DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 97–21; 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: Final rule.

SUMMARY: The Federal Acquisition Regulatory Council (FAR Council) is issuing a final rule clarifying what constitutes a ''satisfactory record of integrity and business ethics'' in making contractor responsibility determinations under FAR Part 9, and revising certain cost principles under FAR Part 31 related to labor relations, and legal and other proceedings.

DATES: *Effective Date:* January 19, 2001.

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 97–21, FAR case 1999–010.

SUPPLEMENTARY INFORMATION: The Federal Acquisition Regulatory Council (FAR Council) is issuing a final rule that clarifies what constitutes a ''satisfactory record of integrity and business ethics'' in making contractor responsibility determinations under FAR Part 9, and revises certain cost principles under FAR Part 31 relating to labor relations, and legal and other proceedings. Public comment on proposed revisions on these matters had previously been requested on July 9, 1999 (64 FR 37360) and on June 30, 2000 (65 FR 40830).

1. The Statutory and FAR Responsibility Criteria

The main portion of this rule makes clarifying revisions to the existing regulatory language in FAR Part 9 (and adds an accompanying certification in FAR Part 52) regarding what constitutes a ''satisfactory record of integrity and business ethics'' in making contractor ''responsibility'' determinations.

By statute, Federal agencies are required to award contracts to ''responsible'' sources. 10 U.S.C. 2305(b); 41 U.S.C. 253b. A ''responsible source'' is defined to be a prospective contractor which, among other things, ''has a satisfactory record of integrity and business ethics.'' 41 U.S.C. 403(7)(D). Congress enacted this definition of ''responsible source'' in 1984 (Pub. L. 98–369, Div. B, Title VII, § 2731, 98 Stat. 1195).

The statutory ''responsibility'' requirement has been implemented in FAR Part 9. The FAR states that ''[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.'' 48 CFR 9.103(a). The FAR makes clear that ''an affirmative determination'' of responsibility is required. ''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.'' 48 CFR 9.103(b); see also 48 CFR 9.103(c) (''A prospective contractor must affirmatively demonstrate its responsibility . . .'').

In accordance with the statutory definition of ''responsible source,'' the FAR states that, ''[t]o be determined responsible, a prospective contractor must . . . Have a satisfactory record of integrity and business ethics . . . .'' 48 CFR 9.104–1. Beyond this simple reiteration of the statutory language, however, the FAR has not elaborated upon what it means to have ''a satisfactory record of integrity and business ethics,'' nor has the FAR provided contracting officers with a framework to guide their analysis and assist them in making this statutorily-required determination.

This lack of guidance has an unfortunate consequence: Contracting officers are extremely reluctant, absent clear guidance, to exercise their discretion in making this determination. As a result, the Government continues to award contracts to firms that have violated procurement and other Federal laws, in some cases repeatedly. For example, in a study of the top 100 defense contractors over a four year period, the General Accounting Office found over 100 instances in which contractors had either been convicted of or signed settlements after charges of violations—of procurement-related law alone. These companies paid more than $400 million in fines and restitution, in some cases for multiple violations. If the analysis had been expanded to include compliance with other laws, the concern might well have been even broader.

It is clear that, in many cases, the Government continues to do business with contractors who violate laws, sometimes repeatedly. By giving contracting officers a clearer basis for declining to contract with such businesses, the Government can improve the integrity of the contracting process, reduce the risk of fraud or noncompliance, and encourage standards of integrity and compliance with the law.

2. The July 1999 Proposed Rule To Clarify the FAR Responsibility Requirement

In July 1999, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) requested comment on a proposed rule that would amend the FAR's responsibility provisions so as to assist contracting officers in making the statutory determination of whether a prospective contractor has ''a satisfactory record of integrity and business ethics.'' (64 FR 37360, July 9, 1999). In fleshing out what constitutes ''a satisfactory record of integrity and business ethics,'' the preamble to the proposed rule stated that a prospective contractor's ''record of compliance with laws'' constitutes ''a relevant and important part of the overall responsibility determination'' *Id.* It was believed that additional regulatory guidance was needed in the FAR ''concerning general standards of contractor compliance with applicable laws when making pre-award responsibility determinations.'' *Id.*

The Councils, therefore, requested comment on a revision to the FAR that ''clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations.'' *Id.* Specifically, the proposed rule would have amended FAR 9.104–1(d) by adding—immediately after the statutory requirement that a prospective contractor ''Have a satisfactory record of integrity and business ethics''—the following parenthetical phrase: ''(examples of an unsatisfactory record may include persuasive evidence of the 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)''. (64 FR 37361, July 9, 1999).

The Councils provided the public with 120 days in which to submit

comments. The Councils received more than 1500 comment letters on the proposal. Some commenters expressed strong support for the proposed rule, while others strongly opposed it. In addition to indicating their overall support or opposition to the proposed rule, commenters on both sides focused on what they viewed as problems with the specific regulatory language in the proposal. In some cases, the commenters suggested alternative language.

3. The June 2000 Revised Proposed Rule To Clarify the FAR Responsibility Requirement

In response to the comments received on the July 1999 proposal, the FAR Council developed a revised proposal. Again, as with the original proposal, the purpose of the revised proposal was to provide contracting officers with guidance in evaluating a prospective contractor's ''record of compliance with laws and regulations'' in connection with the statutory ''responsibility'' determination that the contractor has ''a satisfactory record of integrity and business ethics.'' In addition, the Council proposed additional procedural protections for contractors, to provide further confidence that contracting officers would not misuse their discretion.

The FAR Council requested comment on the revised proposal in June 2000 (65 FR 40830, June 30, 2000). In the preamble to the June 2000 notice, the FAR Council summarized the comments that had been submitted on the July 1999 proposal. *Id.*

In response to the concerns raised by commenters on the July 1999 proposal, the FAR Council revised the proposed amendment to FAR Part 9 in a number of respects. First, to aid contracting officers in evaluating a prospective contractor's ''record of compliance with laws and regulations,'' the FAR Council proposed additional language, for inclusion in FAR 9.103, to state that contracting officers ''should coordinate nonresponsibility determinations based upon integrity and business ethics with legal counsel (see 9.104–1(d)).'' Second, the FAR Council modified the amendments that had been proposed in July 1999 for FAR Part 9, ''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.'' 65 FR 40830. Under the proposed amendments, as modified by the FAR Council, FAR 9.104–1(d) would state that a prospective contractor shall ''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).)'' The concluding reference to FAR 9.104–3(c) was to add new language, contained in the FAR Council's amended proposal, that would assist contracting officers by providing them with a framework for their evaluation of a prospective contractor's ''record of compliance with laws'':

> ''(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.''

In connection with this proposed framework, the FAR Council also proposed a corresponding amendment to the existing contractor responsibility certification in FAR Part 52. This amended certification would provide information that the contracting officer would need in conducting the evaluation in proposed FAR 9.104–3(c). Under the FAR Council's proposal, a prospective contractor would certify whether it ''has'' or ''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.''

Finally, as the preamble explained, the FAR Council proposed to amend FAR Parts 14 and 15 to ''ensure that if non-responsibility is the basis for rejection of [a party] from the competition, then the contracting officer must provide the reasons for the non-responsibility determination in the notification'' that is provided to that unsuccessful bidder and offeror (65 FR 40831, June 30, 2000).

The FAR Council provided the public with 60 days in which to submit comments on the revised proposal. Substantially fewer comments were submitted on the June 2000 proposal than had been submitted on the July 1999 proposal. Whereas more than 1500 comment letters were submitted on the original proposal, only about 300 comments were received on the revised proposal (and a substantial number of these 300 comments were an essentially identical form letter). Again, as with the original proposal, some commenters expressed strong support for the revised proposal, while others strongly opposed it. Moreover, commenters on both sides focused on what they viewed as problems with the specific regulatory language in the revised proposal and, in some cases, they suggested alternative language.

4. The June 2000 Proposal to Amend Part 31

In addition to the revised proposals to amend FAR Parts 9, 14, 15, and 52 on the contractor responsibility determination, the June 2000 notice also proposed amendments to FAR Part 31 to address the allowability, in the context of cost-based Federal contracts, of costs relating to labor relations and to legal and other proceedings (65 FR 40833, June 30, 2000). These proposed amendments to Part 31 were a revision of the amendments that had been proposed in the July 9, 1999 notice (65 FR 37361). As the preamble to the June 2000 notice explained, the FAR Council revised its proposed Part 31 amendments in response to the concerns that were expressed by the 135 commenters who had addressed the Part 31 proposal in the July 1999 notice. *Id.* at 40831.

In sum, the June 2000 notice proposed that the following costs would not be allowable (*i.e.*, the Federal Government would not pay for them): costs incurred ''for activities that assist, promote, or deter unionization'' and costs incurred in ''a civil or administrative proceeding'' brought by a government where there has been ''a finding that the contractor violated, or failed to comply with, a law or regulation.'' *Id.* at 40833. The purpose of these amendments was to ensure consistency with Federal ''neutrality'' in labor relations (*id.* at 40831) and with the principle that ''[t]axpayers should not have to pay the legal defense costs associated with adverse decisions against contractors'' (64 FR at 37360–61).

B. The Final Rule

1. Summary of the Final Rule

Based on its consideration of the comments received on both proposed rules, the FAR Council is issuing this final rule. It provides both clearer guidance than in earlier proposals and additional procedural protection for contractors, to ensure that contracting officer discretion is fairly employed. The following changes are being made to the FAR:

FAR Part 9. Language has been added to FAR Part 9 that:

—Clarifies that contracting officers should coordinate nonresponsibility determinations based upon integrity and business ethics with agency legal counsel (FAR 9.103(b)).

—Clarifies 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)).

—Provides an expanded guidance statement to contracting officers that (1) reinforces the link between a satisfactory record of integrity and business ethics, compliance with law and the Government's interest in contracting with responsible reliable, honest and law abiding contractors; in sum, contractors it can trust; (2) requires contracting officers to consider all relevant credible information but states that the greatest weight must be given to offenses adjudicated within the past three years; (3) explains that a single violation of law will not ''normally'' give rise to a determination of non-responsibility, and that the focus of the assessment should be on ''repeated, pervasive or significant'' violations of law; and (4) requires the contracting officer to take into account any administrative agreements entered into between the prospective contractor and the Government (FAR 9.104–3(c)).

FAR Parts 14 and 15. New language has been added to modify FAR 14.404–2(i) and 15.503(a)(1) that provides for notification to unsuccessful bidders and offerors promptly after a nonresponsibility determination is made. The modification would ensure that if nonresponsibility 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 nonresponsibility determination in the notification. If the prospective contractor disagrees with the contracting officer's decision, the prospective contractor may seek an independent review of that decision by filing suit in Federal District court under the Administrative Procedures Act; or by filing a bid protest with the General Accounting Office, the agency protest official, the Court of Federal Claims or the Federal District Court. If an agency receives notice of a protest from the GAO prior to award, a contract may not be awarded unless specifically authorized by 31 U.S.C. 3553. If an agency receives notice of a protest from the GAO within the later of ten days after award, or five days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required, contracting officers shall immediately suspend performance or terminate the award of the contract unless specifically authorized by 31 U.S.C. 3553.

FAR Part 31. Language has been added to FAR Part 31 on the following points:

• FAR 31.205–21, Labor Relations Costs. This rule makes unallowable those costs incurred for activities that assist, promote or deter unionization.

• FAR 31.305–47, Costs related to legal and other proceedings. This rule makes 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. Language has been added to FAR Part 52 on the following points:

• FAR 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters. The current certification is amended to require offerors to certify regarding violations of tax, labor and employment, environmental, antitrust, or consumer protection laws adjudicated within the last three years. This certification will impose less burden on contractors than the certification that had been proposed in June 2000. It is a check-the-box certification under which a contractor will have to provide additional detailed information only upon the request of the contracting officer, and this is expected to occur generally only when that contractor is the apparently successful offeror.

• FAR 52.212–3(h), Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549). The existing certification is amended to require offerors to certify regarding violations of tax, labor and employment, environmental, antitrust, or consumer protection laws adjudicated within the last three years. This certification will impose less burden on contractors than the certification that had been proposed in June 2000. It is a check-the-box certification under which a contractor will have to provide additional detailed information only upon the request of the contracting officer, and this is expected to occur generally only when that contractor is the apparently successful offeror.

2. Comments on the June 2000 Proposal and Changes in the Final Rule

As noted above, some commenters on the June 2000 notice expressed strong support for the revised proposal, while others strongly opposed it. Moreover, commenters on both sides focused on what they viewed as problems with the specific regulatory language in the revised proposal and, in some cases, they suggested alternative language. The following summarizes the significant comments received on the June 2000 proposal, outlines the FAR Council's responses to those comments, and explains the significant changes that have been made to the amendments that were proposed in June 2000.

A number of commenters who opposed the proposed revisions argued that the proposal would provide contracting officers with excessive discretion to eliminate prospective contractors from Federal contracting opportunities, and that this would result in arbitrary responsibility decisions. We believe that the final rule addresses this concern. As has been noted earlier in this notice, and in the two proposals, the purpose behind this rulemaking is to provide contracting officers with additional guidance to assist them in making the ''integrity and business ethics'' responsibility determination. In addition to providing this guidance, the FAR Council has added a number of safeguards that are discussed elsewhere in this notice. The FAR Council believes

that the guidance and safeguards in the final rule will help to ensure that contracting officers make responsibility determinations in a non-arbitrary manner that, in accord with the statutory purpose, protects the Government's interest. Of course, if a contracting officer determines that a prospective contractor does not have a ''satisfactory record of integrity and business ethics,'' and the prospective contractor disagrees with that determination, the prospective contractor may seek an independent review of that decision by filing suit in Federal District court under the Administrative Procedures Act; or by filing a bid protest with the General Accounting Office, the agency protest official, the Court of Federal Claims or the Federal District Court.

Many of the commenters who expressed opposition to the proposed FAR amendments on the ''integrity and business ethics'' responsibility determination made arguments that, in one way or another, essentially questioned the underlying premise of this rulemaking and advocated that no revisions be made to the FAR in this area. These commenters asserted that there is no evidence of a ''problem'' which this rulemaking would ''solve''; they argued that there is no ''nexus'' between a prospective contractor's record of compliance with the law and the contracting officer's ''responsibility'' determination; they argued that a non-responsibility determination, based on a prospective contractor's lack of compliance with legal requirements, is an impermissible ''extra penalty'' for the violations; they argued that contracting officers are not qualified to evaluate a prospective contractor's record of compliance with the law; they argued that the proposed revisions to FAR Part 9 would not have the effect of clarifying the responsibility determination, and in this regard they argued that the proposed language was vague; and they contended that proposed language (and, in particular, the proposed certification) would not improve the efficiency of the procurement process and, in this regard, they argued that a ''cost-benefit'' analysis of the proposal should be conducted.

These arguments had also been raised in comments that opposed the July 1999 proposal, and the FAR Council continues to disagree with them. This rulemaking is intended to provide contracting officers with additional guidance on making an ''integrity and business ethics'' determination that, by statute, contracting officers are already required to make. As noted above, the FAR has previously not provided any elaboration on what it means to have ''a satisfactory record of integrity and business ethics'' the FAR has simply restated the statutory language that a ''responsible source'' is one that has ''a satisfactory record of integrity and business ethics.'' The fundamental premise of the two prior proposals, and this final rule, is that an evaluation of a prospective contractor's ''record of integrity and business ethics'' necessarily needs to include an evaluation of its ''record of compliance with laws and regulations.'' (64 FR 37360, July 9, 1999.) This is an eminently reasonable proposition. Operating in a law-abiding (as opposed to law-breaking) manner is an essential component of having ''integrity'' and ''ethics'' and, therefore, of meeting the overall requirement of responsibility that businesses contracting with the Government—and with private businesses—must meet.'' Thus, while the statutory criterion of ''integrity and business ethics'' is not limited to (*i.e.,* it is not exhausted by) the inquiry into whether a firm operates within the boundaries of the law, an irreducible element of what it means for a prospective contractor to have ''a satisfactory record of integrity and business ethics'' is that the prospective contractor is, essentially, law-abiding. We therefore believe, and many commenters expressed their strong agreement, that it would be entirely proper for a contracting officer to reach the conclusion, for example, that a company does not have a ''satisfactory record of integrity and business ethics'' when the facts show that the company has engaged, within the past three years, in ''repeated, pervasive, or significant violations'' of legal requirements.

Scrutinizing a prospective contractor's record of compliance with the law, and making satisfactory compliance an express element of the responsibility determination, is both consistent with practices outside the Government and serves the Government's interests. First, by ensuring that its contractors possess a satisfactory record of compliance with law, the Government increases its confidence that a contractor is a responsible, reliable company that will perform the contract in an efficient, responsible and timely manner. It should also reduce the risk that compliance issues will interfere with performance of the contract.

A justification for this rulemaking, then, is that it provides contracting officers with guidance that will assist them in evaluating a prospective contractor's record of compliance with laws and, thus, in making the statutory determination of whether the prospective contractor has ''a satisfactory record of integrity and business ethics.'' We believe that the final rule provides useful clarifying guidance, and it has been improved through the rulemaking process, in response to the comments that were submitted on the two proposals. In particular, by establishing a hierarchy of violations of legal requirements (and obtaining factual information on such violations), the final rule provides a more refined and objective framework for making this determination than simply having contracting officers make determinations about ''integrity and business ethics''—as they have done in the past—without the benefit of any clarifying guidance. We believe that contracting officers, guided by the amended regulation and in consultation with agency legal counsel, are in a better position to make the ''integrity and business ethics'' determination. In sum, we believe that the final rule represents a considerable improvement over the existing rule, which has required contracting officers to make an ''integrity and business ethics'' determination, but has not provided them with any guidance on how they should make that determination.

Another objection to the June 2000 proposal was the argument by some commenters that the proposed rule, in their view, does not provide prospective contractors with ''due process.'' This was also raised by those commenters who argued that the Federal agencies should rely instead on the debarment process, which they argued is sufficient to address the problem posed by prospective contractors who do not comply with the law. On the debarment issue, some commenters also argued that a nonresponsibility determination that is based on a prospective contractor's unsatisfactory record of complying with legal requirements constitutes a ''de facto debarment'' and, as such, is inappropriate.

The FAR Council does not agree with these objections. Contrary to the commenters who argued otherwise, prospective contractors will have at least as much (if not more) ''due process'' than they have enjoyed up to now with respect to the responsibility determination of whether they have ''a satisfactory record of integrity and business ethics.'' In summary, prospective contractors know, in advance, the general substantive standard that they are being evaluated under *i.e.,* whether they have ''a satisfactory record of integrity and business ethics.'' They also know, in advance, that the contracting officer will

focus on the prospective contractor's record of compliance with legal requirements and, in doing so, the contracting officer will be aided by a framework that establishes a hierarchy of violations and a certification that obtains information, from the prospective contractor, on such violations. When a contracting officer makes a nonresponsibility determination, he or she is required to notify the unsuccessful bidder or offeror, and state the reasons for the determination. If the prospective contractor does not agree with a determination of nonresponsibility, then it may file suit in Federal District Court under the Administrative Procedures Act; or the prospective contractor may file a bid protest with the General Accounting Office, the agency protest official, the Court of Federal Claims, or the Federal District Court. The prospective contractor may present its arguments against the non-responsibility determination, and the determination will be reviewed by the independent body.

In response to the arguments in the comments about the debarment process, we do not agree that the separate debarment process is a substitute for a responsibility determination on ''integrity and business ethics.'' The fact that a prospective contractor is not found on the list of debarred entities does not mean, ipso facto, that the prospective contractor therefore has a ''satisfactory record of integrity and business ethics.'' Contracting officers are required, by statute and the FAR, to make an ''affirmative determination of responsibility'' (FAR 9.103(b)), which must include a determination by the contracting officer that the prospective contractor has a ''satisfactory record of integrity and business ethics.'' As we have explained, the ''integrity and business ethics'' responsibility determination needs to include an evaluation by the contracting officer of the prospective contractor's record of compliance with legal requirements. We also do not agree with those commenters who argued that a nonresponsibility determination, based on a prospective contractor's violation of legal requirements, would necessarily constitute a ''de facto debarment.'' The fact that a contracting officer has determined that a prospective contractor is nonresponsible does not mean that the prospective contractor has therefore been subject to a ''de facto debarment.'' As the case law makes clear, the determination of whether a prospective contractor has been subject to a ''de facto debarment'' is fact-sensitive and depends on the circumstances of each case. Moreover, if a prospective contractor believes that it has been subject to a ''de facto debarment,'' then it will continue to have the same remedy that it has had up to now: it may seek an independent review of the contracting officer's non-responsibility determination. The final rule does not diminish the remedies that are available to prospective contractors for challenging what they believe are ''de facto debarments.''

Finally, a number of commenters raised concerns about the impact of the proposed rule, or about the scope of the guidance in FAR 9.104–3(c) or the scope of the certification. Some commenters stated their belief that the proposal would have a significant, and disproportionately adverse, impact on the ability of small businesses to obtain Federal contracts. As is explained below in connection with the Regulatory Flexibility Act, the FAR Council does not believe that the final rule will have a significant economic impact on a substantial number of small entities. Apart from the certification requirement, the final rule does not impose any new obligations, of any kind, on prospective contractors; they already have an obligation to comply with the law. This is not a regulation that, for example, requires a company to install certain equipment, prescribes how a company shall carry out its operations, or prohibits a company from operating in any particular way. Rather, the final rule provides guidance to contracting officers on how they are to make their statutory determination of whether a prospective contractor has a ''satisfactory record of integrity and business ethics.'' In addition, the FAR Council does not believe that the guidance in the final rule will have a significant or disproportionate adverse impact on small businesses generally. The FAR Council believes that, as a class, small businesses are generally law-abiding and, furthermore, the FAR Council is not aware of any evidence that would indicate (and the FAR Council has no reason to believe) that small businesses are any less law-abiding than large businesses. The FAR Council, therefore, does not expect that there will be a substantial number of small businesses that will be found, by a contracting officer, to have an unsatisfactory ''record of integrity and business ethics.'' Finally, for the reasons set forth in the Regulatory Flexibility Act and Paperwork Reduction Act discussions, below, the FAR Council does not believe that responding to the certification in the final rule will require small businesses to expend a significant amount of effort and resources.

A number of commenters addressed the fact that the proposed certification included only violations of Federal law. Some commenters argued that the certification should also address violations of State law. Commenters also argued that the certification should include adverse civil judgments that arose in cases that are brought by private parties, as well as in cases brought by governmental authorities. Other commenters raised the concern that the proposed certification, by focusing on violations of Federal law, could harm U.S.-based firms, as opposed to foreign-based firms. In response to these comments, it is helpful to distinguish between the standard that is set forth in FAR 9.104–1(d) and 9.104–3(c), and the implementing certification that has been added to FAR Part 52. Under the standard in FAR 9.104, the contracting officer ''must consider all relevant credible information'' regarding the prospective contractor's compliance with laws (the proposal stated that the contracting officer ''may consider'' such information; in response to comments, this was made mandatory rather than permissive). Although the final rule establishes a hierarchy of violations of law, some of which are also referenced in the certification, the contracting officer is not limited to considering only the listed violations. Again, the contracting officer ''must consider all relevant credible information,'' and such information relates to the prospective contractor's record of compliance with laws and regulations. The FAR Council expects that, as a practical matter, such information will generally pertain to compliance with Federal and State laws, but a prospective contractor's record of compliance with foreign laws and regulations can also constitute ''relevant credible information.''

The final certification that has been added to Part 52, however, is not as broad as the standard in FAR 9.104. The certification is an implementation measure, designed to provide the contracting officer with the information that the FAR Council anticipates will be most useful in making the responsibility determination (*e.g.,* felony convictions and indictments), while at the same time avoiding the imposition of undue reporting burdens on prospective contractors. In response to comments, the final certification has been broadened to include violations of State felony law as well as Federal law. In both cases, the certification focuses on cases that have been brought by

governmental authorities. The final certification, however, has not been broadened to include adverse judgments in civil cases brought by private parties or to include violations of foreign law. In addition, in response to comments, the certification in the final rule has been clarified to exclude administrative ''complaints'' (as opposed to adjudicated administrative actions); the final certification, therefore, addresses ''adverse decisions by Federal administrative law judges, boards, or commissions indicating willful violations.'' The fact that administrative complaints, private civil cases, and violations of foreign law have been not included in the final certification, however, does not mean that they cannot be taken into the contracting officer's consideration in making the responsibility determination; to the extent that the contracting officer becomes aware of such cases, and they constitute ''relevant credible information,'' the contracting officer must consider them in making the responsibility determination. Rather, the relatively narrow focus of the certification (as opposed to the general standard) reflects the FAR Council's attempt to craft a certification that is clear and that does not impose an undue reporting burden on prospective contractors. Finally, in an attempt to reduce the reporting burden on prospective contractors, the final certification requires a prospective contractor to supply additional detailed information only if requested to do so by the contracting officer, whereas the proposed certification would have required all prospective contractors who responded affirmatively to supply additional information (*e.g.,* ''explain the nature of the violation and whether any fines, penalties, or damages were assessed'').

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. Section 601, *et seq.* In accordance with the requirements of 5 U.S.C. Section 605, the FAR Council is publishing the following statement in support of its certification. A copy of this certification and supporting statement has been forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

Statement in Support of Certification

FAR Part 31

With regard to the changes to Part 31 cost principles, this rule will not have a significant economic impact on a substantial number of small entities, because most contracts and subcontracts with small entities are awarded using 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.

FAR Parts 9, 14, 15, and 52

With regard to the changes to Parts 9, 14, 15, and 52, this rule will not have a significant economic impact on a substantial number of small entities for the following reasons:

Background

The law requires contracting officers to award contracts to responsible sources defined, in part, to be prospective contractors who have a record of integrity and business ethics. 41 U.S.C. 253b, 10 U.S.C. 2305(b) and 41 U.S.C. 403. The objective of this final rule is to provide an objective basis for making this judgment. The rule makes clear that contracting officers must consider violations of laws in determining whether a prospective contractor has met that standard.

A satisfactory record of integrity and business ethics is one that indicates that the prospective contractor possesses basic honesty, and that the Government can trust or rely on the contractor to perform the contract. A satisfactory record is one that includes satisfactory compliance with laws. Five categories of laws are identified—tax, labor and employment, environmental, antitrust and consumer protection laws.

In assessing whether the contractor has a record of satisfactory compliance with laws, the rule directs the contracting officer to focus on a pattern of repeated, pervasive, or significant violations of the law rather than single violations and to give the greatest weight to matters adjudicated within the last three years.

To facilitate the transfer of information between the prospective contractor and contracting officer, a new certification has been added, requiring the prospective contractor to certify regarding certain violations adjudicated within the last three years.

It is estimated that the rule will apply to approximately 171,000 small entities.

Discussion

In considering whether the rule would have a significant economic impact on a substantial number of small entities, the FAR Council viewed the impact in two ways: first, by application of the statutory standard and implementing guidance for assessing a prospective contractor's record of integrity and business ethics; and two, through the requirement of a non statutory certification.

The following summarizes the significant comments received from small businesses, the basic assumptions made regarding the potential impact, and changes made in the rule to address the two areas of impact outlined above.

Response to Significant Comments

1. ''The rule would punish a wrongdoer's employer, the small business entity employees and their local communities through the loss of work.'' The purpose of this rule is not to ''punish'' prospective contractors for violations of law. Instead, the purpose of this rule is to provide contracting officers with additional guidance to assist them in making the determination, that they are required by statute to make, that a prospective contractor has a ''satisfactory record of integrity and business ethics.'' A prospective contractor's record of complying with legal requirements is a necessary component of its ''record of integrity and business ethics.'' No change in the rule was made as a result of this comment.

2. ''The rule assumes that large and small business entities will be treated equally under the rule.'' Concern was expressed that the rule does not place small entities on a level playing field with large businesses because small entities lack the resources to defend potential lawsuits and the flexibility to mitigate the impact of adverse judgments. The FAR Council is not in a position to know what factors may motivate a particular business, in any particular case, to defend itself (or not) against charges of legal wrongdoing. However, we believe that the final rule addresses the thrust of the commenters' concern. For example, through the hierarchy of violations and the certification, the rule focuses the contracting officer on criminal felony convictions and indictments, on adverse civil judgments in cases brought by the Federal Government, and on adjudicated administrative decisions, not simply unadjudicated complaints. The hierarchy of violations and the certification thus focuses on judicial and administrative processes that have their own inherent procedural protections. The FAR Council therefore has no reason for concluding that these judicial and administrative processes are inherently unfair as applied to small businesses. In addition, the guidance in the final rule instructs the contracting officer to focus on ''repeated, pervasive, or significant'' violations of law, rather than on isolated infractions. We therefore believe that, under the final rule, there is a ''level playing field'' between large and small businesses. No change in the rule was made based on size of the business offering to the Government.

3. ''Lack of adequate guidance to contracting officers and their legal counsel to determine satisfactory compliance with law will/could cause the improper elimination of small business concerns from a contract award.'' In response to this comment, an extended guidance statement has been added that will assist the contracting officer making this determination. However, as with any business decision, this is a judgment call requiring the contracting officer to review and analyze the facts and make a determination based on those facts. Also, the SBA Certification of Competency program remains intact requiring nonresponsibility determinations to be referred to SBA.

4. ''The rule does not provide any guidance how small entities, offering as prime contractors, are to deal with responsibility determinations of their prospective

subcontractors. Nor does the rule provide guidance how small entities offering as subcontractors will be affected by the rule.'' Currently, a prime contractor is responsible for determining the responsibility of its prospective subcontractors; the only requirement imposed is that the prime contractor assure the Government that each first tier subcontractor is not debarred, suspended, or proposed for debarment. This rule does not change that requirement. It will still be up to the prime contractor, large or small, to assure the capability and honesty of the potential subcontractor to fulfill the Government's needs. We assume some kind of due diligence on the part of the prime contractor.

5. ''The burden on small businesses is not minimized by only requiring the certification over $100,000; small businesses will still have to demonstrate their responsibility under $100,000 and the absence of a certification will deny them the opportunity to do so.'' The Federal Acquisition Streamlining Act provided for the use of simplified acquisition procedures under $100,000. For example, oral solicitations are permitted under that threshold. In establishing the certification as an implementation measure, the FAR Council had to balance the need to obtain information that will be useful to the contracting officer in making the responsibility determination with the need to avoid imposing undue reporting burden on prospective contractors. The FAR Council believes that the $100,000 acquisition level is an appropriate threshold for imposition of the certification.

Basic Assumptions

In developing the policies and procedures contained in the final rule, the FAR Council considered available alternative approaches and impacts of each of the alternatives on small entities. To start, however, the FAR Council was bound by statutory requirements and made certain assumptions regarding the impact on small businesses that narrowed the scope of alternatives available for consideration.

By law, a contracting officer must already make an affirmative determination of responsibility in order for a prospective contractor to be eligible for award. That determination must include an assessment of the contractor's record of integrity and business ethics. By law, a contracting officer must already make an affirmative determination of responsibility in order for a prospective contractor to be eligible for award. That determination must include an assessment of the contractor's record of integrity and business ethics. Until this point the FAR has merely restated the law and has not provided any guidance to the contracting officer on what constituted a record of integrity and business ethics. This rule intends to fill that gap and provide contracting officers with a road map for use in that decision-making process.

One alternative would be to exempt small businesses from the rule. But because the rule assists the contracting officer in making the basic statutory assessment, the FAR Council concluded that exempting small businesses would actually remove the beneficial aspect of the rule to small businesses. In addition, the FAR council believes that a prospective contractor's record of complying with legal requirements is a relevant consideration for evaluating its record of integrity and business ethics—regardless of the size of the business. Under the procurement statutes, small and large business are subject to the same ''integrity and business ethics'' responsibility determination. Thus, the rule does not exempt small businesses from the statutory ''integrity and business ethics'' determination, and the rule does not exempt small businesses from the final rule's clarifying guidance on how contracting officers should evaluate a prospective contractor's legal compliance when making this determination.

The basic policy of the Government is to award a fair share of contracts to small entities. It is not the intent of the final rule to interfere with that policy. Sufficient procedures are in place to ensure this policy is not altered and that the essence of the final rule is carried out in an equitable manner. For example, the contracting officer will still be required to forward nonresponsibility determinations for small entities to the Small Business Administration (SBA) in accordance with the certificate of competency program.

A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, integrity) for the purpose of receiving and performing a specific Government contract. In accordance with FAR 19.602, upon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility, the contracting officer must refer the matter to the cognizant SBA area office. Contract award must be withheld for a period of at least 15 days while SBA reviews the referral. The SBA at that point is authorized to overturn the decision of the contracting officer and issue a COC determining that the small offeror is responsible and, therefore, eligible for award.

The FAR Council has long believed that small entities are generally law-abiding. This rulemaking process has not given the FAR Council any reason to change this view. Neither the public comment nor internal agency data indicate that a substantial number of small entities have violated applicable legal requirements in a manner that would result in a contracting officer determining that they are nonresponsible under this rule.

For example, for fiscal year 2000, the Department of Labor is reporting 536 violations of the Service Contract Act by small businesses with less than 100 employees. (For the same year, the Federal Procurement Data System shows 46,205 (through the third quarter) contract awards to small entities.) After consideration of violations of all laws by small businesses, agencies made only 20 nonresponsibility determinations based on a lack of integrity and business ethics for fiscal years 1996 through 1999 which were referred to SBA for a COC. Of that number, the SBA declined to issue a COC in 10 cases. Given these numbers, we cannot conclude that violations of laws by small entities occur in such a number as to render a substantial number nonresponsible under the provisions of this rule.

Another alternative considered was to exempt small businesses from the requirement of the certification. The FAR Council did not adopt this alternative either, for several reasons. First, the FAR Council could not conclude that the new certification (requiring all offerors for contracts greater than $100,000 to certify regarding certain violations of law adjudicated within the past three years) represented a significant economic burden to small entities. This is a check-the-box certification requiring detailed information only from offerors that respond affirmatively to the certification, and normally only from the apparent awardee. The average time required of a small business to respond to the certification should be much lower than that of a large business and most small businesses should require minimal recordkeeping. Second, the certification is a streamlined method of securing information upon which the contracting officer would make the determination that the prospective contractor has a satisfactory record of integrity and business ethics. Ultimately, this should be beneficial to small businesses in assuring that the contracting officer has the correct information upon which to make this determination.

In assessing the potential economic impact of the certification on small businesses, the FAR Council also considered the fact that the new requirement is simply an amendment to an existing certification. The current certification already requires prospective contractors to certify regarding violations adjudicated within the last three years of a number of laws at the Federal, state and local levels. The current certification already applies to both criminal and civil actions, as well as convictions and indictments. The new certification merely adds five new categories of laws and also extends to administrative actions. Consequently, the FAR Council concluded that the new requirement would not result in a significant economic impact on a substantial number of small entities.

Thus, while we believe that the rule will apply to a substantial number of small entities, we are unable to conclude that it will have a significant economic impact on a substantial number of small entities.

Changes Made to the Rule

Notwithstanding the above, alternatives to language in the proposed rules were considered which the FAR Council believes would achieve the Government's goal and minimize the impact of small entities. Those areas were the following:

1. *Link to honesty and trustworthiness.* Some commenters were concerned that the rule does not contain an overarching policy statement thereby creating a vagueness for contracting officers trying to assess a contractor's record of integrity and business ethics. They expressed concern that

inadvertent violations of laws could form the basis for nonresponsibility determinations. The rule now reflects that a satisfactory record of integrity and business ethics is one that indicates that the prospective contractor possesses basic honesty and trustworthiness, and that the Government can trust or rely on the contractor to perform the contract.

2. *Additional guidance has been added for how contracting officers should weigh the evidence.* Some commented that the rule did not contain guidance on how contracting officers should weigh evidence. The final rule provides a hierarchy of violations for consideration by the contracting officers. First, the hierarchy focuses on Federal and state offenses (convictions, civil judgments, administrative rulings, indictments). Second, criminal violations are limited to felonies. Third, although the contracting officer may consider relevant credible information, the hierarchy focuses on five new categories of laws: tax, labor and employment, antitrust, environmental and consumer protection laws. Fourth, violations adjudicated within the last three years are to be given the greatest weight.

3. *Comments were received that the proposed rule will establish vague, ambiguous and subjective standards.* To the contrary, this rule provides an objective basis for making a determination that otherwise is subjective. Some expressed concern that a series of minor violations could form the basis for a non-responsibility determination. To respond to those comments, an extended guidance statement has been added. The rule directs the contracting officer to give the greatest weight to adjudicated matters where there is a history of repeated, pervasive and significant violations. A single violation normally will not be cause for a determination of nonresponsibility.

4. *Certification.* Some commented that the certification requirement was burdensome. In response to those commentors, the new certification is a check-the-box certification requiring detailed information only upon request by the contracting officer and not from all offerors. Normally, this will be where the apparent awardee has responded affirmatively to the certification.

Conclusion

Based on the above, the FAR Council has concluded, and thereby certifies, that the rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866

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

D. Non-Statutory Certification Approval

In accordance with Section 29 of the Office of Federal Procurement Policy Act, 41 U.S.C. Section 425, the FAR Council has requested approval from the Administrator for Federal Procurement Policy for inclusion of a non-statutory Certification in the Federal Acquisition Regulation. In the absence of an Administrator, that approval has been granted by the Director of the Office of Management and Budget in accordance with the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3348(b)(2).

E. 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 had previously approved an annual reporting burden of 91,667 hours based on 1,100,000 respondents and 1,100,000 annual responses. The information collection provisions of this rule have been submitted to OMB but will not take effect prior to OMB approval of these provisions under the Paperwork Reduction Act.

The FAR Council analysis for the proposed rule estimated that the annual reporting burden for OMB Control Number 9000–0094 applied to only 89,995 respondents, of which approximately 50,000 would be affected by the new certification requirement. The FAR Council further estimated that the addition of this new certification requirement would increase the total burden hours by 515,000 hours, for a new total of 606,667 hours. This was based on an estimate that the additional certification would 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 estimated that in 50,000 cases the contracting officer would 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.

Several commenters addressed the estimated paperwork burden. The FAR Council considered these comments in formulation of the final rule and in the final paperwork burden analysis.

1. Estimates of burden

One commenter argued that the PRA burden estimate for the proposed rule was low, and the commenter pointed to an earlier (and higher) draft burden estimate that had been prepared. The higher estimate cited by the commenter reflected an earlier (unpublished) draft version of the collection of information. The FAR Council believes that its burden estimate for the proposed rule was correct. In this case, the burden estimate was being updated as the collection was being developed. It is not uncommon for an agency to revise its burden estimate as the agency develops a collection of information. Under the PRA, it is entirely appropriate for agencies, in their development of a collection of information, to seek to identify ways to decrease its burden or increase its practical utility through modifications to the collection. In addition, during the development of a collection of information, agencies often review their methodology and analysis for estimating its burden, and this review can also result in revisions to a burden estimate (this can occur even when the collection itself has not changed). In this case, after a draft (higher) burden estimate was prepared, clarifying changes were made to the collection, and it was this revised collection that was published for comment. In the course of updating the burden estimate for the collection, to take into account these clarifications, the FAR Council also reviewed its methodology and analysis for estimating the collection's burden. As a result of the clarifications and review, the burden estimate for the proposed rule was lower than the draft (informal) burden estimate that had been prepared for the prior draft of the collection. Similarly, in response to comments that were received on the proposed rule, the collection of information has been subsequently modified, and this has resulted in the burden estimate being further revised.

2. Number of Respondents and Responses.

The paperwork burden justification for the final rule retains the estimate of 50,000 respondents and 500,000 responses per year.

One commenter states that the FAR Council's estimate appears based on suspension and debarment actions. This is incorrect. This new certification requirement has been added to the provision at 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters and 52.212–3, Offeror Representations and Certifications—Commercial Items. One of these provisions is included in all solicitations where the contract value is expected to exceed the simplified acquisition threshold (SAT). Therefore, the same 50,000 respondents must answer all parts of the certification, whether or not they have been debarred,

suspended, or convicted of various violations. As previously stated, the 39,995 subcontractors that respond to inquiries from the prime contractor regarding debarment, suspensions, or proposed debarment are not affected by the new certification requirements.

Most of the 171,000 small business entities that may be affected by the new responsibility standards are not affected by the certification requirement. Only offerors responding to solicitations that exceed the simplified acquisition threshold are affected. Such small businesses are already included in the estimate of 50,000 respondents. This new certification cannot increase the number of respondents, but only increase the burden hours per respondent.

Another commenter cites Federal Procurement Data System data that the Government undertook 11.6 million procurement actions in FY 1998. The number of procurement actions is much greater than the number of contract awards that exceed the SAT. Most contract actions are under the SAT. In addition, contract actions also include orders, funding actions, additional work, or change orders. These contract actions would not require certification. For example, DoD is responsible for about half of all FPDS contract actions. In FY 1998, DoD only awarded 22,549 definitive contracts that exceeded the simplified acquisition threshold. The estimate of 500,000 responses considered the fact that each offeror, not just the ultimate awardee, must complete the required certificate.

3. Burden Hours.

The proposed rule required each offeror that responded affirmatively to the new certification to explain the nature of the violation and whether any fines, penalties, or damages were assessed and also permitted the contracting officer to request additional information. The paperwork burden estimate for the proposed rule included 375,000 hours for response to the certification (3 hours per initial response, 0.5 hours per subsequent response) and 140,000 hours to supply additional information requested by the contracting officer (4 hours per initial response and 1 hour per subsequent response).

The final rule does not require any information other than the certification, unless requested by the contracting officer. Therefore, we have reduced the estimated hours per response to 1 hour per initial response and 0.3 hours per subsequent response, for a total of 185,000 hours for the certification itself, a reduction of 190,000 hours. We estimate that in many acquisitions, the contracting officer will only request additional information if the otherwise apparently successful offeror has certified affirmatively. However, in some source selections, the contracting officer may request such information from all offerors in the competitive range that certified affirmatively. Therefore, we still estimate 50,000 additional requests for information from 30,000 respondents. We have retained the burden estimate of 4 hours per initial response and 1 hour per subsequent response, for a total of 140,000 hours for providing additional information.

Several commenters state that businesses wishing to do business with the Government in excess of the SAT will have to establish a system to track compliance and keep it current. As one commenter stated, no single official at any but the smallest companies is presently able to keep track of its compliance with all applicable laws, nor would they have reason to do so. We concur that most large businesses and some small businesses will probably establish a new system or augment a current system to track such compliance. Such a system would be required in any complex organization to obtain the significant reductions that we have built into estimates of subsequent response time. Therefore, we have included an estimated average of 6 hours per year for recordkeeping for each of the 30,000 respondents to the request for additional information, for a total of 180,000 annual recordkeeping hours.

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] 0.362 hours.

Recordkeepers: 30,000.

Average annual hours per recordkeeper: 6 hours.

Additional burden hours: 505,000.

Total burden hours: 596,667 hours.

The Paperwork Reduction Act does not apply to the changes to FAR Part 31, Contract Cost Principles and Procedures, because these changes do not impose information collection requirements that require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

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

Government procurement.

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

Dated: December 15, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 97–21 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 97–21 are effective January 19, 2001.

Dated: December 15, 2000.

David A. Drabkin,

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

Dated: December 15, 2000.

Michael E. Sipple,

Acting Director, Defense Procurement.

Dated: December 15, 2000.

Tom Luedtke,

Associate Administrator for Procurement, National Aeronautics and Space Administration.

Therefore, DoD, GSA, and NASA 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. 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 nonresponsibility determinations based upon integrity and business ethics with legal counsel.

* * *

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 the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws.

* * * * *

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.* (1) Prospective contractors must have a satisfactory record of integrity and business ethics in order to receive a Government contract. This determination can be made by examining a prospective contractor's record of compliance with the law. A satisfactory record of compliance with the law indicates that the prospective contractor possesses basic honesty, integrity and trustworthiness, and that the Government can trust or rely on the contractor to perform the contract in a timely manner. In making a determination of responsibility based upon integrity and business ethics, contracting officers must consider all relevant credible information. However, contracting officers should give the greatest weight to violations of laws that have been adjudicated within the last three years preceding the offer. Normally, a single violation of law will not give rise to a determination of nonresponsibility, but evidence of repeated, pervasive, or significant violations of the law may indicate an unsatisfactory record of integrity and business ethics. Also, contracting officers should give consideration to any administrative agreements entered into with prospective contractors who take corrective action after disclosure of law violations. These contractors, despite findings of law violations, may continue to be responsible contractors because they have corrected the conditions that led to the misconduct. On the other hand, failure to comply with the terms of an administrative agreement is evidence of a lack of integrity and business ethics. Contracting officers must consider information based on the following which are listed in descending order of importance:

(i) Convictions of and 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 statement, tax evasion, or receiving stolen property.

(ii) Indictments for the offenses listed in 9.104–3(c)(1)(i).

(iii) Relative to tax, labor and employment, environmental, antitrust, or consumer protection laws:

(A) Federal or state felony convictions.

(B) Adverse Federal court judgments in civil cases brought by the United States.

(C) Adverse decisions by a Federal administrative law judge, board, or commission indicating violations of law.

(D) Federal or state felony indictments.

Also, contracting officers may consider other relevant information such as civil or administrative complaints or similar actions filed by or on behalf of a federal agency, board or commission, if such action reflects an adjudicated determination by the agency.

* * * * *

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 nonresponsible 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 nonresponsibility 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 nonresponsibility determination, the contracting officer must state the basis for the determination.

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

7. Amend 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. Redesignate paragraph (a)(1)(ii) as (a)(1)(iii) and add a new (a)(1)(ii) 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 (Jan. 2001)

* * * * *

(a) * * *

(1) * * *

(ii)(A) The offeror, aside from the offenses enumerated in paragraphs (a)(1)(i)(A), (B), and (C) of this provision, has [ ] has not [ ] within the past three years, relative to tax, labor and employment, environmental, antitrust, or consumer protection laws—

(*1*) Been convicted of a Federal or state felony (or has any Federal or state felony indictments currently pending against them); or

(*2*) Had a Federal court judgment in a civil case brought by the United States rendered against them; or

(*3*) Had an adverse decision by a Federal administrative law judge, board, or commission indicating a willful violation of law.

(B) If the offeror has responded affirmatively, the offeror shall provide additional information if requested by the Contracting Officer; and

* * * * *

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. Revise paragraph (h)(2);

e. Add new paragraphs (h)(3) and (h)(4) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Jan. 2001)

* * * * *

(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—

* * * * *

(2) [ ] Have, [ ] have not, within the 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;

(3) [ ] Are, [ ] are not presently indicted for, or otherwise criminally or civilly charged by a government entity with, commission of any of these offenses; and

(4)(i) The offeror, aside from the offenses enumerated in paragraphs (1), (2), and (3) of this paragraph (h), [ ] has [ ] has not within the past three years, relative to tax, labor and employment, environmental, antitrust, or consumer protection laws—

(A) Been convicted of a Federal or state felony (or has any Federal or state felony indictments currently pending against them); or

(B) Had a Federal court judgment in a civil case brought by the United States rendered against them; or

(C) Had an adverse decision by a Federal administrative law judge, board, or commission indicating a willful violation of law.

(ii) If the offeror has responded affirmatively, the offeror shall provide additional information if requested by the Contracting Officer.

* * * * *

[FR Doc. 00–32429 Filed 12–19–00; 8:45 am]

BILLING CODE 6820–EP–P

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 (Public Law 104–121). It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 97–21 which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding this rule by referring to FAC 97–21 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 Proceedings (FAC 97–21, FAR Case 1999–010)

This final rule amends—

- Part 9 to clarify that a satisfactory record of compliance with the law indicates that the prospective contractor possesses basic honesty and that the Government can trust or rely on the contractor to perform the contract in a timely manner. In making a determination of responsibility based upon integrity and business ethics, contracting officers must consider all relevant credible information. However, contracting officers should give the greatest weight to violations of laws that have been adjudicated within the last three years preceding the offer.
- FAR Parts 14 and 15 to provide notice to prospective contractors as quickly as possible when a nonresponsibility determination is made;
- FAR Part 31, to make unallowable certain costs related labor activities, and other legal proceedings unallowable; and
- FAR Part 52, to add a requirement for offerors to certify to violations of certain laws.

Dated: December 15, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 00–32430 Filed 12–19–00; 8:45 am]

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