
Contracting Policy Bulletin

HQ AFSPC/LGCP

January 2001

HQ AFSPC/LGCP's monthly Contracting Policy Bulletin lists the latest updates to the FAR and FAR Supplements. In each issue the changes since the previous issue are highlighted. (For those reading this in Word 7.0, **all policy available on the Internet is hyperlinked directly to the web site where it is located. Just click on the blue text.**) Comments or recommendations regarding this Bulletin may be directed to Ms. Suzanne Snyder, e-mail: suzanne.snyder@peterson.af.mil or DSN 692-5498.

Current and past policy bulletins are posted on the HQ AFSPC/LGC Home Page (<http://www.peterson.af.mil/hqafspc/contracting/>).

Headlines

New FAR Rule clarifying contractor responsibility determinations (FAR)

FAR Definitions clarified and relocated (FAR)

Final Rule on CAS Threshold and Waiver Adopted (FAR)

AFSPC launches self-help web link on contracting webpage (MISCELLANEOUS)

New Technology Incentive added to Weighted Guidelines Calculation (DFARS)

Final Case on NAICS adopted (DFARS)

FAR

FACs (Available at <http://farsite.hill.af.mil/regst1.htm#FAC>)

FAC 97-21, dated December 20, 2000 with effective date of 19 January 2001 (Final rule to FAR Case 1999-010) clarified what constitutes a "satisfactory record of integrity and business ethics" in making contractor responsibility determinations under FAR Part 9, and revised certain cost principles under FAR Part 31 related to labor relations, legal and other proceedings.

Specifically language has been added to FAR Part 9 that:

- Clarifies that contracting officers should coordinate nonresponsibility determinations based upon integrity and business ethics with agency legal counsel (FAR 9.103(b)).
- Clarifies 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)).
- Provides an expanded guidance statement to contracting officers that (1) reinforces the link between a satisfactory record of integrity and business ethics, compliance with law and the Government's interest in contracting with responsible reliable, honest and law

abiding contractors; in sum, contractors it can trust; (2) requires contracting officers to consider all relevant credible information but states that the greatest weight must be given to offenses adjudicated within the past three years; (3) explains that a single violation of law will not "normally" give rise to a determination of non-responsibility, and that the focus of the assessment should be on "repeated, pervasive or significant" violations of law; and (4) requires the contracting officer to take into account any administrative agreements entered into between the prospective contractor and the Government (FAR 9.104-3(c)).

Language in FAR Parts 14 and 15 has been added to modify FAR 14.404-2(i) and 15.503(a)(1) that provides for notification to unsuccessful bidders and offerors promptly after a nonresponsibility determination is made. If nonresponsibility is the basis for rejection of the bid or elimination of an offer from the competition, then the contracting officer must provide the reasons for the nonresponsibility determination in the notification.

Certifications at 52.209-5 and 52.212-3 have been amended to provide the Contracting Officer with information that focuses on cases that have been brought by governmental authorities (e.g., felony convictions and indictments of Federal and State law). Although administrative complaints, private civil cases, and violations of foreign law have been not included in the final certification, this does not mean they cannot be taken into consideration in making the responsibility determination (to the extent that the contracting officer becomes aware of such cases, and they constitute "relevant credible information"). Certification is a check-the-box under which a contractor will have to provide additional detailed information only upon the request of the contracting officer, and this is expected to occur generally only when that contractor is the apparently successful offeror.

In FAR Part 31 language has been added to make unallowable those costs incurred for activities that assist, promote or deter unionization and costs incurred in civil or administrative proceedings brought by a government where the contractor violated, or failed to comply with a law or regulation.

FAC 97-22, dated 10 January 2001 with an effective date of 12 March 2001 (Cost Accounting Standards Item III effective 10 January 2001) contains five final rules as well as technical amendments. Specifically the following changes are made:

Item I--Definitions (FAR Case 1999-403) clarifies the applicability of definitions used in the FAR, eliminates redundant or conflicting definitions, and makes definitions easier to find. The rule accomplishes this by relocating definitions of terms that are used in more than one FAR part with the same meaning to 2.101; relocates other definitions of terms to the "Definitions" section of the highest level FAR division (part, subpart, or section) where the term as defined is used. It clarifies that a term, defined in FAR 2.101, has the same meaning throughout the FAR unless the context in which the term is used clearly requires a different meaning; or unless another FAR part, subpart, or section provides a different definition for that particular part, subpart, or section. Finally the change adds cross-references to definitions of terms in FAR 2.101 that are defined differently in another part, subpart, or section of the FAR.

Item II--Applicability, Thresholds and Waiver of Cost Accounting Standards Coverage (FAR Case 2000-301) converts the interim rule published as Item VIII of FAC

97-18 to a final rule without change. This rule amends FAR Subpart 30.2, CAS Program Requirements, and the FAR clause at 52.230-1, Cost Accounting Standards Notices and Certification, to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106-65) and the Cost Accounting Standards (CAS) Board's final rule, Applicability, Thresholds and Waiver of Cost Accounting Standards Coverage. The FAR rule revises policies affecting which contractors and subcontractors must comply with CAS by removing the requirement that a contractor or subcontractor must have received at least one CAS-covered contract exceeding \$1 million ("trigger contract") to be subject to "full CAS coverage." The CAS Board added a new "trigger contract" dollar amount of \$7.5 million (which is already referenced at FAR 30.201-1) and increased the dollar threshold for full CAS coverage from \$25 million to \$50 million; and revised the CAS waiver procedures and conditions at FAR 30.201-5.

Item III--Advance Payments for Non-Commercial Items (FAR Case 99- 016) amends the FAR to permit federally insured credit unions, in addition to banks, to participate in the maintenance of special accounts for advance payments. (The rule will only affect contracting officers that provide contract financing using advance payments for non-commercial items.)

Item IV--Part 12 and Assignment of Claims (FAR Case 1999-021) amends the FAR to correct an inconsistency between two clauses related to the assignment of claims. This rule revises FAR 52.212-4(b) to prohibit a contractor from assigning its rights to receive payment under the contract if payment is made by a third party such as when a Governmentwide commercial purchase card is used.

Item V--Clause Flowdown--Commercial Items (FAR Case 1996-023) amends the clause at FAR 52.244-6, Subcontracts for Commercial Items, to revise the listing of clauses the contractor must flow down to subcontractors by adding the clause FAR 52.219-8, Utilization of Small Business Concerns. In addition, the rule adds language to inform contractors that they may flow down a minimal number of additional clauses to subcontractors to satisfy their contractual obligations.

Item VI Technical Amendments consists of amendments to update references and make editorial changes.

DFARS

DFARS Change Notices (replaced DACs and Departmental Letters) (Available at <http://www.acq.osd.mil/dp/dars/dfars/changes.htm>)

DFARS Change Notices DCN 20001213 was published on December 13, 2000 with 1 interim rule and 5 final rules as follows:

Interim Rule

DFARS Case 2000-D301 Domestic Source Restrictions—Ball and Roller Bearings and Vessel Propellers)

Final Rules

Profit Incentives to Produce Innovative New Technologies (DFARS Case 2000-D300) This final rule implements Public Law 106-65 and amends the weighted guidelines method of profit computation at DFARS 215.404-71 to combine the

management and cost control elements of the performance risk factor; to establish a new "technology incentive" range for technical risk; and to slightly modify some of the cost control standards. In addition, the rule amends DFARS 215.404-4(b) to clarify that departments and agencies must use a structured approach for developing a prenegotiation profit or fee objective on any negotiated contract action when cost or pricing data is obtained.

North American Industry Classification System (DFARS Case 2000-D015)

The interim rule to convert programs based on the Standard Industrial Classification system to the North American Industry Classification System published on August 17, 2000 (Change Notice 20000817) is converted to a final rule without change.

Polyacrylonitrile (PAN) Carbon Fiber (DFARS Case 2000-D017)

Material Management and Accounting Systems (DFARS Case 2000-D003)

revises the material management and accounting system (MMAS) requirements at DFARS 242.72 and 252.242-7004. Specifically the rule: (1) Requires use of the MMAS clause only in cost-reimbursement contracts and fixed-price contracts with progress payments made on the basis of costs; (2) Eliminates the requirement for inclusion of the MMAS clause in contracts with small businesses, educational institutions, and nonprofit organizations; (3) Replaces the requirement for an MMAS "demonstration" with a requirement for the contractor to have policies, procedures, and operating instructions that adequately describe its MMAS and to provide results of internal compliance reviews to the Government; and (4) Makes the dollar threshold for conducting an MMAS review consistent with the threshold for conducting a Contractor Insurance/Pension Review (\$40 million of qualifying sales to the Government during the contractor's preceding fiscal year).

Authority to Indemnify Against Unusually Hazardous or Nuclear Risks (DFARS Case 2000-D025) amends DFARS Part 250, Extraordinary Contractual Actions, to clarify that the Under Secretary of Defense (Acquisition, Technology, and Logistics) may indemnify a contractor against unusually hazardous or nuclear risks, in accordance with the acquisition authority provided the Under Secretary at 10 U.S.C. 133.

Class Deviations (Available at <http://www.acq.osd.mil/dp/dars/classdev.html>)

No new class deviations have been issued since CD 2000-O0006 dated 25 Aug 00.

Other Director of Defense Procurement Memos (Available at http://www.safaq.hq.af.mil/contracting/policy/ddp_memo.cfm)

No new memos since 2 Aug 00.

AFFARS

AFACS (Available at <http://farsite.hill.af.mil/regst1.htm#AFAC>)

No new AFACs have been issued since AFAC 96-4, issued 13 Oct 00. Effective 20 Oct 00.

Contracting Policy Memos (Available at http://www.safaq.hq.af.mil/contracting/policy/das_pol.cfm)

A new Contracting Policy Memos OO-C-03 dated 27 Dec 00 pertaining to Approval Levels for Defective Pricing Actions was issued. Specifically, the clearance procedures at 5301.90 no longer apply to defective pricing actions.

Contracting Information Memos (Available at http://www.safaq.hq.af.mil/contracting/policy/das_info.shtml)

No new Contracting Information Memos have been issued since 15 Oct 99.

Contracting Related Memos (Available at <http://www.safaq.hq.af.mil/contracting/policy/conrelatedmemo.html>)

No new Contracting Related Memos have been issued since 4 Dec 00.

AFSPCFARS

AFSPCACs <http://www.spacecom.af.mil/hqafspc/contracting/Policy/afspcfars1.htm>

Correction: The AFSPC Acquisition Circular (AFSPCAC) 2000-01 to the AFSPC FAR Supplement was issued on 17 Nov 00 not 15 Nov 00 - summary of changes was previously furnished in the December bulletin.

Information (Policy) Letters
(http://www.spacecom.af.mil/hqafspc/contracting/Policy/hq_air_force_space_command.htm)

No new INFO.LTRs have been issued since INFO.LTR 2000-08 dated 14 Sep 00.

MISCELLANEOUS

Self Help Website Launched: HQ AFSPC/LGC has launched a link on the homepage website for on-line distance learning and training materials. Take some time to look at the first two areas of emphasis – source selection and past performance at <http://www.spacecom.af.mil/hqafspc/contracting>.

Web-based CPARS: As the entire AF begins moving towards inputting contractor performance evaluations via the electronic, web-based CPARS, you may want to look at the new AF CPARS Guide posted at the following web site: <http://www.cpars.navy.mil> Click on "Reference Materials" on the left side of the page and then click on "AF CPARS Guide (Policy)" in the top, center of the page.

Source Selection Insight from SAF: On a recent Source Selection Decision Document (SSDD) viewed at AF level, two issues arose that were shared with the AF Source Selection Expert Advisor Community to share as lessons learned:
~ Remember, proposals conducted under AF procedures are not "ranked". The rationale is that ranking diminishes the subjectivity of the trade-off decision.

~ It is unnecessary and inappropriate to reflect a specific relevancy rating of each contract considered during the past performance evaluation. While examples that support the overall performance confidence assessment rating should be provided, do not include the relevancy rating of each contract reviewed.

New Guidance on Requirement for Contracting Field: Section 808 of the FY01 National Defense Authorization Act (NDAA) sets forth new minimum educational requirements for Contracting Officers above the Simplified Acquisition Threshold (SAT) and for GS-1102s and similar military positions. Section 808 requires a bachelors degree AND 24 semester hours of business related courses. Although this legislation wasn't signed into law until 30 Oct 00, it was effective retroactive to 01 Oct 00. The Air Force is working to determine the correct application of this requirement and development of a waiver process. Stay tuned for more on this "hot topic".

Links on E-filing and Record Keeping: A link is now available on the Chief Information Officer Council website for the Department of Justice final guidance on legal considerations related to e-filing and record keeping.
<http://www.cybercrime.gov/ecommerce.html>

Looking for Laws on Small Business Program? Check of the following website for assistance: <http://www.sba.gov/library/lawroom.html>

Javits-Wagner-O'Day Act: Coming soon look for a change to the FAR to implement existing law which states that when any portion of contracted services are on the Procurement List under the Javits-Wagner-O'Day Act, then the prime contractor must subcontract to the JWOD provider identified by the President's Committee. This is a mandatory subcontract for services and there is no exception for Randolph-Sheppard prime contractors.

Business Solutions in Public Interest Awards: The Council for Excellence in Government, Government Executive magazine and the Office of Federal Procurement Policy are once again partnering to recognize the success of leaders in the acquisition field. Applications are now being accepted for the 2001 Business Solutions in the Public Interest awards for acquisition excellence. The awards will identify leading examples of the greatest impact and trend-setting accomplishments in the practice of the new business performance culture. The awards also will recognize the importance of partnership between agency staff and leadership in thinking through, planning and managing acquisitions. More information on the awards program, including the application, can be found at www.excelgov.org/cgi-bin/acqaward or by contacting bsp@excelgov.org. Deadline for electronic application: February 16, 2001, paper application: February 9, 2001. **Note: For AFSPC units, application for this award should be submitted through HQ AFSPC/LGC.**

PROTEST SUMMARIES Jump this website and then click on case you would like to read (<http://www.gao.gov/decisions/bidpro/bidpro.htm>) The follow provides a sampling of recent protest cases.

Dynacs Engineering Company, Inc. v. United States, No. 00-166C (Fed.Cl. Oct. 25, 2000) Originally filed and denied as a GAO protest, this postaward protest by Dynacs Engineering Co. of a contact award to Federal Data Corp. at the Court of Federal Claims was sustained. The Court found that NASA had conducted "prejudicially unequal"

discussions with competitive range offerors. The error cited by the Court was that NASA discussed with FDC weaknesses identified in the first round of discussions that still remained but failed to afford Dynacs the same opportunity.

Performance Construction Inc., GAO B-286192, 10/30/00 Interesting case dealing with electronic commerce and website postings in which GAO found for the agency stating that even if the website had not been unavailable (it was not) on the day for receipt of proposals, for an offeror to wait until the last date to attempt to obtain solicitation amendments does not satisfy a firm's obligation to make every reasonable effort to obtain solicitation materials. An extension to prepare a proposal because the offeror waited until the closing date to obtain information was not justified.

AMI Construction, B-286351, December 27, 2000. Contracting agency's reliance on information in the Small Business Administration's (SBA) PRO-Net database to determine that the protester, which certified itself in its bid as an eligible HUBZone small business concern, was not small and thus was not eligible for a HUBZone evaluation preference was improper because such questions must be referred to the SBA under applicable regulations where the agency does not believe it can or should accept the bidder's self-certification.

Wackenhut International, Inc., B-286193, December 11, 2000. Another case of sustained protest based on failure to follow Section M of the solicitation. Protest of evaluation of proposals and source selection is sustained where agency failed to evaluate the offerors' proposed compensation plans in accordance with the RFP.

National Systems Management Corporation, B-286112.2, November 16, 2000 Agency's evaluation of protester's proposal is unobjectionable where the record establishes that the evaluation was reasonable and consistent with the stated evaluation factors; protester's mere disagreement with the agency's conclusions does not render the evaluation unreasonable. Under best value solicitation in which technical factors were more important than price, selection on the basis that protester's technical advantage on most important technical factor did not warrant the associated price premium is unobjectionable and consistent with the evaluation scheme.

Imaging Systems Technology, B-283817.3, December 19, 2000 Cancellation of solicitation based on a determination that in-house performance would cost the government less than contractor performance was improper where comparison of in-house and contractor performance was neither realistic nor fair. Specifically, there were significant areas in which the cost comparison was not based on the same work effort for the in-house and contractor personnel. Essentially, the Air Force concluded that the quantity estimates in the RFP were unrealistically high, and calculated the cost of in-house performance based on more realistic, but much lower, quantity estimates.