

**DEPARTMENT OF DEFENSE
GENERAL SERVICES ADMINISTRATION
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

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

48 CFR Parts 3, 4, 9, 14, 15, 37, 52, and 53

[Federal Acquisition Circular 840960]

**Federal Acquisition Regulation (FAR);
Procurement Integrity**

RIN 9000-AD01

55 FR 36782

Thursday, September 6, 1990

ACTION: Interim rule with request for comment.

SUMMARY: On November 17, 1988, section 6 of the Office of Federal Procurement Policy (OFPP) Act Amendments of 1988 amended the OFPP Act by adding section 27, Procurement Integrity, codified at section 423 of title 41 of the United States Code, herein referred to as "the Act." An interim rule was published on May 11, 1989, in the Federal Register (54 FR 20488) followed by a 60-day public comment period. In November 1989, section 27 was amended by section 814 of Pub. L. 10109189 and subsequently suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. 101-194, for the period December 1, 1989, through November 30, 1990. This interim rule replaces the coverage previously promulgated in FAC 84-47 and incor-

porates coverage resulting from the public comment period for FAC 84-47, changes to the public law, and the suspension of section 27.

The Act prohibits certain activities by competing contractors, Government procurement officials and other individuals during the conduct of a Federal agency procurement. In general, these prohibited activities involve soliciting or discussing post-Government employment, offering or accepting a gratuity, or soliciting or disclosing proprietary or source selection information.

The Act also contains certification and disclosure provisions for both contractors and Government officers and employees, imposes post provides for criminal and civil penalties and administrative and contractual remedies for violations of the Act.

DATES: Effective Date: September 6, 1990.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before November 6, 1990, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4041, Washington, DC 20405.

Please cite FAC 84-60 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Sharon A. Kiser, FAR Secretariat, Office of Federal Acquisition Policy, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 84-60.

SUPPLEMENTARY INFORMATION:

A. Background

Approximately 200 comments were received from 50 different commenters regarding the interim rule (FAC 840947) implementing section 27 of the OFPP Act as originally enacted. While the FAR Council was developing a final rule which would consider the public comments, Public Law 101-189 made changes to section 27. Those changes were so significant that it is now necessary to publish another interim rule incorporating the statutory changes and addressing the public comments. In addition, the suspension of

section 27 and the new statutory definition of procurement official require a more specific treatment of the applicability of section 27 as originally enacted and as amended.

The most frequent public comments were in the following areas: source selection and proprietary information; employment restrictions; the meaning of "personal and substantial"; commencement of a procurement; contractor certifications; and the definitions of "competing contractor," "procurement official," and "possible violation." In response to those comments, this interim rule makes changes in each of those areas. Examples of changes stemming from the public comments include the definition of "source selection information," the requirements for marking information as source selection information, and the definitions of "competing contractor," "proprietary information," and "procurement official" have been revised; a definition of "possible violation" has been added; the regulations dealing with the processing of violations have been significantly revised, including an identification of the individuals authorized to take actions; contractor certification requirements have been simplified as a "best knowledge and belief" standard added; an FAR parts have been made. The significant statutory changes are commencement of a procurement is tied to specific actions; the definition of "procurement official" has been redefined in terms of certain specific activities; the definition of "gratuity, or other thing of value" is no longer tied to agency standards of conduct regulations and includes a government wide monetary standard; provisions for recusal from participation in a procurement have been added; employment restrictions with regard to subcontractors have been clarified; provisions for ethics advisory opinions for present or former Government officers or employees who are or were procurement officials have been added; and the scope of the ethics training certifications required from procurement officials has been expanded. The new statutory certification provision will require agencies to obtain new certifications for individuals who will be performing procurement official activities on or after December 1, 1990. In addition, because the law was suspended for the period December 1, 1989, through November 30, 1990, and the definition of procurement official was statutorily changed, the interim rule was modified to emphasize the impact of the changes in law and the law's suspension on the prohibitions and restrictions applicable to procurement officials. For example (1) the post-employment restrictions under section 27 as originally enacted only attach to individuals who perform activities during the period July 16, 1989, through November 30, 1989; (2) activities performed during the suspension period have no impact on post-employment rights; and (3)

the post-employment restrictions under section 27 as amended apply on or after December 1, 1990, and may also apply as well to an individual who was a procurement official under section 27 as originally enacted and whose activities prior to December 1, 1989, would meet the definition of a procurement official under section 27, as amended.

B. Coordination With the Director, Office of Government Ethics

Effective June 1, 1990, the Director of the Office of Government Ethics became responsible for issuing regulations implementing subsections 27 (a)(1), (a)(2), (b)(1), (b)(2), (c), (f), and (k) of the OFPP Act. Those regulations are required to be issued in the FAR in coordination with the FAR Council. The provisions for which the Office of Government Ethics is responsible relate to gratuities, seeking employment, recusal, post employment, and ethics advisory opinions. Pertinent provisions of the interim rule were developed by the Office of Government Ethics in coordination with the FAR Council. The interim rule is issued by the FAR Council in coordination with the Office of Government Ethics.

C. Determination to Issue an Interim Rule

A determination has been made under authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) to issue the regulations in FAC 84-60 as an interim rule. This However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating a final rule.

D. Regulatory Flexibility Act

The interim change (FAC 84-60) to the FAR 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. The impact is likely to occur because, in connection with contract awards, extensions, and modifications in excess of \$100,000, offerors will be required to gather and provide to the Government certain information regarding the activities of the offeror during the conduct of the procurement. Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be sent to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR

subparts will also be considered. Such comments must be submitted separately and cite FAR Case 90-610 (FAR Case 89-23) in correspondence.

E. Paperwork Reduction Act

The information collection requirements in this interim rule are being resubmitted for approval under OMB Control Number 9000-0103, as required by 44 U.S.C. 3501, et seq. Annual reporting burden: The annual reporting burden is estimated as follows: Respondents, 20,000; responses per respondent, 20; total annual responses, 400,000; hours per response, 5 minutes; and total response burden hours, 33,333. Annual recordkeeping burden: The annual record keeping burden with respect to incorporating the training requirement into training programs is estimated as follows: Respondents, 20,000; responses per respondent, 20; total annual responses, 400,000; hours per response, 20 minutes; and total response burden hours, 13,333. Any public comments concerning the information collection requirements should be submitted to the Office of Management and Budget (OMB), Mr. Stephen Holden, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

List of Subjects in 48 CFR Parts 3, 4, 9, 14, 15, 37, 52, and 53 Government procurement.

Dated: August 31, 1990.

Albert A. Vicchiolla, Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular [Number 84-60]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 840960 is effective September 6, 1990.

Eleanor Spector, Deputy Assistant Secretary of Defense for Procurement

Richard H. Hopf, Associate Administrator for Acquisition Policy.

S.J. Evans, Assistant Administrator for Procurement, NASA.

The Administrator of the Office of Federal Procurement Policy, Office of Management and Budget, and the Director, Office of Government Ethics, concur.

Allan V. Burman, Administrator, Office of Federal Procurement Policy.

Dated: August 27, 1990.

Stephen D. Potts,
Director, Office of Government Ethics.