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IN REPLY
REFER TO

DESC-CPA

APR 11 2001

CONTRACTING INSTRUCTION (CI): 01-10
MEMORANDUM FOR CI Distribution

SUBJECT: CONTRACTOR RESPONSIBILITY RULE (FAC 97-24)

This CI supersedes CI 01-6, "Contractor Responsibility Rule (FAC 97-21)." As published in the Federal Register (Vol. 66, No. 64/ Tuesday, April 3, 2001), the FAR Council has decided to stay the final rule of December 20, 2000. The previous FAR sections that were in effect, such as the previous version of the certification, are restored by this interim rule.

The requirement that contractors must be responsible is statutory, and this stay does not relieve offerors of the requirement to have a satisfactory record of integrity and business ethics. Contracting officers will continue to have the authority and duty to make responsibility determinations. The Government still needs the information contained in the previous certifications, as contained in the DESC updated clauses K1.01-9, K1.01-10, and K94, found in the "I" drive.

This CI is effective immediately and expires upon dissemination. Point of contact is William Latimer, extension 8628.

SHARON L. MURPHY
DESC Senior Procurement Official

Attachment:
Federal Register/Vol. 66, No. 64/Tuesday, April 03, 2001.

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Federal Register

Tuesday,
April 3, 2001

Part II

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1 and Parts 9, et al.
Federal Acquistion Regulations; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings; Final Rule and Proposed Rule
Federal Acquistion Regulation; Small Entity Compliance Guide; Final Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 14, 15, 31, and 52

[FAC 97–24, FAR Case 1999–010 (stay)]

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: Interim rule—reinstatement of text; stay of final rule; request for comments.

SUMMARY: The Federal Acquisition Regulation Council (FAR Council) published in the **Federal Register** at 65 FR 80255, December 20, 2000, a final rule addressing contractor responsibility and costs incurred in legal and other proceedings. After further review, the FAR Council is immediately staying that rule. The FAR Council intends the stay will last for 270 days from April 3, 2001, or until finalization of the proposed rule (entitled "Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings" that is being published concurrently with this interim rule), whichever is sooner. The FAR Council is requesting comments in this FAR interim rule on the length of the stay. During the stay, the FAR text is restored to the text as it existed before January 19, 2001. In a separate document being published today, the FAR Council is publishing a proposed rule, requesting comments under that FAR case on revoking the December 20, 2000, final rule.

DATES: *Effective Date:* Effective April 3, 2001, the rule published in the **Federal Register** at 65 FR 80255, December 20, 2000, is stayed indefinitely (except for the redesignation of 9.104–3(c) and (d) as 9.104–3(d) and (e); the designation of the text in 31.205–21 as paragraph (a); and the redesignation of 52.209–5(a)(1)(ii) as 52.209–5(a)(i)(iii)). The amendments made by this rule are effective April 3, 2001.

Applicability Date: The FAR, as amended by this rule, is applicable to solicitations issued on or after January 19, 2001. Contracting officers must amend solicitations already issued that incorporated the certification provision(s) from the final rule published in the **Federal Register** on December 20, 2000 (65 FR 80255), to delete those certification provision(s) and insert the certification provision(s) in this rule.

Comment Date: Interested parties should submit comments in writing on or before June 4, 2001 to be considered in the formulation of a final rule concerning the stay.

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.1999–010@gsa.gov. Please submit comments only and cite FAR case 1999–010 (stay) 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 FAC 97–24, FAR case 1999–010 (stay).

SUPPLEMENTARY INFORMATION:

A. Background

1. The Final Rule

The FAR Council published a proposed rule amending FAR Parts 9 and 31 in the **Federal Register** at 64 FR 37360, July 9, 1999. In response to the proposed rule, the FAR Council received more than 1500 letters. After reviewing the public comments, the FAR Council decided to republish the proposed rule with certain changes.

The FAR Council published a revised proposed rule amending FAR Parts 9, 14, 15, 31, and 52 in the **Federal Register** at 65 FR 40830, June 30, 2000. Over 300 public comments were received.

The final rule, which was published in the **Federal Register** at 65 FR 80255 on December 20, 2000, had an effective date of January 19, 2001, 30 days from date of publication.

The final rule included the following revisions:

FAR Part 9

Added language stating that a satisfactory record of integrity and business ethics includes satisfactory compliance with the law including tax, labor and employment, environmental, antitrust, and consumer protection laws (FAR 9.104–1(d)).

Required contracting officers to consider all relevant credible information but stated that the greatest weight must be given to offenses adjudicated within the past three years.

FAR Part 14 and 15

Directed contracting officers to notify offerors if the offerors were excluded based on a nonresponsibility determination.

FAR Part 31

At FAR 31.205–21, made unallowable those costs incurred for activities that assist, promote, or deter unionization.

At FAR 31.305–47, made unallowable those costs incurred in civil or administrative proceedings brought by a government where the contractor violated, or failed to comply with a law or regulation.

FAR Part 52

At FAR 52.209–5, amended the previous certification to require offerors to certify to additional violations (violations of tax, labor and employment, environmental, antitrust, or consumer protection laws) adjudicated within the last three years. It was a check-the-box certification. An offeror would have to provide additional detailed information only upon the request of the contracting officer.

At 52.212–3(h), made an equivalent change for the certification for commercial items.

2. The Lawsuit

The Business Roundtable, Chamber of Commerce of the United States, National Association of Manufacturers, Associated General Contractors of America, Inc., and Associated Builders and Contractors, Inc., filed a lawsuit in the United States District Court for the District of Columbia on December 22, 2000, seeking to overturn the final rule.

3. Letters

The FAR Council has received letters from major industry associations representing thousands of firms, and from Congressional Representatives, requesting an effective date extension of at least six months. Industry concerns extend especially to contractors' ability to comply with the rule's new certification requirements, which apply to procurements over $100,000.

4. Action

The FAR Council is reassessing the advantages and disadvantages of the changes made by the December 20, 2000, final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule. In this regard, it is not clear to the FAR Council

that there is a justification for including the added categories of covered laws in the rule and its implementing certification, that the rule provides contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation, or that the final rule is justified from a cost benefit perspective. In a proposed rule also published today, the FAR Council is requesting public comments on revoking the final rule.

In the interim, the FAR Council has determined that the 30-day effective date did not give contractors, and the Government, sufficient time to meet the new obligations and responsibilities imposed by the final rule. Government contracting officers have not had sufficient training. Offerors have not had sufficient time to establish a system to track compliance with applicable laws and keep it current, in order to be able to properly fill out the certification. Although there is language in the noncommercial items certification which assures contractors that no system of records needs to be established to render the certification in good faith, this language is not found in the commercial items certification. There are criminal penalties for a false certification (18 U.S.C. 1001). The FAR Council now recognizes that it will take more time than it anticipated for businesses to put the systems in place.

Therefore, the FAR Council has decided to stay the final rule of December 20, 2000. The FAR Council intends the stay to last for 270 days from the date of publication of this interim rule, or until finalization of the proposed rule (published concurrently with this interim rule), whichever is sooner.

The final rule has only been in effect since January 19, 2001. There has not been time for the public to be in a position of reliance upon the rule's existence.

The previous FAR sections that were in effect, such as the previous version of the certification, are restored by this interim rule. The requirement that contractors must be responsible is statutory, and this stay does not relieve offerors of the requirement to have a satisfactory record of integrity and business ethics. Contracting officers will continue to have the authority and duty to make responsibility decisions. Agency debarring officials will continue to have the authority and duty to make determinations whether to suspend and debar a contractor. The Government still needs the information contained in the previous certifications, which covered such things as whether the contractor or its principals are presently debarred, or had a felony conviction for contract fraud.

The stay is not intended to be a statement that violations of the additional laws discussed in the December 20, 2000, rule could not have been considered in the past, or could not be considered in the future, by contracting officers or agency debarring officials.

The FAR Council is inviting comments in two rules. In this interim rule, FAR Case 1999–010, comments are requested on the length of the stay. In the accompanying proposed rule, FAR case 2001–014, comments are requested on the revocation of the December rule.

When staying Code of Federal Regulations text, if the previous text is restored, the **Federal Register** requires different numbering from the stayed text. The stayed text uses the numbering that was published in Federal Acquisition Circular 97–21. The revised numbering of the restored text is not a substantive change.

This is a significant rule and was 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 Department of Defense, the General Services Administration, and National Aeronautics and Space Administration certify that this action does 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 action stays FAR revisions implemented under FAR case 1999–010 published in the **Federal Register** on December 20, 2000 (65 FR 80255), that did not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

This action does not impose any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This stay is necessary because otherwise the rule imposes burdens that the Government and contractors are not prepared to meet. While the stay is in effect, the FAR Council will be collecting public comments about the length of the stay, and also collecting public comments on the proposed rule being published today rescinding the rule permanently.

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

Government procurement.

Dated: March 29, 2001.

Al Matera,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97–24 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

All Federal Acquisition Regulation (FAR) changes and other directive material contained in FAC 97–24 are effective April 3, 2001.

Dated: March 7, 2001.

Deidre A. Lee,

Director, Defense Procurement.

Dated: February 13, 2001.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: February 15, 2001.

Tom Luedtke,

Associate Administrator for Procurement, National Aeronautics and Space Administration.

Accordingly, the final rule published in the **Federal Register** at 65 FR 80255, December 20, 2000, is stayed, and DoD, GSA, and NASA further amend 48 CFR parts 9, 14, 15, 31, and 52 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. In section 9.103, redesignate paragraph (c) as (d); and add a new paragraph (c) to read as follows:

9.103 Policy.

* * * * *

(c) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of

information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determination of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see subpart 19.8).

* * * * *

3. In section 9.104–1, redesignate paragraphs (e), (f), and (g) as (f), (g), and (h), respectively; and add a new paragraph (e) to read as follows:

9.104–1 General standards.

* * * * *

(e) Have a satisfactory record of integrity and business ethics;

* * * * *

PART 14—SEALED BIDDING

4. In section 14.404–2, redesignate paragraphs (j), (k), and (l) as (k), (l), and (m), respectively; and add a new paragraph (j) to read as follows:

14.404–2 Rejection of individual bids.

* * * * *

(j) Low bids received from concerns determined to be not responsible pursuant to Subpart 9.1 shall be rejected (but if a bidder is a small business concern, see 19.6 with respect to certificates of competency).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

5. In section 15.503, redesignate paragraph (a)(2) as (a)(3) and add a new paragraph (a)(2) to read as follows:

15.503 Notifications to unsuccessful offerors.

(a) * * *

(2) *Preaward notices of exclusion from competitive range.* The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

6. In section 31.205–47, amend paragraph (a) by adding the definition of "Fraud" and redesignate paragraphs (b)(3) through (b)(5) as (b)(4) through (b)(6), respectively; and add a new paragraph (b)(3) to read as follows:

31.205–47 Costs related to legal and other proceedings.

(a) * * *

Fraud, as used in this subsection, means—

(1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

(2) Acts which constitute a cause for debarment or suspension under 9.406–2(a) and 9.407–2(a) and

(3) Acts which violate the False Claims Act, 31 U.S.C., sections 3729–3731, or the Anti-Kickback Act, 41 U.S.C., sections 51 and 54.

* * * * *

(b) * * *

(3) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct;

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. In section 52.209–5—

a. Revise the provision date (that is stayed as part of this rule); and

b. Add paragraphs (a)(1)(i)(D) and (E) 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 (Apr 2001)

(a)(1) * * *

(i) * * *

(D) Have [ ] have not [ ], within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: 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; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and

(E) Are [ ] are not [ ] presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision.

* * * * *

8. In section 52.212–3—

a. Revise the provision date (that is stayed as part of this rule); and

b. Add paragraph (i) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Apr 2001)

* * * * *

(i) *Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549).* The offeror certifies, to the best of its knowledge and belief, that—

(1) The offeror and/or any of its principals [ ] are, [ ] are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency; and

(2) [ ] Have, [ ] have not, within a three-year period preceding this offer, been convicted of or had a civil *judgment rendered against them for:* commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving *stolen property; and [ ] are, [ ] are not* presently indicted for, or otherwise criminally or civilly charged by a Government entity with, commission of any of these offenses.

(End of provision)

* * * * *

[FR Doc. 01–8122 Filed 3–30–01; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121). It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 97–24 which amends the FAR. Interested parties may obtain further information regarding this rule by referring to FAC 97–24 which precedes this document. This document is also available via the Internet at *http://www.arnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact Ralph De Stefano, Procurement Analyst, General Services Administration, at (202) 501–1758.

Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Procedures (FAR Case 1999–010)

The FAR Council has determined that the 30-day effective date did not give Federal contractors and the Federal Government sufficient time to meet the new obligations and responsibilities imposed by the December 20, 2000, final rule. Therefore, the FAR Council has decided to stay the effective date of the final rule. During the stay, the FAR text is restored to the text as it existed before January 19, 2001.

Dated: March 29, 2001.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 01–8123 Filed 3–30–01; 8:45 am]

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