk of abuse, and perhaps leading to inconsistent application of law;

(2) The proposed rule could have the effect of shifting responsibility for reviewing and giving effect to violations of law from agency debarment officials to contracting officers, placing an undue burden on contracting officers;

(3) The proposal seemed more of a punitive measure than one designed to protect the Government's interest;

(4) The proposal appeared to permit contracting officers to give undue weight to unsubstantiated allegations;

(5) The proposed rule appeared to modify the causes for debarment; and

(6) An Initial Regulatory Flexibility Analysis should be performed, because the final rule could have a significant economic impact on a substantial number of small entities.

After considering all of these comments, the FAR Council is replacing the initial proposal with two separate proposed rules. The present FAR case represents a revised proposed rule

pertaining to contractor responsibility and certain cost principles. It includes an Initial Regulatory Flexibility Analysis (*see* Paragraph B., Regulatory Flexibility Act), which supports a conclusion that the rule is not likely to have a significant economic impact on a substantial number of small entities. The FAR Council plans to open a new FAR case addressing the issue of debarment responding to the public's comments on that subject.

In the present FAR case, the FAR Council has revised the proposed rule in a number of ways:

(1) New language would clarify FAR 9.103 to reflect that contracting officers should coordinate with agency legal counsel on all non-responsibility determinations based upon integrity and business ethics.

(2) Additional language would modify FAR 9.104-1(d) to confirm that satisfactory compliance with federal laws including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws would be part of a satisfactory record of integrity and business ethics.

(3) A revised section clarifies that in assessing contractor responsibility, contracting officers may consider all relevant credible information, but should give greatest weight to decisions within the past three years preceding the offer as follows:

Convictions of or civil judgments rendered against the prospective contractor for—

(a) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public (Federal, State, or local) contract or subcontract;

(b) Violation of Federal or State antitrust statutes relating to the submission of offers;

(c) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(d) Any other Federal or State felony convictions or pending Federal or State felony indictments; and

(e) Federal court judgments in civil cases brought by the United States against the contractor.

Federal decisions by Federal Administrative Law Judges or Federal Administrative Judges and adjudicatory decisions, orders, or complaints issued by any federal agency, board, or commission, indicating the contractor has been found to have violated Federal tax, labor and employment, antitrust, or consumer protection law.

(4) All offerors must certify to contracting officers whether within the past three years, they have been convicted of any felonies (or have any felony indictment currently pending against them) arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws, had any adverse court judgments in civil cases against them arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws in which the United States brought the action, or been found by a Federal Administrative Law Judge, Federal Administrative Judge, agency, board or commission to have violated any Federal tax, labor and employment, environmental, antitrust, or consumer protection law. Before publication of a final rule, the FAR Council would need to obtain approval of this new certification requirement from the Administrator for Federal Procurement Policy in accordance with 41 U.S.C. 425(c)(1)(B).

(5) New language would modify FAR 14.404-2(i) and 15.503(a)(1), which provide for notification to unsuccessful bidders and offerors promptly after a non-responsibility determination is made. The modification would ensure that if non-responsibility is the basis for rejection of the bid or elimination of an offer from the competition, then the contracting officer must provide the reasons for the non-responsibility determination in the notification.

The FAR Council intends these changes to the initial proposed rule to clarify the longstanding requirement that federal contractors have a "satisfactory record of integrity and business ethics." It solicits comments on whether or not this proposal is successful in this regard. Comments on whether the revised language in 9.104-1(d) and 9.104-3(c) sufficiently clarifies for contracting officers and for federal contractors what constitutes a "satisfactory record of integrity and business ethics," and what additional or alternative language would be helpful in this regard would be particularly useful.

b. *Workplace practices.* The initial proposal included changes requiring federal contractors to maintain such workplace practices as, training, worker retention and legal compliance to assure a skilled, stable and productive workforce. After reflecting further on this subject, the FAR Council has decided not to proceed with such language. The general responsibility standards in FAR 9.104-1(e), which require the prospective contractors to have the necessary organization, experience, accounting and operational controls, and technical skills, or the

ability to obtain them, already cover this requirement adequately.

2. *Cost Principle Changes*

The initial proposed rule would have revised FAR Part 31 to make unallowable those costs that a contractor incurs related to—

1. Influencing an employee's decision regarding unionization (FAR 31.205-21, Labor relations costs); and

2. Any judicial or administrative proceeding brought by "the Government," if there is a finding that the contractor violated a law or regulation (FAR 31.205-47, Costs related to legal and other proceedings).

The CAAC and DARC received comments from 135 respondents on this portion of the proposed rule. After careful consideration, the FAR Council has decided to make the following changes:

a. *FAR 31.205-21, Labor relations costs.* A number of respondents indicated that the term "influencing" may be too vague, leading to difficulty in identifying these types of costs. The FAR Council has decided to revise paragraph (b) by substituting the phrase "assist, promote, or deter" for the term "influencing" since this phrase has been used in neutrality provisions of cost-based Federal programs for years (e.g., 29 U.S.C. 1553(c)(1), 29 U.S.C. 2931(b)(7), 42 U.S.C. 12634(b)(1) and 42 U.S.C. 9839(e)).

b. *FAR 31.205-47, Costs related to legal and other proceedings.* A number of respondents suggested that the proposed rule had a number of inconsistencies—

(1) The proposed language at FAR 31.205-47(b)(3) was inconsistent with the introductory language at FAR 31.205-47(b). Paragraph (b)(3) appeared to apply only to proceedings brought by the Federal Government, but the introductory language seemed to refer to proceedings brought by State, local, or foreign governments as well. The FAR Council has resolved the ambiguity by proposing that the costs should be unallowable if incurred in connection with any such Federal, State, local or foreign government proceeding. Therefore, there is no change to the existing regulations.

(2) The proposed language in paragraph (b)(3) appeared inconsistent with the language in paragraph (b)(2). Paragraph (b)(2), currently in the FAR and unchanged in the initial proposed rule, disallows costs incurred in connection with a civil or administrative proceeding for violation of, or failure to comply with, a law or regulation where there is a finding of contractor liability involving fraud or

the imposition of a monetary penalty. Paragraph (b)(3) made costs unallowable if there was a finding of a violation of a law or regulation regardless of whether the violation involved fraud or the contractor was assessed a monetary penalty. Although the paragraphs are intended to be consistent, paragraph (b)(3) appeared to disallow some costs allowed under paragraph (b)(2). To remedy this inconsistency, the FAR Council proposes to eliminate the language at paragraph (b)(3) and expand the scope of paragraph (b)(2) to include findings in any civil or administrative proceeding that the contractor violated, or failed to comply with, any law or regulation. Since paragraph (b)(2) no longer refers to allegations of fraud, the FAR Council has eliminated the definition of "fraud" in paragraph (a).

Executive Order 12866

The FAR Council intends to clarify existing regulations concerning the assessment of contractor responsibility. It does not regard this rule as a significant rule subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. It also does not regard this rule as a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The FAR Council has examined whether this revised proposal would 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.* In commenting on the initial proposal, some small businesses suggested that the clarification regarding integrity and business ethics might result in more adverse responsibility determinations, and the denial of contracts to small businesses.

The FAR Council has prepared an Initial Regulatory Flexibility Analysis (IRFA) and will provide it to the Chief Counsel for Advocacy at the Small Business Administration. The analysis supports a conclusion that this rule would not likely have a significant economic impact on a substantial number of small entities. The analysis is summarized below. There was also a concern that the proposed rule would change the Certificate of Competency program which is the process through which small businesses can challenge contracting officers' decisions about contractor responsibility. Nothing in the initial proposal nor this revised proposal changes the Certificate of Competency program.

The objective of the proposed rule is to make it clear that the contracting officer should consider violations of federal law in determining whether a prospective contractor has an unsatisfactory record of integrity and business ethics. The legal basis for the proposed rule is 41 U.S.C. 253b and 10 U.S.C. 2305(b), which require the Government to award contracts to "responsible sources"; 41 U.S.C. defines "responsible source" to be in part, a prospective contractor who has a record of integrity and business ethics. The rule will affect both large and small businesses interested in participating in Federal Government procurement. It is estimated that approximately 171,000 small entities will be affected by this rule. The proposed rule will add a new certification requiring prospective contractors to certify whether they have been convicted of any felonies (or have any felony indictment currently pending against them) arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws, had any adverse court judgments in civil cases against them arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws in which the United States brought the action, or been found by a Federal Administrative Law Judge, Federal Administrative Judge, agency, board or commission to have violated any Federal tax, labor and employment, environmental, antitrust, or consumer protection law. The certification will be required of all businesses, including small businesses, interested in submitting offers in response to solicitations that exceed the simplified acquisition threshold (see Section C).

The contracting officer will still be required to forward non-responsibility determinations for small entities to the Small Business Administration in accordance with the certificate of competency program. Nothing in that requirement has been changed by this rule.

The proposed change to the FAR pertaining to Part 31 cost principles 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 most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles contained in this rule. In fiscal years 1998 and 1999 approximately 1/2 of 1 percent of contracts awarded to small entities were subject to the cost principles. Therefore, the Initial Regulatory Flexibility Analysis that has been performed does not address the cost principles.

A copy of the IRFA may be obtained from the FAR Secretariat. The CAAC and DARC will consider comments from small entities concerning the affected FAR parts 9, 14, 15, 31, and 52 in accordance with 5 U.S.C. 610. The FAR Council will also consider comments on its conclusion that this regulation is not likely to have a significant impact on a substantial number of small entities.

Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 1999-010), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) applies because the FAR changes to Parts 9 and 52 increase the information collection requirements that have been approved by the Office of Management and Budget (OMB) under OMB Control Number 9000-0094. OMB has currently approved an annual reporting burden of 91,667 hours based on 1,100,000 respondents and 1,100,000 annual responses. In preparing the revised proposal, the FAR Council has reviewed the number of likely respondents. It notes that the average respondent submits numerous responses throughout the year. It now estimates that the annual reporting burden for OMB Control Number 9000-0094 applies to only 89,995 respondents, of which approximately 50,000 are affected by the new certification requirement. The other 39,995 respondents are subcontractors, responding to the prime contractor regarding suspension and debarment only. It further estimates that the addition of this new certification requirement will increase the total burden hours by 515,000 hours, for a new total of 606,667 hours. This assumes an estimate that the additional certification will take an average of 3 hours each for 50,000 initial responses and .5 hours each for 450,000 subsequent responses that year, for a composite average of .75 hours per response. In addition, the FAR Council estimates that in 50,000 cases the contracting officer will request additional information from the respondent in accordance with FAR 9.408(a), requiring an additional 4 hours each for 30,000 initial responses, and 1 hour each for each of 20,000 subsequent responses for a composite average of 2.8 hours per response.

The revised annual reporting burden is estimated as follows:

Respondents: 89,995.

Responses per respondent: 12.8.

Total annual responses: 1,150,000.

*Average hours per response:*¹ 0.528 hours.

Total burden hours: 606,667 hours.

The Paperwork Reduction Act does not apply to the proposed changes to FAR Part 31, Contract Cost Principles and Procedures, because these changes do not impose information collection

¹ Average hours per response is calculated by dividing total burden hours by total annual responses.

requirements that require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

D. Request for Comments Regarding Paperwork Burden

Please submit comments, including suggestions for reducing this burden, not later than August 29, 2000 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503.

The FAR Council particularly invites public comments on—

- Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility;
- Whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

The commenter may obtain a copy of the justification from the General Services Administration, FAR Secretariat (MVR), Room 4035, Washington, DC 20405, telephone (202) 208-7312. Please cite OMB Control Number 9000-0094, FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, in all correspondence.

List of Subjects in 48 CFR Parts 9, 14, 15, 31, and 52

Government procurement.

Dated: June 22, 2000.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 9, 14, 15, 31, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 9, 14, 15, 31, 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. Amend section 9.103 to add a new sentence after the second sentence in paragraph (b) to read as follows:

9.103 Policy.

* * * * *

(b) * * * Contracting officers should coordinate non-responsibility

determinations based upon integrity and business ethics with legal counsel (see 9.104-1(d)). * * *

* * * * *

3. Revise paragraph (d) of section 9.104-1 to read as follows:

9.104-1 General standards.

* * * * *

(d) Have a satisfactory record of integrity and business ethics including satisfactory compliance with federal laws including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws. (See 9.104-3(c).)

* * * * *

4. In section 9.104-3, redesignate paragraphs (c) and (d) as (d) and (e) respectively; and add a new paragraph (c) to read as follows:

9.104-3 Application of standards.

* * * * *

(c) Integrity and business ethics. In making a determination of responsibility based upon integrity and business ethics (see 9.104-1(d)), contracting officers may consider all relevant credible information. Contracting officers should give greatest weight to decisions within the past three years preceding the offer as follows—

(1) Convictions of or civil judgments rendered against the prospective contractor for:

(i) Commission of Fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public (Federal, State or local) contract or subcontract;

(ii) Violation of Federal or State antitrust statutes relating to the submission of offers;

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(iv) Any other Federal or State felony convictions or pending Federal or State felony indictments; and

(v) Federal court judgments in civil cases brought by the United States against the contractor.

(2) Federal decisions by Federal Administrative Law Judges or Federal Administrative Judges and adjudicatory decisions, orders, or complaints issued by any Federal agency, board, or commission, indicating the contractor has been found to have violated Federal tax, labor and employment, antitrust, or consumer protection law.

* * * * *

PART 14—SEALED BIDDING

5. Revise paragraph (i) of section 14.404-2 to read as follows:

14.404-2 Rejection of individual bids.

* * * * *

(i) The contracting officer must reject low bids received from concerns determined to be not responsible pursuant to Subpart 9.1 (but if a bidder is a small business concern, see Subpart 19.6 with respect to certificates of competency). The contracting officer must promptly notify the bidder of the non-responsibility determination and the basis for it.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

6. Revise paragraph (a)(1) of section 15.503 to read as follows:

15.503 Notifications to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive range*. The contracting officer must notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice must state the basis for the determination and that a proposal revision will not be considered. When the exclusion or elimination of a proposal is based on a non-responsibility determination, the contracting officer must state the basis for the determination.

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

7. Revise section 31.205-21 by designating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

31.205-21 Labor relations costs.

* * * * *

(b) Costs incurred for activities that assist, promote, or deter unionization are unallowable.

8. Amend section 31.205-47 in paragraph (a) by removing the definition "Fraud"; and revising paragraph (b)(2) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(b) * * * (2) In a civil or administrative proceeding, a finding that the contractor violated, or failed to comply with, a law or regulation;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. In section 52.209-5—

a. Revise the date of the clause; b. In paragraph (a)(1)(i)(B), remove "a 3-year" and add "the three-year" in its place; and remove "and" at the end of the paragraph;

c. In paragraph (a)(1)(i)(C), at the end of the paragraph remove the period and add "; and" in its place; and

d. Add a new paragraph (a)(1)(i)(D) to read as follows:

52.209-5 Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.

* * * * *

Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters (Date)

(a) * * *

(1) * * *

(i) * * *

(D) The offeror, aside from the offenses enumerated in subdivision (a)(1)(i)(A), (B), and (C) of this provision has ; has not ; within the past three years, been convicted of any felonies (or has any felony indictment currently pending against them) arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws, had any adverse court judgments in civil cases against them arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws in which the United States brought the action, or been found by a Federal Administrative Law Judge, Federal Administrative Judge, agency, board or commission to have violated any Federal tax, labor and employment, environmental, antitrust, or consumer protection law. If the respondent has answered "has" to the above question, please explain the nature of the violation and whether any fines, penalties, or damages were assessed.

* * * * *

10. In section 52.212-3—

a. Revise the date of the clause; b. Revise the introductory text of paragraph (h);

c. In paragraph (h)(1), remove ", and" and add ";" in its place; and

d. In paragraph (h)(2), remove "within a" and add "within the" in its place; and at the end of the paragraph, remove the period and insert "; and"; e. Add a new paragraph (h)(3) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Date)

* * * * *

(h) Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549).

(Applies only if the contract value is expected to exceed the simplified acquisition threshold.) The offeror certifies, to the best of its knowledge and belief, that—

* * * * *

(3) The offeror has ; has not ; within the past three years, been convicted of any felonies (or has any felony indictment currently pending against them) arising from any Federal

tax, labor and employment, environmental, antitrust, or consumer protection laws, had any adverse court judgments in civil cases against them arising from any Federal tax, labor and employment, environmental, antitrust, or consumer protection laws in which the United States brought the action, or been found by a Federal Administrative Law Judge, Federal Administrative Judge, agency, board or commission to

have violated any Federal tax, labor and employment, environmental, antitrust, or consumer protection law. If the respondent has answered "has" to the above question, please explain the nature of the violation and whether any fines, penalties, or damages were assessed.

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