

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 1, 12, 23, and 52**

[FAR Case 97-033]

RIN 9000-A119

**Federal Acquisition Regulation;  
Pollution Control and Clean Air and  
Water**

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

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to remove Subpart 23.1, 52.223-1, and 52.223-2. Improvements that are being implemented by the Environmental Protection Agency (EPA) will enable it to identify and provide more up-to-date information on facilities that, because of their involvement in criminal violations of the Clean Air Act (CAA) or Clean Water Act (CWA), may not be used in the performance of Government contracts. Although this amendment eliminates the certification burden on offerors and bidders, the proposed changes represent no change to longstanding Federal policy that until such time as EPA determines that the causes giving rise to criminal CAA or CWA violations have been corrected, a contracting officer must not award a contract to be performed by convicted persons at ineligible facilities.

**DATES:** Comments should be submitted on or before July 12, 1999, to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), Attn: Laurie Duarte, 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.97-033@gsa.gov.

Please cite FAR case 97-033 in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to

status or publication schedules. For clarification of content, contact Mr. Paul Linfield, Procurement Analyst, at (202) 501-1757. Please cite FAR case 97-033.

**SUPPLEMENTARY INFORMATION:****A. Background**

Section 306 of the Clean Air Act (CAA), 42 U.S.C. 7606, and Section 508 of the Clean Water Act (CWA), 33 U.S.C. 1368, prohibit award of a Federal contract to any person who has been convicted of various violations under the Acts if the convicted person owns, leases or supervises the facility at which the violation(s) occurred, and any part of the contract will be performed at the violating facility. This ineligibility begins the moment a judgment of conviction is entered. The statutes provide that the ineligibility for contract award remains in effect until the EPA Administrator certifies that the conditions giving rise to the conviction have been corrected. To ensure that awards are made only to eligible facilities, FAR Subpart 23.1 provides at section 23.105, that an offeror must certify whether it proposes to use a facility that is on the EPA List of Violating Facilities and that it will notify the contracting officer before award, if it receives from EPA notice that EPA is considering listing the facility (FAR 52.223-1, Clean Air and Water Certification).

The FAR previously has considered different methods of enforcing the CAA and CWA ineligibility provisions. The Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355, Section 8301(g), 42 U.S.C. 7606 note) prohibited the use, in commercial item acquisitions, of a certification or a contract clause to implement the otherwise unchanged ineligibility provisions of the two statutes. Section 4301(b) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106) required the Administrator for Federal Procurement Policy to issue for public comment a proposal to remove from the FAR those certification requirements that were not specifically imposed by statute. The FAR published a final rule in the **Federal Register** at 61 FR 233 on January 2, 1997 (FAR Case 96-312), implementing the CAA and CWA amendments for commercial items, but retained the certification for other acquisitions as the least burdensome and most effective means of ensuring that Government contracts were not awarded to a contractor proposing to use, for contract performance, a listed facility (62 FR 233).

This proposed rule would remove FAR Subpart 23.1, the certification at FAR 52.223-1, the contract clause at FAR 52.223-2, Clean Air and Water,

and would provide agency contracting officers with a uniform procedure to determine a persons eligibility for award of a Government contract or subcontract. The same procedure would apply regardless of whether the acquisition is for a commercial item or not. FAR Subpart 9.4 requires that before awarding contracts and approving subcontracts, agency contracting officers must check the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs (GSA List). Internet access to the GSA List is available (<http://www.arnet.gov/epl>). Excluded parties whose ineligibility is limited by reason of a CAA or CWA conviction are identified by the facility and conviction listing, the Cause and Treatment Code "H" annotation. The textual content of Code H is provided to GSA by the EPA Debarring Official, the Federal official with the delegated responsibility for determining when CAA and CWA-ineligible parties have corrected the conditions giving rise to their criminal convictions.

In the past, certifications served to ensure that bidders and offerors who were convicted of violations of the CAA and CWA identified themselves to Contracting Officers. This mechanism supplemented the GSA List which, because of occasional delays and lapses in communicating criminal conviction information to EPA officials, might not include an offeror or bidder with a recent CAA or CWA conviction. The EPA plans to improve its information systems with a view toward making the CAA and CWA ineligibility data in the GSA List as complete and timely as possible.

By improving its information systems and revising the Cause and Treatment Code, EPA believes that FAR Subpart 23.1 can be removed without having a detrimental effect on the Government's environmental policy. Reliance on the GSA List provides an adequate mechanism for ensuring that agency contracting officers do not award contracts to ineligible offerors. As a result of these developments, the necessity for a certification to achieve compliance with the CAA and CWA ineligibility provisions has been significantly diminished, if not eliminated.

This rule also would remove the contract clause at FAR 52.223-2. This clause states that the contractor agrees to comply with the CAA and CWA. Neither statute requires that such a clause be included in Federal contracts and subcontracts. The elimination of the clause in no way would diminish the Government's ability to enforce the CAA

and CWA requirements that apply to efforts performed under Federal contracts.

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

### B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because generally less than 50 facilities a year are ineligible for contract award as a result of convictions for violations of the CAA or CWA. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 97-033), in correspondence.

### C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) is deemed to apply because the proposed rule would eliminate an information collection requirement approved under OMB Control Number 9000-0021. Accordingly, a request to remove the requirement will be submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 1, 12, 23, and 52

Government procurement.

Dated: May 7, 1999.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Therefore, 48 CFR Parts 1, 12, 23, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 12, 23, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

#### 1.106 [Amended]

2. Section 1.106 is amended in the introductory text by removing the word "ten" and adding "10"; and in the table following the introductory paragraph by removing FAR segment "52.223-1" and its corresponding OMB Control Number, "9000-0021".

### PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Section 12.503 is amended by revising the introductory text of paragraph (b); removing paragraph (b)(1); redesignating (b)(2) and (b)(3) as (b)(1) and (b)(2), respectively; removing paragraph (b)(4); and redesignating paragraph (b)(5) as (b)(3).

#### 12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

\* \* \* \* \*

(b) Certain requirements of the following laws are not applicable to executive agency contracts for the acquisition of commercial items:

\* \* \* \* \*

#### 12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

4. Section 12.504 paragraph (b) is revised to read as follows:

\* \* \* \* \*

(b) The requirements for a certificate and clause under the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, (see Subpart 22.3) are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components.

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### PART 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

#### 23.1 [Reserved]

5. Subpart 23.1 is removed and reserved.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

#### 52.223-1 [Removed and Reserved]

6. Section 52.223-1 is removed and reserved.

#### 52.223-2 [Removed and Reserved]

7. Section 52.223-2 is removed and reserved.

[FR Doc. 99-12154 Filed 5-12-99; 8:45 am]

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