

1.501, public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Office of Federal Acquisition Policy.

Therefore, 48 CFR Part 31 is amended as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR Part 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).

2. Section 31.205-6 is amended by adding paragraph (p) to read as follows:

31.205-6 Compensation for personal services.

* * * * *

(p) *Limitation on allowability of compensation for certain contractor personnel.* (1) For contracts awarded during fiscal year 1997, costs incurred from October 1, 1996, through September 30, 1997, for compensation of an officer in a senior management position in excess of \$250,000 per year are unallowable (Section 809 of Public Law 104-201).

(2) As used in this paragraph:

(i) *Compensation* means—

(A) The total amount of taxable wages paid to the employee for the year concerned; plus

(B) The total amount of elective deferred compensation earned by the employee in the year concerned.

(ii) *Officer in a senior management position* means—

(A) The contractor's Chief Executive Officer (CEO) or any individual acting in a similar capacity;

(B) The contractor's four most highly compensated officers in senior management positions, other than the CEO; and

(C) If the contractor is organizationally subdivided into intermediate home offices and/or segments, the five most highly compensated individuals in senior management positions at each such intermediate home office and/or segment.

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48 CFR Part 33

[FAC 90-45; FAR Case 95-309; Item XII]

RIN 9000-AH10

Federal Acquisition Regulation; Agency Procurement Protests

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 to amend the Federal Acquisition Regulation (FAR) to provide for informal, procedurally simple, and inexpensive resolution of protests. This final rule implements Executive Order 12979, Agency Procurement Protests. 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.

EFFECTIVE DATE: March 3, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-45, FAR case 95-309.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule revises the agency procurement protest procedures at FAR 33.103 to implement Executive Order 12979 of October 25, 1995, Agency Procurement Protests (60 FR 55171, October 27, 1995). An interim rule was published in the Federal Register at 61 FR 39219, July 26, 1996. Six sources submitted public comments. All comments, including comments from GAO, were considered in developing the final rule.

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat. The analysis is summarized as follows:

This rule implements Executive Order 12979, Agency Procurement Protests, which requires the heads of the executive departments and agencies engaged in the procurement of supplies and services to prescribe administrative procedures for the resolution of procurement protests as an alternative to protests in a forum outside the procuring agencies. There were no public

comments received in response to the Initial Regulatory Flexibility Analysis. Several changes were made as a result of public comments in response to the interim rule. The time to file a protest was reduced from 14 to 10 days after the basis of protest is known, or should be known, to conform with revisions to General Accounting Office protest procedures. The rule was revised to clarify that agencies may designate an official, other than the contracting officer, to receive protests. Agencies may also designate whether a review of a protest by an official other than the contracting officer is instead of, or in addition to, review of the protest by the contracting officer. The rule was revised to permit agencies to exchange information with a protester while considering the protest.

The rule will apply to all actual or potential bidders or offerors, large and small, whose direct economic interests would be affected by the award or failure to award a Government contract. The number of small entities to which the rule will apply is estimated to be between 35,000 and 45,000. This rule does not impose any reporting, recordkeeping, or other compliance requirements.

This rule is expected to have a beneficial impact on small entities by prescribing informal, procedurally simple, and inexpensive means to resolve protests. The rule encourages the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel as alternative protest resolution methods.

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 Part 33

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 33 is amended as set forth below:

PART 33—PROTESTS, DISPUTES, AND APPEALS

1. The authority citation for 48 CFR Part 33 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).

2. Section 33.103 is amended—

- a. in paragraph (c) by removing "and permitted by law";
- b. by revising paragraphs (d)(2)(i) and (d)(4);
- c. in paragraph (e) by revising "14 days" to read "10 days";

d. in the first sentence of paragraphs (f)(1) and (f)(2) by inserting the word "agency" after the word "pending";

e. by adding paragraph (f)(4); and

f. by revising paragraphs (g) and (h) to read as follows:

33.103 Protests to the agency.

* * * * *

(d) * * *

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

* * * * *

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

* * * * *

(f) * * *

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agencies protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

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48 CFR Parts 1, 5, 14, and 36

[FAC 90-45; FAR Case 96-305; Item XIII]

RIN 9000-AH17

Federal Acquisition Regulation; Two-Phase Design Build Selection Procedures

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 to amend the Federal Acquisition Regulation (FAR) to implement Section 4105 of the Clinger-Cohen Act of 1996 (Public Law 104-106), which authorizes the use of two-phase design-build procedures for construction contracting. 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.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Jack O'Neill at (202) 501-3856 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-5, FAR case 96-305.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule with request for public comment was published in the Federal Register at 61 FR 41212, August 7, 1996. Comments were received from 77 respondents. After analysis of the public comments and further consideration of the proposed language, the rule was revised at FAR 36.104, 36.301(b)(2), and 36.303-1 to more closely conform to the provisions of Section 4105 of Public Law 104-106. In addition, examples of phase-two evaluation factors have been added at FAR 36.303-(a).

B. Regulatory Flexibility Act

This final rule may 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 rule reduces the cost of proposal preparation for those offerors not selected for Phase Two, when two-phase design-build procedures are used. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is summarized as follows:

We estimate that approximately 1,465 small businesses responding to two-phase design-build solicitations annually may save proposal costs on an average of eight separate solicitations each. This final rule imposes no new reporting or recordkeeping requirements.

A copy of the FRFA will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR Case 96-305), in correspondence.

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 1, 5, 14, and 36

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 1, 5, 14, and 36 is amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 5, 14, and 36 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 REGULATION SYSTEM

1.106 [Amended]

2. Section 1.106 is amended in the list following the introductory paragraph by removing the FAR segment "36.302" and inserting "36.213-2".

PART 5—PUBLICIZING CONTRACT ACTIONS

3. Section 5.204 is amended by revising the first sentence to read as follows:

5.204 Presolicitation notices.

Contracting officers shall publicize presolicitation notices in the CBD (see 15.404 and 36.213-2). * * *