

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 17, 33, 49, and 52

[FAR Case 2000-406]

RIN 9000-AJ10

Federal Acquisition Regulation; Definition of "Claim" and Terms Relating to Termination

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 and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify and move the definitions of "claim," and certain terms relating to termination.

DATES: Interested parties should submit comments in writing on or before October 15, 2001 to be considered in the formulation of a final rule.

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

Submit electronic comments via the Internet to: farcase.2000-406@gsa.gov

Please submit comments only and cite FAR case 2000-406 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 Ms. Linda Klein, Procurement Analyst, at (202) 501-3775. Please cite FAR case 2000-406.

SUPPLEMENTARY INFORMATION:

A. Background

This rule is one of a series of rules that considers moving definitions of terms that are located outside FAR 2.101 into FAR 2.101 if the terms are used in more than one part of the FAR. This will clarify the applicability of definitions, eliminate redundant or conflicting definitions, and make them easier to find. The Councils do not intend to make any substantive changes to the FAR by these amendments.

This proposed rule—
• Revises and moves the definitions of "claim" from 33.201; "continued portion of the contract," "partial termination," "terminated portion of the contract" from FAR 49.001; and "termination for convenience" from FAR 17.103;

• Adds a definition of "termination for default" at FAR 2.101 and a new paragraph 17.104(d) that explains the distinction between "termination for convenience";

• Revises FAR 33.213(a) to clarify the distinction between claims "arising under a contract" and claims "relating to a contract";

• Revises the definition of "claim" in the clause at FAR 52.233-1 to conform to the definition at FAR 2.101; and

• Makes other editorial revisions for clarity.

This rule was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule 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, the rule does not change policy. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 17, 33, 49, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, et seq. (FAR case 2000-406), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 2, 17, 33, 49, and 52

Government procurement.

Dated: August 9, 2001.

Gloria Sochon,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 17, 33, 49, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 2, 17, 33, 49, 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 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding, in alphabetical order, the definitions "Claim," "Continued portion of the contract," "Partial termination," "Termination for convenience," "Termination for default," and "Terminated portion of the contract" to read as follows:

2.101 Definitions.

* * * * *

Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

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Continued portion of the contract means the portion of a contract that the contractor must continue to perform following a partial termination.

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Partial termination means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

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Termination for convenience means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest.

Termination for default means the exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

Terminated portion of the contract means the portion of a contract that the contractor is not to perform following a partial termination. For construction contracts that have been completely terminated for convenience, it means

the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

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PART 17—SPECIAL CONTRACTING METHODS

17.103 [Amended]

3. In section 17.103, remove the definition “Termination for convenience”.

4. Amend section 17.104 by adding paragraph (d) to read as follows:

17.104 General.

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(d) The termination for convenience procedure may apply to any Government contract, including multiyear contracts. As contrasted with cancellation, termination can be effected at any time during the life of the contract (cancellation is effected between fiscal years) and can be for the total quantity or partial quantity (where as cancellation must be for all subsequent fiscal years” quantities).

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.205–47 [Amended]

5. Amend section 31.205–47 in paragraph (f)(1) by removing “(see 33.201)”.

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.201 [Amended]

6. In section 33.201, remove the definition “Claim.”

7. Amend section 33.213 by revising paragraph (a) to read as follows:

33.213 Obligation to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, the Act, at 41 U.S.C. 605(b), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer’s decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233–1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233–1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233–1.) This distinction is recognized by the clause with its Alternate I (see 33.215).

PART 49—TERMINATION OF CONTRACTS

49.001 [Amended]

8. In section 49.001, remove the definitions “Claim,”

“Continued portion of the contract,” “Partial termination,” and “Terminated portion of the contract.”

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Section 52.233–1 is amended by revising the date and paragraph (c) of the clause; and in Alternate I by revising the date and the introductory paragraph to read as follows:

52.233–1 Disputes.

* * * * *

DISPUTES (DATE)

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(c) *Claim*, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

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Alternate I (Date). As prescribed in 33.215, substitute the following paragraph (i) for paragraph (i) of the basic clause:

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