

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 1, 32, 33, and 52

[FAR Case 94-731]

RIN 9000-AG52

Federal Acquisition Regulation;
Ratification and Protest Costs

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

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) dated October 13, 1994, to implement the requirements for protests and disputes in Government procurement. The rule reflects the **Federal Register** publication at 60 FR 2630, January 10, 1995, concerning amendments made under FAR case 94-731, Ratification of Protest Costs, and should be read in conjunction with that case. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before May 22, 1995 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 4037, Washington, DC 20405.

Please cite FAR Case 94-731 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Craig Hodge, Protests/Disputes Team Leader at (703) 274-8940 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 FAR Case 94-731, Ratification of Protest Costs.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994 (the Act), Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a

result of implementing the Act include the areas of protests, disputes, and appeals.

This case presents proposed FAR amendments developed under FAR Case 94-731, Ratification of Protest Costs. Sections 1016, 1403, and 1435 of the Act provide that agencies may be required to pay protest and offer preparation costs to protesters under certain circumstances. Often as the result of discovery during a protest, misrepresentations may be detected that could not have been reasonably known to the agency's evaluators. A protest may be sustained where the award has been induced by a material misrepresentation by the awardee. Such situations often involve proposed "key personnel."

The agency is without effective remedy in such cases. Theoretically, the agency could ask the Department of Justice to file a lawsuit against the offeror making the misrepresentations. However, due to the heavy workload of the Justice attorneys, this is not a practical alternative. The proposed FAR change will not adversely affect any substantive right of an offeror. Under the proposed language, the Government remedy is to offset such costs on the same or an unrelated contract. If the offeror believes that the offset is not justified, it may appeal the action to the agency, or under the Contract Disputes Act to either a Board of Contract Appeals or the Court of Federal Claims.

In view of expected benefits to Government and industry from the Act, FAR implementation was formulated under an expedited process. The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR Case 94-731) because of the clarity and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption) on or before April 24, 1995.

The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

This proposed 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 the vast number of contracts do not involve protests where misrepresentation is detected through discovery. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601 *et seq.* (FAR Case 94-731), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Parts 1, 32, 33, and 52

Government procurement.

Dated: March 16, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Parts 1, 32, 33 and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 32, 33 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 1—FEDERAL ACQUISITION
REGULATION SYSTEM

2. Section 1.602-3 is amended by revising paragraph (c)(2) to read as follows:

1.602-3 Ratification of unauthorized
commitments.

* * * * *

(c) * * *

(2) The ratifying official has the authority to enter into a contractual commitment.

* * * * *

PART 32—CONTRACT FINANCING

3. Section 32.602 is amended by adding paragraph (h) to read as follows:

32.602 General.

* * * * *

(h) Reimbursement of costs, as provided in 48 CFR (FAR) 33.102(b), 33.104(h)(1), and 33.105(g)(1), paid by the Government where a postaward

protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

4. Section 32.603 is revised to read as follows:

32.603 Applicability.

Except as otherwise specified, this subpart applies to all debts to the Government arising in connection with contracts and subcontracts for the acquisition of supplies or services and debts arising from the Government's payment of costs, as provided in 48 CFR (FAR) 33.102(b), 33.104(h)(1), and 33.105(g)(1), where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

PART 33—PROTESTS, DISPUTES, AND APPEALS

5. Section 33.102 is amended by redesignating paragraphs (b) and (c) as (c) and (e), respectively, and adding new paragraphs (b) and (d); and revising newly designated paragraphs (e)(2) and (e)(3) to read as follows:

33.102 General.

* * * * *

(b) If in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that may have been taken by the Comptroller General in the event of a GAO protest; and

(2) Pay appropriate costs as stated in Section 33.104(h).

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of 48 CFR (FAR) part 32, subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

* * * * *

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and
(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) * * *

(2) May protest to the GAO in accordance with GAO regulations (48 CFR part 21). An interested party who has filed a protest regarding an ADP procurement with the GAO may not file a protest with the GSBICA with respect to that procurement.

(3) May protest to the GSBICA regarding an award of an ADP contract in accordance with GSBICA Rules of Procedure (48 CFR chapter 61). An interested party who has filed a protest regarding an ADP procurement with GSBICA (40 U.S.C. 759(f)) may not file a protest with the GAO with respect to that procurement.

6. Section 33.104 is amended by revising paragraph (h) to read as follows:

33.104 Protests to GAO.

* * * * *

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract or a proposed award or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency conducting the procurement pay to an appropriate interested party the direct cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney's fees and consultant and expert witness fees, and bid and proposal preparation costs.

(2) If the GAO recommends the award of costs to an interested party, the agency, in accordance with agency procedures, shall attempt to reach an agreement on the amount of the cost to be paid. If the agency and the interested party are unable to agree on the amount to be paid, GAO may, upon request of the interested party, recommend to the agency the amount of cost that the agency should pay.

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 48 CFR (FAR) 19.001 definition, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government; or

(ii) For attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to what constitutes a

"reasonable" level for attorneys' fees for small businesses.

(4) A recommended award of costs may be paid by the agency out of funds available to or for the use of the agency for the acquisition of supplies or services. Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs which have not yet been paid.

(5) If the GAO recommends the agency pay costs (as defined under paragraph (h)(1) of this section) and the agency does not promptly pay the costs, the agency shall promptly report to GAO the reasons for the failure to follow the GAO recommendation.

(6) Any costs the contractor receives under this section shall be excluded from all proposals, billings, or claims against the Government and such exclusions should be reflected in the cost agreement.

(7) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a post award protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of 48 CFR (FAR) part 32, subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

7. Section 33.105 is amended by—

(a) Redesignating paragraphs (f) and (g) as (g) and (h) and adding a new paragraph (f);

(b) By adding paragraphs (g)(3), (4), and (5); and

(c) By revising the new paragraph (h).

The revised text reads as follows:

33.105 Protests to GSBICA.

* * * * *

(f) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be made part of the public record (subject to any protective order considered appropriate by the Board) before dismissal of the protest. If an agency is party to a settlement agreement, the submission of the agreement to the Board shall include a memorandum, signed by the contracting officer concerned, that describes in detail the procurement, the grounds for protest, the Government's position regarding the grounds for protest, the terms of the settlement, and the agency's position regarding the

propriety of the award or proposed award of the contract at issue in the protest.

(g) * * *

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 48 CFR (FAR) 19.001 definition, "Small business concern"), costs under paragraph (g)(1) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government; or

(ii) For attorneys' fees that exceed \$150 per hour unless the Board determines, on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to what constitutes a "reasonable" level for attorneys' fees for small businesses.

(4) Within 30 days after receipt by the agency of an application for cost, the agency may file an answer.

(5) If the Government pays costs, as provided in paragraph (g)(1) of this section, where a post award protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of 48 CFR (FAR) part 32, subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(h) The GSBICA's final decision may be appealed by the agency or by any interested party, including any intervening interested parties, as set forth in the Contract Disputes Act.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.233-3 is amended by revising the date of the clause; and by adding paragraph (f) to read as follows:

52.233-3 Protest after award.

* * * * *

Protest After Award (Date)

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(f) If as the result of the awardee's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this solicitation is sustained, and the Government pays costs, as provided in 48 CFR (FAR) 33.102(b)(2), 33.104(h)(1), or 33.105(g)(1), the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of 48 CFR (FAR) part 32, subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(End of clause)

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