

Federal Register

Tuesday
December 31, 1996

Part III

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

**48 CFR Ch. I
Federal Acquisition Regulations; Final
Rule**

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Chapter 1

**Federal Acquisition Circular 90-44;
Introduction**

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

ACTION: Summary presentation of final and interim rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules issued by the FAR Council in this Federal Acquisition Circular (FAC) 90-44. Each rule follows this document in the order listed below. A companion document, the Small Entity Compliance Guide, follows this FAC and may be located on the internet at <http://www.gsa.gov/far/compliance>.

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

FOR FURTHER INFORMATION CONTACT:

The analyst whose name appears (in the table below) in relation to each FAR case or subject area. For general information, contact Beverly Wayson, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 90-44 and specific FAR case number(s).

SUPPLEMENTARY INFORMATION: Federal Acquisition Circular 90-44 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR case	Analyst
I	Automatic Data Processing Equipment Leasing Costs (Interim)	96-010	Olson
II	Major System Definition	96-322	O'Neill
III	Preaward Debriefings	96-304	DeStefano
IV	Certification Requirements—Drug-Free Workplace	96-311	DeStefano
V	Consideration of Late Offers	95-019	DeStefano
VI	Foreign Differential Pay (Interim)	96-012	Olson
VII	Final Indirect Cost Rates	95-018	Klein
VIII	Modification of Existing Contracts (Interim)	96-606	DeStefano

Item I—Automatic Data Processing Equipment Leasing Costs (FAR Case 96-010)

This interim rule deletes the cost principle at FAR 31.205-2, Automatic Data Processing Equipment (ADPE) Leasing Costs, the ADPE definition at 31.001, and references to the term ADPE found elsewhere in Part 31.

Item II—Major System Definition (FAR Case 96-322)

This final rule amends the definition of “major system” at FAR 2.101 to increase the dollar thresholds applicable to the Department of Defense. The rule implements 10 U.S.C. 2302(5) as amended by Section 805 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201).

Item III—Preaward Debriefings (FAR Case 96-304)

This final rule revises FAR Subpart 15.10 to implement Section 4104 of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). Section 4104 requires that, prior to contract award, contracting officers provide a debriefing to any interested offeror on the reasons for that offeror’s exclusion from the competitive range in a competitive negotiation.

Item IV—Certification Requirements—Drug-Free Workplace (FAR Case 96-311)

This final rule amends FAR Parts 9, 13, 23, and 52 to delete the requirement for an offeror to provide a certification regarding a drug-free workplace. The

rule implements Section 4301(a)(3) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106).

Item V—Consideration of Late Offers (FAR Case 95-019)

This final rule amends the late bid rule to allow an offer to be accepted if the late receipt was due primarily to Government mishandling after receipt at the Government installation. The rule recognizes the use of hand-carried offers (including delivery by a commercial carrier) as a common business practice and provides flexibility in determining when an offer (bid or proposal) was received at the Government activity, by applying standards used by the General Accounting Office. The rule also expands the definition of acceptable evidence to support acceptance of a late offer and adds a new exception at 52.215-10(a)(5) and 52.215-36(a)(3) which allows consideration of a proposal that was misdirected or misdelivered (not necessarily through mishandling) to an office other than that designated for receipt of offers in the solicitation. These changes do not apply to commercial item solicitations which contain the provision at 52.212-1(f), Late Offers.

Item VI—Foreign Differential Pay (FAR Case 96-012)

This interim rule deletes the prohibition at FAR 31.205-6(e)(2) on the calculation of foreign differential pay based directly on an employee’s specific

increase in income taxes resulting from assignment overseas.

Item VII—Final Indirect Cost Rates (FAR Case 95-018)

This final rule amends FAR Subpart 42.7 and Part 52 to improve procedures for providing payments to contractors under cost-type contracts by permitting, with certain restrictions, contractor use of billing rates contained in certified final indirect cost rate proposals, providing for Government release of 75 to 90 percent of all fee withholdings under physically completed contracts, after receipt of the contractor’s certified final indirect cost rate proposal, and establishing a timeframe for contractor submission of final invoices or vouchers.

Item VIII—Modification of Existing Contracts (FAR Case 96-606)

This interim rule amends FAR 43.102 to provide for modification of existing contracts without requiring consideration, upon request of the contractor, to incorporate changes authorized by the Clinger-Cohen Act of 1996 (Pub. L. 104-106).

Dated: December 19, 1996.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.
Federal Acquisition Circular
FAC 90-44

Federal Acquisition Circular (FAC) 90-44 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 90-44 is effective December 31, 1996 except the following items:

Items III, IV, and VIII, January 1, 1997; and

Items V and VII, March 3, 1997.

Dated: December 19, 1996.

Roland A. Hassebrock,
Col., USAF Acting Director, Defense Procurement.

Dated: December 18, 1996.

Ida M. Ustad,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: December 19, 1996.

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

[FR Doc. 96-32804 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Parts 1 and 31

[FAC 90-44; FAR Case 96-010; Item I]

RIN 9000-AH41

Federal Acquisition Regulation; Automatic Data Processing Equipment Leasing Costs

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

ACTION: Interim rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to an interim rule which deletes the definition of automatic data processing equipment (ADPE) and the cost principle concerning ADPE leasing costs. 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 Date:* December 31, 1996.

Comment Due Date: To be considered in the formulation of a final rule, comments should be submitted to the address given below on or before March 3, 1997.

ADDRESSES: Comments should be submitted to: General Services Administration, FAR Secretariat, 18th & F Streets NW, Room 4037, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: 96-010@www.ARNET.gov.

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Olson at (202) 501-3221 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 90-44, FAR case 96-010.

SUPPLEMENTARY INFORMATION:

A. Background

The cost principle at FAR 31.205-2, Automatic Data Processing Equipment (ADPE) Leasing Costs, was implemented when ADPE was an emerging technology, had limited applications, and was a substantial cost element on Government contracts. For these early computer systems, the hardware itself constituted the major expense, and that fact, coupled with the risks of ownership of this rapidly evolving technology, justified the detailed scrutiny required under the cost principle. In the current technological environment, however, where hardware costs are no longer such a significant expense and computer systems have become ubiquitous in the workplace, the continued application of FAR 31.205-2 is no longer appropriate and is an unnecessary accounting and administrative burden on contractors. The cost principle at FAR 31.205-36, Rental Costs, adequately protects the Government's interests in this cost area without prescribing overly detailed annual requirements.

This interim rule deletes the cost principle at 31.205-2, the ADPE definition at 31.001, and references to the term "ADPE" found elsewhere in Part 31.

B. Regulatory Flexibility Act

The interim rule is not expected to 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 most contracts awarded to small entities use simplified acquisition procedures, or are awarded on a competitive, fixed-price basis, and do not require application of the FAR cost principles. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subparts also will be considered in accordance with 5 U.S.C. 601. Such comments must be submitted separately

and cite 5 U.S.C. 601, *et seq.* (FAR case 96-010) in correspondence.

C. Paperwork Reduction Act

The interim rule deletes the information collection requirement at FAR 31.205-2, which was previously approved by the Office of Management and Budget (OMB) under Control Number 9000-0072.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that, pursuant to 41 U.S.C. 418b, urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. The rule is necessary because the cost principle at FAR 31.205-2 imposes unnecessary administrative and accounting requirements on contractors and the Government, since it requires contractors to annually demonstrate compliance with a number of specific criteria, including obtaining contracting officer approval in certain circumstances. In order for contractors, and ultimately, the Government, to experience cost savings as quickly as possible, it is necessary that an interim rule be published to eliminate this burdensome and obsolete requirement. However, pursuant to Public Law 98-577 and FAR 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 Parts 1 and 31

Government procurement.

Dated: December 19, 1996.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR parts 1 and 31 are amended as set forth below:

1. The authority citation for 48 CFR parts 1 and 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).

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 "31.205-2" and the corresponding OMB control number "9000-0072".

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.001 [Amended]

3. Section 31.001 is amended by removing the definition "Automatic data processing equipment (ADPE)".

31.109 [Amended]

4. Section 31.109 is amended by removing paragraph (h)(10) and redesignating paragraphs (h)(11) through (h)(17) as (h)(10) through (h)(16), respectively.

31.205-2 [Removed and reserved]

5. Section 31.205-2 is removed and reserved.

6. Section 31.205-36 is amended in paragraph (a) by revising the first sentence to read as follows:

31.205-36 Rental costs.

(a) This subsection is applicable to the cost of renting or leasing real or personal property acquired under "operating leases" as defined in Statement of Financial Accounting Standards No. 13 (FAS-13), Accounting for Leases. * * *

* * * * *

[FR Doc. 96-32805 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Part 2

[FAC 90-44; FAR Case 96-322; Item II]

RIN 9000-AH42

Federal Acquisition Regulation; Major System Definition

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 revise the dollar thresholds in the definition of "major system" for the Department of Defense. 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.

EFFECTIVE DATE: December 31, 1996.

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 4037, GS Building, Washington, DC 20405 (202) 501-4755.

Please cite FAC 90-44, FAR case 96-322.

SUPPLEMENTARY INFORMATION:

A. Background

Section 805 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201) amends the definition of "major system" in 10 U.S.C. 2302. This rule revises the definition at FAR 2.101 to conform with Section 805.

B. Regulatory Flexibility Act

The final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. Therefore, the Regulatory Flexibility Act does not apply. However, 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.* (FAC 90-44, FAR case 96-322), 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 Part 2

Government procurement.

Dated: December 19, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Part 2 is amended as set forth below:

PART 2—DEFINITIONS OF WORDS AND TERMS

1. The authority citation for 48 CFR Part 2 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 2.101 is amended in the definition of "Major system" by revising paragraph (a), and adding at the end of paragraph (c) the parenthetical "(10 U.S.C. 2302 and 41 U.S.C. 403)." to read as follows:

2.101 Definitions.

* * * * *

Major system * * *
(a) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are

estimated to be more than \$115,000,000 (based on fiscal year 1990 constant dollars) or the eventual total expenditure for the acquisition exceeds \$540,000,000 (based on fiscal year 1990 constant dollars);

* * * * *

[FR Doc. 96-32806 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Parts 5, 13, 14, 15, 19, 25, 33, and 36

[FAC 90-44; FAR Case 96-304; Item III]

RIN 9000-AH13

Federal Acquisition Regulation; Preaward Debriefings

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 implement Section 4104 of the Clinger-Cohen Act of 1996. The rule requires that, prior to contract award, contracting officers provide a debriefing to any interested offeror on the reasons for that offeror's exclusion from the competitive range in a competitive negotiation. 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. The Federal Acquisition Reform Act of 1996 was subsequently renamed the Clinger-Cohen Act of 1996.

EFFECTIVE DATE: January 1, 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 90-44, FAR case 96-304.

SUPPLEMENTARY INFORMATION:

A. Background

Section 4104 of the Clinger-Cohen Act of 1996 (Public Law 104-106) requires that, prior to contract award, contracting officers provide a debriefing to any interested offeror on the reasons for that offeror's exclusion from the competitive range in a competitive negotiation. The contracting officer may refuse a preaward debriefing request if it is not in the best interest of the Government to

conduct a debriefing at that time. Section 4104 also requires that the debriefing include the following information: The agency's evaluation of the significant elements in the offeror's proposal; a summary of the rationale for the offeror's exclusion; and reasonable responses to relevant questions posed by the debriefed offeror as to whether the source selection procedures in the solicitation and applicable regulations were followed by the agency.

A proposed rule requesting public comments was published in the Federal Register at 61 FR 32580, June 24, 1996. Five comments were received from four respondents and were considered in developing the final rule.

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 rule provides for earlier debriefings to unsuccessful offerors but does not significantly alter the amount of information provided to unsuccessful offerors.

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, 13, 14, 15, 19, 25, 33, and 36

Government procurement.

Dated: December 19, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 5, 13, 14, 15, 19, 25, 33, and 36 are amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 13, 14, 15, 19, 25, 33, 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).

Chapter 1 [Amended]

2. In the list below, for each section listed in the left column, remove the citation listed in the middle column, and insert the citation in the last column:

Section	Remove	Insert
5.303(b)(2)	15.1002(c)	15.1003(b)
13.106-2(c)(3)	15.1002(c)(2)	15.1003(b)(2)
15.412(d)	15.1002(c)(1)	15.1003(b)(1)
15.609(c)	15.1002(b)	15.1003
19.302(d)(1)	15.1002(b)(2)	15.1003(a)(2)
19.501(h)(1)	15.1002(b)(2)	15.1003(a)(2)
19.501(h)(2)	15.1002(b)(2)	15.1003(a)(2)
25.405(e)	15.1002	15.1003
33.103(f)(3)	15.1004	15.1006
33.104(c)(1)	15.1004	15.1006

PART 14—SEALED BIDDING

3. Section 14.503-1 is amended by revising the second sentence of paragraph (g) to read as follows:

14.503-1 Step one.

* * * * *

(g) * * * Upon written request, the contracting officer shall debrief unsuccessful offerors (see 15.1005 and 15.1006).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.612 is amended by revising paragraph (f) to read as follows:

15.612 Formal source selection.

* * * * *

(f) *Notices and debriefings.* See 15.1003, 15.1004, 15.1005, and 15.1006.

5. Subpart 15.10 is revised to read as follows:

Subpart 15.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

- Sec.
- 15.1001 Definition.
- 15.1002 Applicability.

- 15.1003 Notifications to unsuccessful offerors.
- 15.1004 Notification to successful offeror.
- 15.1005 Preaward debriefing of offerors.
- 15.1006 Postaward debriefing of offerors.
- 15.1007 Protests against award.
- 15.1008 Discovery of mistakes.

15.1001 Definition.

Day, as used in this subpart, has the meaning set forth at 33.101.

15.1002 Applicability.

This subpart applies to the use of competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). To the extent practicable, however, the procedures and intent of this subpart, with reasonable modification, should be followed for acquisitions described in 6.102(d): broad agency announcements, small business innovation research contracts, and architect-engineer contracts. However, they do not apply to multiple award schedules, as described in 6.102(d)(3).

15.1003 Notifications to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive*

range. The contracting officer shall promptly notify offerors when they are excluded from the competitive range or otherwise excluded from further consideration. The notice shall—

- (i) State the basis for the determination and that a proposal revision will not be considered;
- (ii) Advise the offeror that, if a preaward or postaward debriefing is desired, a written request must be submitted to the contracting officer within three days; and
- (iii) Indicate that, absent receipt of a timely written request, the Government is not obligated to provide a preaward or a postaward debriefing.

(2) *Preaward notices for small business set-asides.* In a small business set-aside (see subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each unsuccessful offeror in writing of the name and location of the apparent successful offeror. The notice also shall state that—

- (i) The Government will not consider subsequent revisions of the unsuccessful offeror's proposal; and
- (ii) No response is required unless a basis exists to challenge the small

business size status of the apparent successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

(b) *Postaward notices.* Within three days after the date of contract award, the contracting officer shall provide written notification to each unsuccessful offeror (unless preaward notice was given under paragraph (a) of this section).

(1) The notice shall include—

(i) The number of offerors solicited;

(ii) The number of proposals received;

(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and

(v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in paragraph (b)(1)(iv) of this section readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) Upon request, the contracting officer shall furnish the information described in paragraphs (b)(1) (i) through (v) of this section to unsuccessful offerors in solicitations using the simplified acquisition procedures in part 13.

15.1004 Notification to successful offeror.

The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting a written notice of the award to that offeror (but see 15.608(b)). When an award is made to an offeror for less than all of the items that may be awarded to that offeror and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the offer acceptance period.

15.1005 Preaward debriefing of offerors.

Offerors excluded from the competitive range or otherwise excluded from further consideration prior to the final source selection decision may request a debriefing before award (10 U.S.C. 2305(b)(6)(A) and 41 U.S.C. 253b(f)–(h)). The process for requesting and conducting preaward debriefings is as follows:

(a) The offeror may request a preaward debriefing by submitting a

written request for debriefing to the contracting officer within three days of the receipt of notice of exclusion from the competitive range. If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing on each acquisition.

(b) The contracting officer should provide a debriefing to the offeror as soon as practicable. If providing a preaward debriefing is not in the best interest of the Government at the time it is requested, the contracting officer may delay the debriefing, but shall provide the debriefing no later than the time postaward debriefings are provided under 15.1006. In that event, the contracting officer shall include the information at 15.1006(d) in the debriefing.

(c) Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

(d) The contracting officer or designee shall chair any debriefing session held. Individuals who conducted the evaluation shall provide support.

(e) At a minimum, preaward debriefings shall include—

(1) The agency's evaluation of significant elements in the offeror's proposal;

(2) A summary of the rationale for excluding the offeror from the competitive range; and

(3) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of excluding the offeror from the competitive range.

(f) Preaward debriefings shall not disclose—

(1) The number of offerors;

(2) The identity of other offerors;

(3) The content of other offerors' proposals;

(4) The ranking of other offerors;

(5) The evaluation of other offerors; or

(6) Any of the information prohibited in 15.1006(e).

(g) The contracting officer shall include an official summary of the debriefing in the contract file.

15.1006 Postaward debriefing of offerors.

(a) An offeror shall be debriefed and furnished the basis for the source selection decision and contract award, if its written request is received by the contracting officer within three days after the offeror receives notice of contract award. Offerors that requested a postaward debriefing at the time they were eliminated from the competitive range or otherwise excluded from

further consideration prior to the final source selection decision shall also be provided a debriefing at this time. An offeror that failed to submit a timely request under 15.1003(a) or 15.1005(a) is not entitled to a debriefing. When practicable, debriefing requests received more than three days after the offeror receives notice of contract award may be accommodated. However, accommodating such untimely debriefing requests does not extend the time within which suspension of performance can be required, as this accommodation is not a "required debriefing" as described in part 33. To the maximum extent practicable, the debriefing should occur within five days after receipt of the written request.

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.

(c) The contracting officer or designee shall chair any debriefing session held. Individuals who conducted the evaluation shall provide support.

(d) At a minimum, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price and technical rating, if applicable, of the successful offeror and the debriefed offeror;

(3) The overall ranking of all offerors when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information exempt from release under the Freedom of Information Act including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost

breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

(f) The contracting officer shall include an official summary of the debriefing in the contract file.

15.1007 Protests against award.

(a) Before filing a protest, prior to award of a contract, of the exclusion of an offeror from the competitive range (or otherwise from further consideration), use of alternative dispute resolution techniques is encouraged (see subpart 33.2).

(b) Protests against award in negotiated acquisitions shall be treated substantially the same as in sealed bidding (see subpart 33.1).

(c) If, within one year of contract award, a protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested contract award, the agency shall make available to all prospective offerors for the new solicitation, or original offerors that are requested to submit new best and final offers—

(1) Information provided in any debriefings conducted on the original award about the successful offeror's proposal; and

(2) Other nonproprietary information provided to the original offerors.

15.1008 Discovery of mistakes.

For treatment of mistakes in an offeror's proposal that are discovered before award, see 15.607. Mistakes in a contractor's proposal that are disclosed after award shall be processed in accordance with 14.407-4.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. Section 36.607 is amended by revising paragraph (b) to read as follows:

36.607 Release of information on firm selection.

* * * * *

(b) Debriefings of successful and unsuccessful firms will be held after final selection has taken place and will be conducted, to the extent practicable, in accordance with 15.1004, 15.1006 (b) through (f), and 15.1007(c). Note that 15.1006 (d)(2) through (d)(5) do not apply to architect-engineer contracts.

[FR Doc. 96-32807 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Parts 9, 13, 23, and 52

[FAC 90-44; FAR Case 96-311; Item IV]

RIN 9000-AH06

Federal Acquisition Regulation; Certification Requirements—Drug-Free Workplace

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 delete the requirement for an offeror to provide a certification regarding a drug-free workplace. 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.

EFFECTIVE DATE: January 1, 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 90-44, FAR case 96-311.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule implements Section 4301(a)(3) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). Section 4301(a)(3) amended 41 U.S.C. 701 to eliminate the requirement for an offeror to certify that it will take certain actions to provide a drug-free workplace.

A proposed rule with request for public comment was published in the Federal Register at 61 FR 31814, June 20, 1996. No substantive comments were received. The final rule includes only editorial changes to the proposed rule.

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, although the rule eliminates a certification requirement, the underlying policy regarding

maintenance of a drug-free workplace has not changed.

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 9, 13, 23, and 52

Government procurement.

Dated: December 19, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 9, 13, 23, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 9, 13, 23, 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

2. Section 9.406-2 is amended by revising paragraph (b)(1)(ii) to read as follows:

9.406-2 Causes for debarment.

* * * * *

(b)(1) * * *

(ii) Violations of the Drug-Free Workplace Act of 1988 (Public Law 100-690), as indicated by—

(A) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

* * * * *

3. Section 9.407-2 is amended by revising paragraph (a)(4) to read as follows:

9.407-2 Causes for suspension.

(a) * * *

(4) Violations of the Drug-Free Workplace Act of 1988 (Public Law 100-690), as indicated by—

(i) Failure to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good

faith effort to provide a drug-free workplace (see 23.504);
* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.111 [Amended]

4. Section 13.111 is amended by removing paragraph (g) and redesignating paragraphs (h) and (i) as (g) and (h), respectively.

PART 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

5. Section 23.504 is amended by revising the introductory text of paragraph (a), paragraphs (a)(3) and (b); and by removing paragraph (c) and redesignating (d) as (c). The revised text reads as follows:

23.504 Policy.

(a) No offeror other than an individual shall be considered a responsible source (see 9.104-1(g) and 19.602-1(a)(2)(i)) for a contract that exceeds the simplified acquisition threshold, unless it agrees that it will provide a drug-free workplace by—
* * * * *

(3) Providing all employees engaged in performance of the contract with a copy of the statement required by paragraph (a)(1) of this section;
* * * * *

(b) No individual shall be awarded a contract of any dollar value unless that individual agrees not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing the contract.
* * * * *

5b. In addition to the amendments set forth above, section 23.504 is further amended by removing “calendar” from paragraphs (a)(4)(ii), (a)(5), (a)(6), and the newly designated paragraph (c).

6. Section 23.505 is amended by revising the section heading and the introductory text of paragraph (a); in paragraph (a)(2) by removing “; or” and inserting a period; and by removing paragraph (b), redesignating paragraph (c) as (b) and revising the introductory text of newly designated (b). The revised text reads as follows:

23.505 Contract clause.

(a) Contracting officers shall insert the clause at 52.223-6, Drug-Free Workplace, except as provided in paragraph (b) of this section, in solicitations and contracts—
* * * * *

(b) Contracting officers shall not insert the clause at 52.223-6, Drug-Free Workplace, in solicitations and contracts, if—
* * * * *

7. Section 23.506 is amended by revising paragraph (d) to read as follows:

23.506 Suspension of payments, termination of contract, and debarment and suspension actions.
* * * * *

(d) The specific causes for suspension of contract payments, termination of a contract for default, or suspension and debarment are—

(1) The contractor has failed to comply with the requirements of the clause at 52.223-6, Drug-Free Workplace; or

(2) The number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace indicates that the contractor has failed to make a good faith effort to provide a drug-free workplace.
* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.223-5 [Removed and reserved]

8. Section 52.223-5 is removed and reserved.

9a. Section 52.223-6 is amended—

(a) In the introductory paragraph by removing “23.505(b)” and inserting “23.505”;

(b) By revising the date of the clause heading;

(c) In the introductory text of paragraph (a) by removing the comma following the word “clause” and inserting an emdash “—”;

(d) At the end of paragraph (b)(6)(ii) by removing the period and inserting “; and”;

(e) By revising paragraph (c); and
(f) In paragraph (d) by removing the “s” from the word “paragraphs”.

The revised text reads as follows:

52.223-6 Drug-Free Workplace.
* * * * *

Drug-Free Workplace (Jan. 1997)
* * * * *

(c) The Contractor, if an individual, agrees by award of the contract or acceptance of a purchase order, not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing this contract.
* * * * *

9b. In addition to the amendments set forth above, section 52.223-6 is further amended by removing “calendar” from the introductory text of paragraph (b) each time it appears, from paragraphs

(b)(4)(ii) and (b)(5), and the introductory paragraph of (b)(6).

[FR Doc. 96-32808 Filed 12-30-96; 8:45 am]
BILLING CODE 6820-EP-M

48 CFR Parts 14, 15, and 52

[FAC 90-44; FAR Case 95-019; Item V]

RIN 9000-AG89

Federal Acquisition Regulation; Consideration of Late Offers

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 broaden the conditions under which late offers for procurements other than commercial items can be considered. 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.

EFFECTIVE DATE: March 3, 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 90-44, FAR case 95-019.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the late bid rule to allow an offer to be accepted if the late receipt was due primarily to Government mishandling after receipt at the Government installation. The rule recognizes the use of hand-carried offers (including delivery by a commercial carrier) as a common business practice, and provides flexibility in determining when an offer (bid or proposal) was received at the Government activity, by applying standards used by the General Accounting Office. The rule also expands the definition of acceptable evidence to support acceptance of a late offer and adds a new exception at FAR 52.215-10(a)(5) and 52.215-36(a)(3) which allows consideration of a proposal that was misdirected or misdelivered (not necessarily through mishandling) to an office other than that designated for receipt of offers in the solicitation. These changes do not apply

to commercial item solicitations which contain the provision at FAR 52.212-1(f), Late Offers.

A proposed rule was published in the Federal Register at 51 FR 18480, April 25, 1996. Six comments were received from four respondents. All comments were considered in developing the final rule.

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 rule applies only in situations where late offers are received. The late offers to which this case applies are only a small portion of all offers received.

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 14, 15, and 52

Government procurement.

Dated: December 19, 1996.

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

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

1. The authority citation for 48 CFR Parts 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).

PARTS 14—SEALED BIDDING

2. Section 14.304-1 is amended by revising paragraphs (a)(2) and (c) to read as follows:

14.304-1 General.

* * * * *

(a) * * *

(2) It was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to government mishandling after receipt at the Government installation;

* * * * *

(c) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of such installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

3. Section 15.412 is amended by revising paragraph (c)(2) to read as follows:

15.412 Late proposals, modifications, and withdrawals of proposals.

* * * * *

(c) * * * (2) the circumstances meet the specific requirements of the provision at 52.215-10, Late Submissions, Modifications, and Withdrawals of Proposals.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 52.214-5 is amended by revising the clause date and paragraph (a)(2), redesignating paragraphs (b), (c), and (d), as (c), (d), and (e), respectively, and adding a new paragraph (b) to read as follows:

52.214-5 Submission of Bids.

* * * * *

Submission of Bids (Feb. 1997)

(a) * * * (2) showing the time and date specified for receipt, the solicitation number, and the name and address of the bidder.

(b) Bidders using commercial carrier services shall ensure that the bid is addressed and marked on the outermost envelope or wrapper as prescribed in subparagraphs (a) (1) and (2) of this provision when delivered to the office specified in the solicitation.

* * * * *

5. Section 52.214-7 is amended by revising the clause date and paragraph (a)(2) to read as follows:

52.214-7 Late Submissions, Modifications, and Withdrawals of Bids.

* * * * *

Late Submissions, Modifications, and Withdrawals of Bids (Feb. 1997)

(a) * * *

(2) Was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation;

* * * * *

6. Section 52.214-23 is amended by revising the clause date and paragraphs (a)(2) and (e) to read as follows:

52.214-23 Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding.

* * * * *

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Feb. 1997)

(a) * * *

(2) Was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation;

* * * * *

(e) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

* * * * *

7. Section 52.214-32 is amended by revising the clause date and paragraph (a)(1) to read as follows:

52.214-32 Late Submissions, Modifications, and Withdrawals of Bids (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Bids (Overseas) (Feb. 1997)

(a) * * *

(1) Was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation; or

* * * * *

8. Section 52.214-33 is amended by revising the clause date and paragraphs (a)(1) and (d) to read as follows:

52.214-33 Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas) (Feb. 1997)

(a) * * *

(1) Was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation;

* * * * *

(d) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained

by the installation, or oral testimony or statements of Government personnel.

* * * * *

9. Section 52.215-9 is amended by revising the clause date and paragraph (a)(2); by redesignating paragraphs (b) through (e) as (c) through (f), respectively and adding a new paragraph (b) to read as follows:

52.215-9 Submission of Offers.

* * * * *

Submission of Offers (Feb. 1997)

(a) * * * (2) showing the time and date specified for receipt, the solicitation number, and the name and address of the offeror.

(b) Offerors using commercial carrier services shall ensure that the proposal is addressed and marked on the outermost envelope or wrapper as prescribed in subparagraphs (a) (1) and (2) of this provision when delivered to the office specified in the solicitation.

* * * * *

10. Section 52.215-10 is amended by revising the clause date and paragraphs (a) and (b); by removing paragraph (c) and redesignating paragraphs (d) through (i) as (c) through (h) respectively; and revising the newly designated (d). The revised text reads as follows:

52.215-10 Late Submissions, Modifications, and Withdrawals of Proposals.

* * * * *

Late Submissions, Modifications, and Withdrawals of Proposals (Feb. 1997)

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt of offers will not be considered unless it is received before award is made and—

(1) It was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th);

(2) It was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation;

(3) It was sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 p.m. at the place of mailing two working days prior to the date specified for receipt of proposals. The term "working days" excludes weekends and U.S. Federal holidays.

(4) It was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals;

(5) There is acceptable evidence to establish that it was received at the activity

designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers, and the Contracting Officer determines that accepting the late offer would not unduly delay the procurement; or

(6) It is the only proposal received.

(b) Any modification of a proposal or quotation, including a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the same conditions as in subparagraphs (a)(1) through (a)(5) of this provision.

* * * * *

(d) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

* * * * *

11. Section 52.215-36 is amended by revising the clause date and paragraphs (a) and (b); by removing paragraph (c) and redesignating paragraphs (d), (e), (f), and (g) as (c), (d), (e), and (f); and revising the newly designated paragraph (c) to read as follows:

52.215-36 Late Submissions, Modifications, and Withdrawals of Proposals (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Proposals (Overseas) (Feb. 1997)

(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and—

(1) It was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation;

(2) It was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals;

(3) There is acceptable evidence to establish that it was received at the activity designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers, and the Contracting Officer determines that accepting the late offer would not unduly delay the procurement; or

(4) It is the only proposal received.

(b) Any modification of a proposal or quotation, including a modification resulting from the Contracting Officer's request for "best and final" offer, is subject to the same conditions as in subparagraphs (a)(1), (2), and (3) of this provision.

(c) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of the installation on the proposal wrapper, other

documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

* * * * *

[FR Doc. 96-32809 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Part 31

[FAC 90-44; FAR Case 96-012; Item VI]

RIN 9000-AH43

Federal Acquisition Regulation; Foreign Differential Pay

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

ACTION: Interim rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to an interim rule to amend the Federal Acquisition Regulation (FAR) by deleting the prohibition on the calculation of foreign differential pay based directly on an employee's specific increase in income taxes resulting from assignment overseas. 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 Date:* December 31, 1996.

Comments Due: To be considered in the formulation of a final rule, comments should be submitted to the address given below on or before March 3, 1997.

ADDRESSES: Comments should be submitted to: General Services Administration, Ms. Beverly Fayson, FAR Secretariat, 18th & F Streets NW, Room 4037, Washington, DC 20405.

E-mail comments submitted over internet should be addressed to: 96-012@www.ARNET.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 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 90-44, FAR case 96-012.

SUPPLEMENTARY INFORMATION:

A. Background

The current cost principle at FAR 31.205-6 prohibits contractors from calculating any increased compensation for foreign overseas differential pay on the basis of an employee's specific

increase in income taxes resulting from foreign assignment. Instead, contractors must employ an alternative, less accurate approach. This prohibition was intended to prevent a conflict with the policy at 31.205-41(b)(1) that Federal income taxes are unallowable costs. However, FAR 31.205-6(e)(1) explicitly states that contractors may properly consider increased Federal income taxes in the allowable foreign differential pay provided to overseas employees.

B. Regulatory Flexibility Act

The interim rule is not expected to 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 most contracts awarded to small entities use the simplified acquisition procedures, or are awarded on a competitive, fixed-price basis, and do not require application of the FAR cost principles. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart also 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.* (FAC 90-44, FAR case 96-012) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim rule does not impose any reporting or recordkeeping requirements which require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that, pursuant to 41 U.S.C. 418b, urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. The rule is necessary because the cost principle at FAR 31.205-6 imposes unnecessary administrative and accounting requirements, since it prohibits contractors from calculating differential pay on the basis of an employee's specific increase in income taxes resulting from foreign assignment. Instead, contractors must employ an alternative, less accurate approach that may result in an employee being

undercompensated (or overcompensated). It is necessary that an interim rule be published to eliminate expeditiously this unnecessarily burdensome requirement that results in unnecessary administrative costs to contractors and may cause financial hardship on certain individuals. However, pursuant to Public Law 98-577 and FAR 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 19, 1996.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

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 revising paragraph (e)(2) to read as follows:

31.205-6 Compensation for personal services.

* * * * *

(e) * * *

(2) Differential allowances for additional Federal, State, or local income taxes resulting from domestic assignments are unallowable.

* * * * *

[FR Doc. 96-32810 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Parts 42 and 52

[FAC 90-44; FAR Case 95-018; Item VII]

RIN 9000-AG88

Federal Acquisition Regulation; Final Indirect Cost Rates

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) concerning the procedures relating to final indirect cost rates to permit, with certain restrictions, increased interim

payments to contractors under certain circumstances. 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.

EFFECTIVE DATE: March 3, 1997.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 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 90-44, FAR case 95-018.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Subpart 42.7 and Part 52 to improve procedures for providing payments to contractors under cost-type contracts by (1) permitting, with certain restrictions, contractor use of billing rates contained in certified final indirect cost rate proposals; (2) providing for Government release of 75 to 90 percent of all fee withholds under physically completed contracts, after receipt of the contractor's certified final indirect cost rate proposal; and (3) establishing a timeframe for contractor submission of final invoices or vouchers.

A proposed rule was published in the Federal Register at 61 FR 26766, May 28, 1996. One source submitted comments which were considered in the development of the final rule.

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 rule merely provides for earlier payments to contractors under cost-type contracts.

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 42 and 52

Government procurement.

Dated: December 19, 1996.
Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 42 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 42 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 42—CONTRACT ADMINISTRATION

2. Section 42.704 is amended by adding paragraph (e) to read as follows:

42.704 Billing rates.

(e) When the contractor provides to the cognizant contracting officer the certified final indirect cost rate proposal in accordance with 42.705–(b) or 42.705–(b), the contractor and the Government may mutually agree to revise billing rates to reflect the proposed indirect cost rates, as approved by the Government to reflect historically disallowed amounts from prior years' audits, until the proposal has been audited and settled. The historical decrement will be determined by either the cognizant contracting officer (42.705–1(b)) or the cognizant auditor (42.705–2(b)).

3. Section 42.705 is revised to read as follows:

42.705 Final indirect cost rates.

(a) Final indirect cost rates shall be established on the basis of—

(1) Contracting officer determination procedure (see 42.705–1) or

(2) Auditor determination procedure (see 42.705–2).

(b) Within 120 days after settlement of the final indirect cost rates (or longer, if approved in writing by the contracting officer), the contractor shall submit a completion invoice or voucher reflecting the settled amounts and rates on all contracts physically completed in the year covered by the proposal.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 52.216–7 is amended by revising the clause date; redesignating paragraph (d)(4) as (d)(5) and adding a new (d)(4); and by revising paragraph (h)(1) to read as follows:

52.216–7 Allowable Cost and Payment.

* * * * *

Allowable Cost and Payment (Feb 1997)

* * * * *

(d) * * *

(4) Within 120 days after settlement of the final indirect cost rates covering the year in

which this contract is physically complete (or longer, if approved in writing by the Contracting Officer), the Contractor shall submit a completion invoice or voucher to reflect the settled amounts and rates.

* * * * *

(h) *Final payment.* (1) Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(4) of this clause, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

* * * * *

5. Section 52.216–8 is amended by revising the clause date and paragraph (b) to read as follows:

52.216–8 Fixed Fee.

* * * * *

Fixed Fee (Feb 1997)

* * * * *

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that after payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

6. Section 52.216–9 is amended by revising the clause date and paragraph (c) to read as follows:

52.216–9 Fixed Fee—Construction.

* * * * *

Fixed Fee—Construction (Feb 1997)

* * * * *

(c) After the payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent

and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

7. Section 52.216–10 is amended by revising the clause date and paragraph (c) to read as follows:

52.216–10 Incentive Fee.

* * * * *

Incentive Fee (Feb. 1997)

* * * * *

(c) *Withholding of payment.* Normally, the Government shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee. After payment of 85 percent of the applicable fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the applicable fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

* * * * *

8. Section 52.216–13 is amended by revising the clause date, redesignating paragraph (c)(4) as (c)(5) and adding a new paragraph (c)(4); and by revising the date and paragraph (h) of Alternate I to read as follows:

* * * * *

52.216–13 Allowable Cost and Payment—Facilities.

* * * * *

Allowable Cost and Payment—Facilities (Feb 1997)

* * * * *

(c) * * *

(4) Within 120 days after settlement of the final indirect cost rates covering the year in

which this contract is physically complete (or longer, if approved in writing by the Contracting Officer), the Contractor shall submit a completion invoice or voucher to reflect the settled amounts and rates.

* * * * *
Alternate I (Feb 1997). * * *
* * * * *

(h) *Final Payment*. Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (c)(4) of this clause, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs not previously paid.

[FR Doc. 96-32811 Filed 12-30-96; 8:45 am]

BILLING CODE 6820-EP-M

48 CFR Part 43

[FAC 90-44; FAR Case 96-606; Item VIII]

RIN 9000-AH44

Federal Acquisition Regulation; Modification of Existing Contracts

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

ACTION: Interim rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to an interim rule to amend the Federal Acquisition Regulation (FAR) to implement Sections 4402 (d) and (e) of the Clinger-Cohen Act of 1996, which authorizes regulations to provide for modification of existing contracts without requiring consideration, upon request of the contractor, to incorporate changes authorized by the Act. 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. The Federal Acquisition Reform Act of 1996 was subsequently renamed the Clinger-Cohen Act of 1996.

DATES: *Effective Date:* January 1, 1997.

Comments Due: To be considered in the formulation of a final rule, comments should be submitted to the address given below on or before March 3, 1997.

ADDRESSES: Comments should be submitted to: General Services Administration, Ms. Beverly Fayson, FAR Secretariat, 18th & F Streets NW, Room 4037, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to: 96-606@www.ARNet.gov.

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 90-44, FAR case 96-606.

SUPPLEMENTARY INFORMATION:

A. Background

Section 4402(d) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106) states that regulations implementing the Act may provide for modification of existing contracts without consideration, upon request of the contractor, to incorporate changes authorized by the Act. Section 4402(e)(2) also states that nothing in the Act requires the renegotiation or modification of existing contracts to incorporate changes authorized by the Act. This interim rule adopts the policy of encouraging, but not requiring, appropriate modifications without consideration, upon the request of the contractor. If the contracting officer determines that modification of an existing contract is appropriate to incorporate changes authorized by the Act, the modification should insert the current version of the applicable FAR clauses into the contract.

B. Regulatory Flexibility Act

The changes in this interim 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 it enables industry and the Government to gain significant benefits, including the potential reduction of contract costs, by authorizing the incorporation into existing contracts any of the Clinger-Cohen Act changes that will benefit the contracting parties. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided 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 subpart also 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.* (FAC 90-44, FAR case 96-606), in correspondence. The IRFA is summarized as follows:

This rule will apply to all large and small entities that currently have a Government contract. Most likely, contractors will not request modification of contracts under \$25,000, because the usually short period of performance under these contracts will discourage modification. The number of active contracts over \$25,000 held by small

entities at any point in time is not readily available. However, in Fiscal Year 1995, small entities were awarded 31,421 contracts (number does not include modifications to contracts) over \$25,000. Small entities may or may not request modification of those contracts depending on whether they determine that modification of their specific contracts to incorporate Clinger-Cohen Act of 1996 changes will be advantageous. This rule imposes no new reporting, recordkeeping, or other compliance requirements. This rule is the only practical alternative to implement subsections 4402 (d) and (e) of the Act.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim rule does not impose any new reporting or recordkeeping requirements which require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DOD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that, pursuant to 41 U.S.C. 418b, urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. The rule is necessary because immediate promulgation of an interim rule will provide significant benefits to industry and the Government. Sections 4402 (d) and (e) of the Clinger-Cohen Act of 1996 authorize contracting officers, if requested by the prime contractor, to modify contracts without requiring consideration to incorporate changes authorized by the Act.

Implementation of Sections 4402 (d) and (e) as an interim rule will enable industry and the Government to gain immediate benefits, including the potential reduction of contract costs. The interim rule authorizes the adoption of any of the rules implementing the Clinger-Cohen Act of 1996 that will benefit the contracting parties. The interim rule should involve no substantial risk to industry, since contractors must affirmatively request adoption of the rules for an existing contract. However, pursuant to Public Law 98-577 and FAR 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 43

Government procurement.