

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

[FAR Case 99-010]

RIN 9000-A140

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

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify coverage and give examples of suitable contractor responsibility considerations, as well as to make unallowable the costs of attempting to influence employee decisions regarding unionization, and make unallowable those legal expenses related to defense of judicial or administrative proceedings brought by the Federal Government when a contractor is found to have violated a law or regulation, or the proceeding is settled by consent or compromise, except to the extent specifically provided as part of the settlement agreement.

DATES: Comments should be submitted on or before November 8, 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), 1800 F Street, NW, Room 4035 ATTN: Laurie Duarte Washington, DC 20405.

Address e-mail comments submitted via the Internet to: farcase.99-010@gsa.gov.

Please submit comments only and cite FAR case 99-010 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAR case 99-010.

SUPPLEMENTARY INFORMATION:**A. Background***1. FAR Responsibility Criteria*

This proposed rule revises FAR 9.104-1(d) and (e) to clarify coverage concerning contractor responsibility considerations, by adding examples of what falls within the existing definition of "an unsatisfactory record of integrity and business ethics." The proposed amendment will provide contracting officers with guidance concerning general standards of contractor compliance with applicable laws when making pre-award responsibility determinations.

A prospective contractor's record of compliance with laws and regulations promulgated by the Federal Government is a relevant and important part of the overall responsibility determination. This proposed FAR amendment clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations. These examples are premised on the existing principle that the Federal Government should not enter into contracts with contractors who do not comply with the law. For example, the proposed rule clarifies that a prospective contractor's failure to comply with applicable tax laws may be considered by the contracting officer in making a responsibility determination. Similarly, the proposed rule attempts to clarify the fact that an established record of employment discrimination would be a relevant part of the contracting officer's responsibility determination because such a record or pattern is a strong indication of a contractor's overall willingness or capability to comply with applicable laws.

Normally, the contracting officer should base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning the underlying charge. However, in some circumstances, it may be appropriate for the contracting officer to base an adverse responsibility determination upon persuasive evidence of substantial noncompliance with a law or regulation (*i.e.*, not isolated or trivial, but repeated and substantial violations establishing a pattern or practice by a prospective contractor. The facts and circumstances in each such case will require close scrutiny and examination.).

An efficient, economical and well-functioning procurement system requires the award of contracts to organizations that meet high standards

of integrity and business ethics and have the necessary workplace practices to assure a skilled, stable and productive workforce. This proposal seeks to further the Government's use of best practices by ensuring the Government does business only with high-performing and successful companies that work to maintain a good record of compliance with applicable laws.

2. Cost Principle Changes

This proposed rule revises the cost principle at FAR 31.205-21 to make unallowable those costs relating to attempts to influence employee decisions regarding unionization. This cost principle change is in furtherance of the Government's long-standing policy to remain neutral with respect to employer-employee labor disputes (see FAR Part 22). Some contractors are claiming, as an allowable cost, those activities designed to influence employees with regard to unionization decisions. Inasmuch as a number of cost-based Federal programs have long made these types of costs unallowable as a matter of public policy (*e.g.*, see 29 U.S.C. 1553(c)(1), 42 U.S.C. 1395x(v)(1)(N), 42 U.S.C. 9839(e), and 42 U.S.C. 12634(b)(1)), equity dictates that this same principle be extended to Government contracts as well.

The proposed rule also revises FAR 31.205-47 to make clear that costs relating to legal and other proceedings are unallowable where the outcome is a finding that a contractor has violated a law or regulation, or where the proceeding was settled by consent or compromise (except that such costs may be made allowable to the extent specifically provided as a part of a settlement agreement). At present, the relevant cost principle generally makes unallowable legal and other proceeding costs where, for example, in a criminal proceeding, there is a conviction; or where, for example, in a civil proceeding, there is a monetary penalty imposed. There are a number of civil proceedings brought by the Federal Government each year that do not result in imposition of a monetary penalty (*e.g.*, NLRB or EEOC proceedings), but which do involve a finding or adjudication that a contractor has violated a law or regulation, and where appropriate remedies are then ordered.

Under the proposed rule, the allowability of legal and other proceedings costs would depend on whether or not a contractor is found to have violated a law or regulation rather than on the nature of the remedy imposed. Taxpayers should not have to pay the legal defense costs associated

with adverse decisions against contractors, especially where the proceeding is brought by an agency of the Federal Government.

3. Additional Considerations

In order to give greater effect to the FAR responsibility clarifications being proposed, please provide comments and suggestions concerning whether the provision appearing at FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, should be amended to provide for enhanced responsibility disclosure relative to this proposal.

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

B. Regulatory Flexibility Act

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 most contracts awarded to small entities do not involve use of formal responsibility surveys. In addition, most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require the submission of cost or pricing data or information other than cost or pricing data, and thus do not require application of the FAR cost principles. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 99-010), in correspondence.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 9 and 31

Government procurement.

Dated: July 1, 1999.

Jeremy F. Olson,

Acting Director, Federal Acquisition Policy Division.

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

1. The authority citation for 48 CFR parts 9 and 31 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 9.104-1 to revise paragraphs (d) and (e) to read as follows:

9.104-1 General standards.

* * * * *

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

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(a)) and the necessary workplace practices addressing matters such as training,

worker retention, and legal compliance to assure a skilled, stable and productive workforce;

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Revise section 31.205-21 to read as follows:

31.205-21 Labor relations costs.

(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

(b) Costs incurred for activities related to influencing employees' decision regarding unionization are unallowable.

4. In section 31.205-47, redesignate paragraphs (b)(3) through (b)(5) as paragraphs (b)(4) through (b)(6) and add new paragraph (b)(3); and revise redesignated paragraphs (b)(5) and (b)(6) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(b) * * *

(3) In a judicial or administrative proceeding brought by the Government, a finding that the contractor violated a law or regulation;

* * * * *

(5) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in paragraphs (b)(1) through (4) of this subsection (but see paragraphs (c) and (d) of this subsection); or

(6) Not covered by paragraphs (b)(1) through (5) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this subsection.

* * * * *

[FR Doc. 99-17298 Filed 7-8-99; 8:45 am]

BILLING CODE 6820-EP-P