

Item VII—Collection of Historically Black Colleges and Universities/ Minority Institutions Award Data (FAR Case 95-306)

This final rule adds a new FAR Subpart 26.3 and a new solicitation provision at 52.226-2 to implement Executive Order 12928, which requires agencies to provide periodic reporting on the progress made in award of contracts to Historically Black Colleges and Universities and Minority Institutions.

Item VIII—Allowability of Foreign Selling Costs (FAR Case 95-021)

This final rule revises FAR 31.205-38(c)(2) by removing the ceiling on allowable foreign selling costs. The rule also amends 31.205-1, Public relations and advertising costs, by deleting reference to the ceiling limitation, and further revises 31.205-38(c)(2) by deleting obsolete language.

Item IX—Independent Research and Development/Bid and Proposal Costs in Cooperative Agreements (FAR Case 95-024)

This final rule amends the cost principle at FAR 31.205-18, Independent research and development (IR&D) and bid and proposal costs, by removing from paragraph (e) the prohibition against treatment of contractor IR&D contributions under NASA cooperative arrangements as allowable indirect costs.

Item X—Prompt Payment (FAR Case 91-091)

This final rule amends FAR 32.102, Subpart 32.9, and related clauses at 52.212-4, 52.232-5, 52.232-8, 52.232-25, 52.232-26, and 52.232-27 in order to implement changes made in OMB Circular A-125 (Revised), dated December 12, 1989, to comply with the Prompt Payment Act Amendments of 1988 (Public Law 100-496). The rule also contains amendments to clarify and simplify the FAR text and clauses.

Item XI—Attorneys' Fees in GAO Protests (FAR Case 96-016)

This final rule amends FAR 33.104 to clarify that the \$150 hourly cap on attorneys' fees applies only to those protests filed on or after October 1, 1995. Protests filed with the General Accounting Office prior to October 1, 1995, are not subject to the hourly cap on attorneys' fees, in accordance with Sections 10001 and 10002 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355).

Item XII—Contractors' Purchasing Systems Reviews (FAR Case 94-605)

This final rule amends FAR 44.302 to (1) add a requirement for the cognizant contract administration agency to determine the need for a contractor purchasing system review (CPSR) based on, but not limited to, the past performance of the contractor and volume, complexity, and dollar value of the contractor's subcontracting activity; and (2) delete the requirement for a CPSR to be performed initially and at least every 3 years thereafter, for contractors exceeding a certain sales level. Also, FAR sections 44.303 through 44.307 are amended to conform to amendments at 44.302.

Item XIII—Performance-Based Payments (FAR Case 96-005)

This final rule amends FAR 52.232-32, Performance-Based Payments, by adding paragraphs (f)(6) and (7) to address title to residual material and liability for Government-furnished property, for consistency with paragraphs (d)(6) and (7) of FAR 52.232-16, Progress Payments.

Item XIV—Technical Corrections

Corrections have been made to Federal Acquisition Circular 90-44, which appeared in the Federal Register at 61 FR 69286, December 31, 1996, to correct clause dates to correspond with the effective dates of the rules, and Federal Acquisition Circular 90-45, published in the Federal Register at 62 FR 224, January 2, 1997, to replace a reference inadvertently omitted in the original document.

Dated: March 7, 1997.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.
[FR Doc. 97-6309 Filed 3-14-97; 8:45 am]
BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

[FAC 90-46; FAR Case 96-300; Item I]

RIN 9000-AH06

Federal Acquisition Regulation; Gratuities

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

ACTION: Interim rule adopted as final.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to exempt solicitations and contracts which do not exceed the simplified acquisition threshold from the prescribed use of the clause relating to gratuities. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Linfield at (202) 501-1757 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-46, FAR case 96-300.

SUPPLEMENTARY INFORMATION:

A. Background

The interim rule published as Item III of Federal Acquisition Circular 90-40 in the Federal Register at 61 FR 39199, July 26, 1996, is adopted as final without change. The interim rule implemented Section 801 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106). Section 801 amended 10 U.S.C. 2207, generally referred to as the Gratuities Act, to exempt contracts which do not exceed the simplified acquisition threshold from application of the Gratuities Act. Therefore, the clause at 52.203-3, Gratuities, is prescribed for inclusion in only those contracts which exceed the simplified acquisition threshold.

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 only a small number of Federal contractors have been subject to action under the Gratuities clause.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public

which 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 3 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Parts 3 and 52 which was published at 61 FR 39199 on July 26, 1996, is adopted as a final rule without change.

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

[FR Doc. 97-6310 Filed 3-14-97; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 14, 15, and 52

[FAC 90-46; FAR Case 91-104; Item II]

RIN 9000-AF50

Federal Acquisition Regulation; Electronic Contracting

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to address the use of electronic commerce/electronic data interchange in Government contracting. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Effective May 16, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-46, FAR case 91-104.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the Federal Register at 58 FR 69588, December 30, 1993. The rule proposed amendments to the FAR to remove any barriers to the use of electronic data interchange in Government contracting. Thirty-six comments from ten respondents were received during the public comment period. After evaluating the public comments, the Councils agreed to publish another proposed rule as a result of significant changes to the previous proposed rule being deemed necessary. The revised proposed rule was published in the Federal Register at 60 FR 12384, March 6, 1995, and an interim rule was published at 60 FR 34735, July 3, 1995. Additional changes to the final rule include—

- Revisions at FAR 5.101(a)(2)(iv) to clarify requirements for electronic posting of solicitations;
- Revisions at FAR 14.209(b) to clarify procedures for informing bidders of cancellation of electronic invitations before opening; and
- Clarification of when electronic bids and proposals will be considered to have been received by the Government for the purposes of the late bid and late proposal rules in various clauses within FAR Part 52.

This rule complements the FACNET rule (FAR Case 94-770; 61 FR 39189, July 26, 1996), which implemented provisions of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355) and the Clinger-Cohen Act of 1996 (Pub. L. 104-106).

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The FRFA is summarized as follows:

This final rule authorizes the use of electronic commerce/electronic data interchange in Government contracting. The legal authority to use electronic commerce for Government contracting actions was confirmed in General Accounting Office (GAO) Advisory Opinion B-238449. The rule will apply to all actual or potential bidders or offerors, large and small, when the solicitation authorizes the use of electronic commerce/electronic data interchange. It is estimated that the rule will apply to at least 8,615,190 small entities. There are no significant alternatives which would accomplish the objectives of the rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which 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 5, 14, 15, and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 5, 14, 15, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 14, 15, 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 5—PUBLICIZING CONTRACT ACTIONS

2. Section 5.101 is amended by revising the first sentence of paragraph (a)(2)(iv) to read as follows:

5.101 Methods of disseminating information.

* * * * *

(a) * * *

(2) * * *

(iv) Electronic posting of requirements in a place accessible by the general public at the Government installation may be used to satisfy the public display requirement. * * *

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PART 14—SEALED BIDDING

3. Section 14.209 is amended by revising paragraph (b) to read as follows:

14.209 Cancellation of invitations before opening.

* * * * *

(b) When an invitation issued other than electronically is cancelled, bids that have been received shall be returned unopened to the bidders and notice of cancellation shall be sent to all prospective bidders to whom invitations were issued. When an invitation issued electronically is cancelled, a general notice of cancellation shall be posted electronically, the bids received shall not be viewed, and the bids shall be purged from primary and backup data storage systems.

* * * * *

4. Section 14.304-1 is amended by revising paragraph (a)(4) to read as follows: