

**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. \* \* \*

\* \* \*

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**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);

\* \* \*

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**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.

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### 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