

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Circular 2001-03;
Introduction**

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

ACTION: Summary presentation of final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001-03. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.arnet.gov/far>.

DATES: For effective dates and comment dates, see separate documents which follow.

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 the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001-03 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.arnet.gov/far>.

Item	Subject	FAR case	Analyst
I	Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings.	1999-010 (Stay)	De Stefano.
II	Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation.	2001-014	De Stefano.

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001-03 amends the FAR as specified below:

**Item I—Contractor Responsibility,
Labor Relations Costs, and Costs
Relating to Legal and Other
Proceedings (FAR Case 1999-010
(Stay))**

The Federal Acquisition Regulatory Council (FAR Council) published in the **Federal Register** at 65 FR 80255, December 20, 2000, a final rule addressing contractor responsibility and costs incurred in legal and other proceedings. After further review, the FAR Council published an interim rule in the **Federal Register** at 66 FR 17754, April 3, 2001, staying that rule. This final rule terminates the stay.

**Item II—Contractor Responsibility,
Labor Relations Costs, and Costs
Relating to Legal and Other
Proceedings—Revocation (FAR Case
2001-014)**

The Federal Acquisition Regulatory Council (FAR Council) published in the **Federal Register** at 66 FR 17758, April 3, 2001, a proposed rule (April proposed rule) with a request for public comments. The April proposed rule proposed revoking a final rule published in the **Federal Register** at 65 FR 80255, December 20, 2000 (December final rule). The December final rule addressed responsibility and costs incurred in legal and other

proceedings. This rule finalizes the April 3, 2001, proposed rule.

Dated: December 14, 2001.

Gloria M. Sochon,

Acting Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001-03 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.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-03 is effective December 27, 2001.

Dated: December 13, 2001.

Deidre A. Lee,
Director, Defense Procurement.

Dated: December 13, 2001.

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

Dated: December 12, 2001.

Tom Luedtke,
Associate Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 9, 14, 15, 31, and 52**

**[FAC 2001-03; FAR Case 1999-010 (Stay);
Item I]**

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: Final rule; termination of stay of final rule.

SUMMARY: The Federal Acquisition Regulatory Council (FAR Council) published in the **Federal Register** at 65 FR 80255, December 20, 2000, a final rule addressing contractor responsibility, labor relations costs, and costs incurred in legal and other proceedings. After further review, the FAR Council published an interim rule in the **Federal Register** at 66 FR 17754, April 3, 2001, staying that rule. The FAR Council intended the stay would last for 270 days from April 3, 2001, until December 29, 2001, or until finalization of the proposed rule (entitled "Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings—Revocation") that was published in the **Federal Register** at 66

FR 17758, April 3, 2001, concurrently with the stay, whichever is sooner.

The FAR Council requested comments on the FAR interim rule-stay on the length of the stay. During the stay, the FAR text was restored to the text as it existed before January 19, 2001. In a separate document published concurrently with the interim rule-stay, the FAR Council published the aforementioned proposed rule, requesting comments under that FAR case on revoking the December 20, 2000, final rule.

This final rule terminates the stay.

DATES: *Effective Date:* December 27, 2001.

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. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 2001-03, FAR case 1999-010 (stay).

SUPPLEMENTARY INFORMATION:

A. Background

1. The Final Rule

The FAR Council published a proposed rule amending FAR Parts 9 and 31 in the **Federal Register** at 64 FR 37360, July 9, 1999. In response to the proposed rule, the FAR Council received more than 1500 letters.

After reviewing the public comments, the FAR Council decided to republish the proposed rule with certain changes. The FAR Council published a revised proposed rule amending FAR Parts 9, 14, 15, 31, and 52 in the **Federal Register** at 65 FR 40830, June 30, 2000. Over 300 public comments were received. The final rule, which was published in the **Federal Register** at 65 FR 80255 on December 20, 2000, had an effective date of January 19, 2001, 30 days from date of publication.

The final rule included the following revisions:

FAR Part 9

Added language stating that a satisfactory record of integrity and business ethics includes satisfactory compliance with the law including tax, labor and employment, environmental, antitrust, and consumer protection laws (FAR 9.104-1(d)). Required contracting officers to consider all relevant credible information but stated that the greatest weight must be given to offenses adjudicated within the past three years.

FAR Part 14 and 15

Directed contracting officers to notify offerors if the offerors were excluded

based on a nonresponsibility determination.

FAR Part 31

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

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

FAR Part 52

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

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

2. The Lawsuit

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

3. Letters

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

4. Action

The FAR Council reassessed the advantages and disadvantages of the changes made by the December 20, 2000, final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule. In this regard, it was not clear to the FAR Council that there was a justification for including the added categories of covered laws in the rule and its implementing certification, that the rule provided contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation, or

that the final rule was justified from a cost-benefit perspective. In a proposed rule published concurrently with the interim rule-stay, the FAR Council requested public comments on revoking the final rule. In the interim rule-stay, the FAR Council determined that the 30-day effective date did not give contractors, and the Government, sufficient time to meet the new obligations and responsibilities imposed by the final rule. Government contracting officers did not have sufficient training. Offerors did not have sufficient time to establish a system to track compliance with applicable laws and keep it current, in order to be able to properly fill out the certification. Although there was language in the noncommercial items certification, which assured contractors that no system of records needed to be established to render the certification in good faith, this language is not found in the commercial items certification. There are criminal penalties for a false certification (18 U.S.C. 1001). The FAR Council recognized that it will take more time than it anticipated for businesses to put the systems in place. Therefore, the FAR Council decided to stay the final rule of December 20, 2000. The FAR Council intended the stay to last for 270 days from the date of publication of the interim rule until December 29, 2001, or until finalization of the proposed rule that was published concurrently with the interim rule-stay, whichever is sooner.

The final rule had only been in effect since January 19, 2001. There had not been time for the public to be in a position of reliance upon the rule's existence. The previous FAR sections that were in effect, such as the previous version of the certification, were restored by this interim rule-stay.

The requirement that contractors must be responsible is statutory, and the stay did not relieve offerors of the requirement to have a satisfactory record of integrity and business ethics. Contracting officers continued to have the authority and duty to make responsibility decisions. Agency debarring officials continued to have the authority and duty to make determinations whether to suspend and debar a contractor. The Government still needed the information contained in the previous certifications, which covered such things as whether the contractor or its principals are presently debarred, or had a felony conviction for contract fraud.

The stay was not intended to be a statement that violations of the additional laws discussed in the December 20, 2000, rule could not have

been considered in the past, or could not be considered in the future, by contracting officers or agency debarring officials.

The FAR Council invited comments on the two rules. In the interim rule-stay, FAR Case 1999-010, comments were requested on the length of the stay. Ninety-eight public comments were received. Ninety-one public comments, 93 percent of the public comments, generally supported the interim rule-stay. All comments were considered in the finalization of the interim rule-stay. The FAR Council has determined to finalize the stay to terminate with the publication of the finalization of the accompanying proposed rule revoking the December rule. In an accompanying final rule, FAR case 2001-014, published concurrently with this rule, the final rule revokes the December 2000 rule.

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

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and 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. 601, *et seq.*, because the action terminates stayed FAR revisions implemented under FAR case 1999-010 published in the **Federal Register** on December 20, 2000 (65 FR 80255), that did not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

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

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

Government procurement.

Dated: December 14, 2001.

Gloria M. Sochon,

Acting Director, Acquisition Policy Division.

Accordingly, the interim rule (stay) published in the **Federal Register** at 66 FR 17754, April 3, 2001, is terminated, and DoD, GSA, and NASA further amend 48 CFR parts 9, 14, 15, 31, and 52 as set forth below:

1. The authority citation for 48 CFR parts 9, 14, 15, 31, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

9.103 [Amended]

2. Amend section 9.103 by removing paragraph (c); and by redesignating paragraph (d) as paragraph (c).

9.104-1 [Amended]

3. Amend section 9.104-1 by removing paragraph (e); and by redesignating paragraphs (f), (g), and (h) as (e), (f), and (g), respectively.

PART 14—SEALED BIDDING

14.404-2 [Amended]

4. Amend section 14.404-2 by removing paragraph (j); and by redesignating paragraphs (k), (l), and (m) as (j), (k), and (l), respectively.

PART 15—CONTRACTING BY NEGOTIATION

15.503 [Amended]

5. Amend section 15.503 by removing paragraph (a)(2), and by redesignating paragraph (a)(3) as (a)(2).

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.205-47 [Amended]

6. Amend section 31.205-47 in paragraph (a) by removing the definition "Fraud"; by removing paragraph (b)(3); and by redesignating paragraphs (b)(4), (b)(5), and (b)(6), as (b)(3), (b)(4), and (b)(5), respectively.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.209-5 [Amended]

7. Amend section 52.209-5 by removing paragraphs (a)(1)(i)(D) and (a)(1)(i)(E).

52.212-3 [Amended]

8. Amend section 52.212-3 by removing paragraph (i); and by redesignating paragraph (j) as (i). [FR Doc. 01-31301 Filed 12-26-01; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 2001-03; FAR Case 2001-014; Item II]

RIN 9000-AJ10

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

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) published in the **Federal Register** at 66 FR 17758, April 3, 2001, a proposed rule (April proposed rule) with request for public comment. The April proposed rule proposed revoking a final rule published in the **Federal Register** at 65 FR 80255, December 20, 2000 (December final rule). The December final rule addressed responsibility, labor relations costs, and costs incurred in legal and other proceedings. This rule finalizes the aforementioned April proposed rule.

An interim FAR rule was published in the **Federal Register** at 66 FR 17754, April 3, 2001, concurrently with the April proposed rule. The interim rule immediately stayed the December final rule (under FAR case 1999-010, Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings). During the stay, the FAR text was restored to the text as it existed before January 19, 2001. The FAR Council intended the stay to last for 270 days from April 3, 2001 (December 29, 2001), or until finalization of the April proposed rule, whichever was sooner. In a separate document being published elsewhere in this issue, the FAR Council is terminating the stay.

The FAR Council published in the **Federal Register** at 66 FR 23134, May 7, 2001, an extension of the April