

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Federal Acquisition Circular 90-31]

**Federal Acquisition Regulation; Introduction of Miscellaneous Amendments**

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of final rules.

**SUMMARY:** This document serves to introduce the final rules which follow and which comprise Federal Acquisition Circular (FAC) 90-31. The Federal Acquisition Regulatory Council has agreed to issue FAC 90-31 to amend the Federal Acquisition Regulation (FAR).

**DATES:** For effective dates, see individual documents following this one.

**FOR FURTHER INFORMATION CONTACT:**

The team leader whose name appears in relation to each FAR case or subject area. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC, 20405 (202) 501-4755. Please cite FAC 90-31 and FAR case number(s).

**SUPPLEMENTARY INFORMATION:** Federal Acquisition Circular 90-31 amends the Federal Acquisition Regulation (FAR) as specified below:

Item	Subject	FAR case	Team leader
I	Consolidation and Revision of the Authority to Examine Records.	94-740	Tucciarone (703) 767-2270
II	Contract Award Implementation .....	94-701	Rider (703) 614-1634
III	Penalties on Unallowable Indirect Costs .....	94-751	Belton (703) 602-2357
IV	Implementation of Various Cost Principle Provisions .....	94-754	Belton (703) 602-2357
V	Entertainment, Gift, and Recreation Costs for Contractor Employees.	94-750	Belton (703) 602-2357
VI	Contractor Overhead Certification .....	94-752	Belton (703) 602-2357
VII	Technical Amendments.		

**Case Summaries**

For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

**Item I—Consolidation and Revision of the Authority to Examine Records (FAR Case 94-740)**

This final rule implements Sections 2201(a), 2251(a), 4102(c), and 4103(d) of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). The rule (1) permits contractors to store records in electronic form; (2) restricts contracting officers from requesting a preaward audit of indirect costs if the results of a recent audit are available; (3) deletes the clause at 52.215-1, Examination of Records by Comptroller General; (4) and revises the clauses at 52.214-26, Audit and Records—Sealed Bidding, and 52.215-2, Audit and Records—Negotiation, to provide for examination of records by the Comptroller General.

**Item II—Contract Award Implementation (FAR Case 94-701)**

This final rule implements Sections 1002, 1003, 1005, 1011, 1012, 1013, 1014, 1052, 1053, 1055, 1061, 1062, 1063, 1064, 1555, 7203, and 10004 of Pub. L. 103-355. The rule (1) requires agencies to report additional information on procurements exceeding \$25,000; (2) expands the criteria for

establishing or maintaining alternative sources of supplies or services; (3) permits use of other than full and open competition to acquire expert services for litigation; (4) places limitations on the use of other than full and open competition when authorized or required by statute; (5) clarifies approval requirements for written justifications for other than full and open competition; (6) revises procedures for specifying evaluation factors and subfactors in solicitations, for conducting written or oral discussions, and for providing postaward notices and debriefings to offerors; (7) requires a written determination before providing for evaluation of options in sealed bid procurements; (8) permits nonprofit agencies for the blind or severely disabled to use Government supply sources in performing contracts under the Javits-Wagner-O'Day Act; and (9) allows award without discussion to other than the lowest overall cost offeror.

**Item III—Penalties on Unallowable Indirect Costs (FAR Case 94-751)**

This final rule implements Sections 2101 and 2151 of Pub. L. 103-355. The rule contains procedures for the assessment of penalties on unallowable indirect costs under contracts exceeding \$500,000. These procedures are essentially the same as those contained in the Defense FAR Supplement.

**Item IV—Implementation of Various Cost Principle Provisions (FAR Case 94-754)**

This final rule implements Section 2101 of Pub. L. 103-355. The rule adds the costs of lobbying the legislative body of a political subdivision of a state to the list of unallowable costs; adds the cost of "conventions" to the costs to be clarified in the cost principles; and expands the coverage to the Coast Guard and the National Aeronautics and Space Administration. Section 2151 amends 41 U.S.C. 256 to include all the provisions of 10 U.S.C. 2324, as amended by Section 2101. Therefore, the provisions are made generally applicable to all other executive agencies. The new FAR language, with only minor variations, was transferred from the current coverage in the Defense Federal Acquisition Regulation Supplement.

**Item V—Entertainment, Gift, and Recreation Costs for Contractor Employees (FAR Case 94-750)**

This rule finalizes the interim rule published in FAC 90-25. The rule implements Section 2192 of Pub. L. 103-355 to revise the cost principles governing entertainment, gift, and recreation costs for contractor employees. The final rule differs from the interim rule in that it (1) clarifies that gifts do not include certain employee performance and achievement awards; (2) clarifies the restrictions

pertaining to entertainment and recreation costs; and (3) eliminates the requirement that certain costs are allowable only if the net amount per employee is reasonable. This final rule replaces the interim rule in its entirety for any contracts containing the interim rule. Thus, the provisions of the interim rule will not apply to costs incurred under any contract under any circumstances.

#### **Item VI—Contractor Overhead Certification (FAR Case 94-752)**

This final rule implements Section 2151 of Pub. L. 103-355. The rule contains procedures for obtaining contractor certification of a proposal to establish or modify billing rates or to establish final indirect cost rates. These procedures are essentially the same as those contained in the Defense FAR Supplement.

Dated: August 7, 1995.

#### **Edward C. Loeb,**

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

#### **Federal Acquisition Circular**

[Number 90-31]

Federal Acquisition Circular (FAC) 90-31 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 90-31 is effective October 1, 1995, except for Item VII which is effective August 16, 1995. FAC Items I through VI are applicable for solicitations issued on or after October 1, 1995. Contracting officers may, at their discretion, include the provisions and clauses in FAC Items I through VI in solicitations issued before October 1, 1995, for contracts expected to be awarded on or after October 1, 1995.

Dated: August 3, 1995.

#### **Eleanor R. Spector,**

*Director, Defense Procurement.*

Dated: August 3, 1995.

#### **Ida M. Ustad,**

*Associate Administrator for Acquisition Policy, General Services Administration.*

Dated: August 7, 1995.

#### **Deidre A. Lee,**

*Associate Administrator for Procurement, National Aeronautics & Space Administration.*

[FR Doc. 95-19857 Filed 8-15-95; 8:45 am]

BILLING CODE 6820-EP-M

#### **48 CFR Parts 1, 4, 14, 15, 25, 50, and 52**

[FAC 90-31; FAR Case 94-740; Item I]

RIN 9000-AG24

#### **Federal Acquisition Regulation; Consolidation and Revision of the Authority To Examine Records**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to implement Sections 2201(a), 2251(a), 4102(c) and 4103(d) of the Act. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**EFFECTIVE DATE:** October 1, 1995.

#### **FOR FURTHER INFORMATION CONTACT:**

Mr. Daniel J. Tucciarone at (703) 767-2270 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 90-31, FAR case 94-740.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), 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 the Act's implementation include changes in the areas of Commercial Item Acquisition, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network.

Title 2, Subtitle C of the Act is entitled Audit and Access to Records. Section 2201(a) of the act merges the audit provision of TINA (10 U.S.C. 2306a) and the audit coverage in 10 U.S.C. Section 2313 into a single comprehensive section at 10 U.S.C. 2313. Section 2201(a) includes subsections that: (1) limit obtaining preaward information when the results of a recent audit are already available, (2) allow a contractor to store original records in electronic form, (3) allow the use of images as original records, and (4) provide a new definition of records.

Section 2251(a) of the Act consolidates the audit rights for civilian agencies and conforms those rights with the provisions in 10 U.S.C. Section 2313 to ensure identical audit authorities for both DOD and civilian agencies.

Sections 2201(a) and 2251(a) both discuss subpoena authorities.

By its terms, the Act at Sections 2201(a) and 2251(a) provides that all cost-reimbursement, incentive, time-and-materials, labor-hour or price-redeterminable subcontracts will be subject to audit. FAR 52.215-2(g), therefore, requires the flowdown of the Audit and Records—Negotiation clause into all subcontracts of these types and into subcontracts when cost or pricing data are required, or when cost performance reports are required. This rule, however, exempts from the flowdown requirement all subcontracts below the simplified acquisition threshold. This conforms the audit rights at the subcontract level with those at the prime contract level.

An Alternate III was added to the clause at FAR 52.215-2 to provide for waiver of the right to examination of records by the Comptroller General.

##### **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 most contracts awarded to small businesses are awarded competitively on a firm-fixed-price basis and, therefore, are not subject to audit requirements.

##### **C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose additional recordkeeping or information collection requirements, or additional 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.* For civilian agency procurements, recordkeeping is reduced due to the higher cost or pricing data threshold.

##### **D. Public Comments**

A proposed rule was published in the **Federal Register** at 59 FR 66408, December 23, 1994. During the public comment period, 11 comments were received. Comments were also received during two agency comment periods. Changes were made to the proposed rule