

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

to achieve clearer, more concise wording based on these comments.

**List of Subjects in 48 CFR Parts 1, 4, 14, 15, 25, 50, and 52**

Government procurement.

Dated: August 7, 1995.

**Edward C. Loeb,**

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

Therefore, 48 CFR Parts 1, 4, 14, 15, 25, 50, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 4, 14, 15, 25, 50, 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 REGULATIONS SYSTEM**

**1.106 [Amended]**

2. Section 1.106 is amended under the "FAR Segment" and "OMB Control Number" headings by removing "52.215-1" and "9000-0034".

**PART 4—ADMINISTRATIVE MATTERS**

3. Section 4.702 is amended by revising paragraph (a) to read as follows:

**4.702 Applicability.**

(a) This subpart applies to records generated under contracts that contain one of the following clauses:

(1) Audit and Records—Sealed Bidding (52.214-26).

(2) Audit and Records—Negotiation (52.215-2).

\* \* \* \* \*

4. Section 4.703 is amended as follows:

a. In paragraph (a) by removing the phrase "books, records, documents," and inserting in its place "records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form,";

b. In paragraph (b) introductory text and the first sentence of (b)(2) by removing the word "documents" and inserting in its place "records";

c. Revising paragraph (c); and

d. Removing paragraph (d) and redesignating paragraph "(e)" as paragraph "(d)". The revised text reads as follows:

**4.703 Policy.**

\* \* \* \* \*

(c) Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in

electronic form unless they contain significant information not shown on the record copy. Original records need not be maintained or produced in an audit if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves accurate images of the original records, including signatures and other written or graphic images, and that the imaging process is reliable and secure so as to maintain the integrity of the records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

\* \* \* \* \*

**4.706 through 4.706-3 [Removed]**

5. Section 4.706 is removed and reserved, and sections 4.706-1 through 4.706-3 are removed.

**PART 14—SEALED BIDDING**

6. Section 14.201-7 is amended by revising paragraph (a) to read as follows:

**14.201-7 Contract clauses.**

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit and Records—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold at 15.804-2(a)(1) for submission of cost or pricing data.

\* \* \* \* \*

**PART 15—CONTRACTING BY NEGOTIATION**

7. Section 15.106-1 is removed and 15.106-2 is redesignated as 15.106-1 and revised to read as follows:

**15.106-1 Audit and Records—Negotiation clause.**

(a) This subsection implements 10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133.

(b) The contracting officer shall, if contracting by negotiation, insert the clause at 52.215-2, Audit and Records—Negotiation, in solicitations and contracts except those (1) not exceeding the simplified acquisition threshold in Part 13; or (2) for utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge.

(c) In facilities contracts, the contracting officer shall use the clause with its Alternate I. In cost-reimbursement contracts with educational institutions and other nonprofit organizations, the contracting officer shall use the clause with its Alternate II. If the examination of records by the Comptroller General is waived in accordance with 25.901, the contracting officer shall use the clause with its Alternate III.

8. Section 15.805-5 is amended in paragraph (a)(1) introductory text by inserting after the first sentence the following:

**15.805-5 Field pricing support.**

(a)(1) \* \* \* The contracting officer should contact the cognizant audit office to determine the existence of audits addressing proposed indirect costs. In accordance with 41 U.S.C. 254d and 10 U.S.C. 2313, the contracting officer shall not request a preaward audit of such indirect costs unless the information available from any existing audit completed within the preceding 12 months is considered inadequate for determining the reasonableness of the proposed indirect costs. \* \* \*

\* \* \* \* \*

**PART 25—FOREIGN ACQUISITION**

9. Section 25.000 is amended by revising the last sentence to read as follows:

**25.000 Scope of part.**

\* \* \* This part also provides policies and procedures pertaining to international agreements, customs and duties, the clause at 52.215-2, Audit and Records—Negotiation, and use of local currency for payment.

10. Section 25.901 is amended by revising the section heading and paragraphs (b), (c), (d)(2), (d)(3), and (d)(5) to read as follows:

**25.901 Omission of audit clause.**

\* \* \* \* \*

(b) *Policy.* As required by 10 U.S.C. 2313, 41 U.S.C. 254d, and 15.106-1(b), the contracting officer shall consider for use in negotiated contracts with foreign contractors, whenever possible, the basic clause at 52.215-2, Audit and Records—Negotiation, which authorizes examination of records by the Comptroller General. Use of the clause with Alternate III should be approved only after the contracting agency, having considered such factors as alternate sources of supply, additional cost, and time of delivery, has made all reasonable efforts to include the basic clause.

(c) *Conditions for use of Alternate III.* The contracting officer may use the clause at 52.215-2, Audit and Records—Negotiation, with its Alternate III in contracts with foreign contractors—

(1) If the agency head, or designee, determines, with the concurrence of the Comptroller General, that waiver of the right to examination of records by the Comptroller General will serve the public interest; or

(2) If the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records, as defined at 4.703(a), available for examination, and the agency head, or designee, determines, after taking into account the price and availability of the property or services from United States sources, that waiver of the right to examination of records by the Comptroller General best serves the public interest.

(d) \* \* \*

(2) Describe the efforts to include the basic clause;

(3) State the reasons for the contractor's refusal to include the basic clause;

\* \* \* \* \*

(5) Determine that it will serve the interest of the United States to use the clause with its Alternate III.

**PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS**

**50.307 [Amended]**

11. Section 50.307 is amended in paragraph (b) by removing "52.215-1, Examination of Records by Comptroller General" and inserting in its place "52.215-2, Audit and Records—Negotiation".

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

12. Section 52.214-26 is revised to read as follows:

**52.214-26 Audit and Records—Sealed Bidding.**

As prescribed in 14.201-7(a), inserting the following clause:

**Audit and Records—Sealed Bidding (Oct 1995)**

(a) As used in this clause, *records* includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) *Cost or pricing data.* If the Contractor has been required to submit cost or pricing data in connection with the pricing of any modification to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the

accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

(1) The proposal for the modification;

(2) The discussions conducted on the proposal(s), including those related to negotiating;

(3) Pricing of the modification; or

(4) Performance of the modification.

(c) *Comptroller General.* In the case of pricing any modification, the Comptroller General of the United States, or an authorized representative, shall have the same rights as specified in paragraph (b) of this clause.

(d) *Availability.* The Contractor shall make available at its office at all reasonable times the materials described in reproduction, until 3 years after final payment under this contract, or for any other period specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR). FAR Subpart 4.7, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims.

(e) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (e), in all subcontracts expected to exceed the threshold in FAR 15.804-2(a)(1) for submission of cost or pricing data. (End of clause)

**52.215-1 [Reserved]**

13. Section 52.215-1 is removed and reserved.

14. Section 52.215-2 is revised to read as follows:

**52.215-2 Audit and Records—Negotiation.**

As prescribed in 15.106-1(b), insert the following clause:

**Audit and Records—Negotiation (Oct 1995)**

(a) As used in this clause, *records* includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) *Examination of costs.* If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this

contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(c) *Cost or pricing data.* If the Contractor has been required to submit cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

(1) The proposal for the contract, subcontract, or modification;

(2) The discussions conducted on the proposal(s), including those related to negotiating;

(3) Pricing of the contract, subcontract, or modification; or

(4) Performance of the contract, subcontract or modification.

(d) *Comptroller General*—(1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) *Reports.* If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or an authorized representative of the Contracting Officer shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating (1) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.

(f) *Availability.* The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

(2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(g) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (a), in all subcontracts under this contract that exceed the simplified acquisition threshold in FAR Part 13, and—

(1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;

(2) For which cost or pricing data are required; or

(3) That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(End of clause)

*Alternate I* (OCT 1995). As prescribed in 15.106-1(c), in facilities contracts, add the following sentence at the end of paragraph (b) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilities under this contract.

*Alternate II* (OCT 1995). As prescribed in 15.106-1(c), in cost-reimbursement contracts with educational and other non-profit institutions, add the following paragraph (h) to the basic clause:

(h) The provisions of OMB Circular No. A-133, "Audits of Institutions of Higher Learning and Other Nonprofit Institutions," apply to this contract.

*Alternate III* (OCT 1995). As prescribed in 15.106-1(c), delete paragraph (d) of the basic clause and redesignate the remaining paragraphs accordingly.

[FR Doc. 95-19858 Filed 8-15-95; 8:45 am]

BILLING CODE 6820-EP-M

## 48 CFR Parts 2, 4, 5, 6, 14, 15, 17, 19, 25, 36, 51 and 52

[FAC 90-31; FAR Case 94-701; Item II]

RIN 9000-AG39

### Federal Acquisition Regulation; Contract Award Implementation

**AGENCIES:** 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 to (1) identify new Federal Procurement Data System reporting requirements, (2) expand the reasons for establishing or maintaining alternative sources of supplies or services, (3) allow acquisition of expert services to support litigation by other than full and open competition and provide an exception to synopsis requirements, (4) clarify procedures for award to a source identified in a statute, (5) clarify approval authority for use of other than full and open competition, (6) revise procedures for use of source selection evaluation factors in solicitations, for conducting written or

oral discussions, and for providing postaward notices and debriefing to offerors, (7) require a determination that an option is likely to be exercised before providing for evaluation of sealed bid options, (8) allow nonprofit agencies for the blind or severely disabled to use Government supply sources in performing certain Javits-Wagner-O'Day contracts, and (9) make procedures for award without discussion the same for Department of Defense and civilian agencies. 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:**

Ms. Melissa Rider, Contract Award Team Leader, at (703) 614-1634 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 94-701.

**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.

This notice announces FAR revisions developed under FAR Case 94-701, Contract Award Implementation, which implements the following sections of the Act:

- Sections 1002 and 1052 amend 10 U.S.C. 2304(b) and 41 U.S.C. 253(b) to—(1) Ensure the continuous availability of a reliable source of supply; (2) satisfy projected needs based on a history of high demand; and (3) satisfy a critical need for medical, safety, or emergency supplies, as reasons for establishing or maintaining alternative sources. (Implementation at FAR 6.202.)
- Sections 1003 and 1053 amend 10 U.S.C. 2304(f)(1)(B)(i) and 41 U.S.C. 253(f)(1)(B)(i) to clarify the approval authority for use of other than full and open competition. (Implementation at FAR 6.304.)
- Sections 1005 and 1055 amend 10 U.S.C. 2304(c)(3) and 41 U.S.C. 253(c) to add the acquisition of expert services for use in any litigation or

dispute involving the Federal Government as an exception to use of full and open competition.

- (Implementation at FAR 6.302-3.)
- Section 1055 also amended 41 U.S.C. 416(c) and 15 U.S.C. 637(c) to provide an exception to the publication of notices in the Commerce Business Daily for acquisition of expert services. (Implementation at FAR 5.201, 5.202, 5.301, and 6.302-3.)
- Sections 1011 and 1061 amend 10 U.S.C. 2305(a) and 41 U.S.C. 253a and 253b to (1) Make procedures for award of contracts without discussion comparable in Department of Defense and civilian agencies, (2) require solicitations for competitive proposals to include all significant factors and subfactors and whether they are more important, of equal importance or less important than cost or price, (3) permit agencies to disclose numerical weights assigned to evaluation factors at their discretion, and (4) allow award without discussion to other than the lowest overall cost offeror. (Implementation at FAR 15.406-5, 15.407, 15.605, 15.610, and 52.215-16.)
- Sections 1012 and 1062 amend 10 U.S.C. 2305(a) and 41 U.S.C. 253a to require a determination that it is likely that an option will be exercised before providing for evaluation of prices of options in solicitations for contracts awarded using sealed bid procedures. (Implementation at FAR 17.202 and 17.208.)
- Sections 1013 and 1063 amend 10 U.S.C. 2305(b) and 41 U.S.C. 253b to require, within three days of contract award, notification to unsuccessful offerors that a contract has been awarded and to allow electronic transmission of the notice. (Implementation at FAR 2.101, 14.408-1, 14.409-1, 15.1002, 15.1003, 25.405, and 36.304.)
- Sections 1014 and 1064 amend 10 U.S.C. 2305(b) and 41 U.S.C. 253b to (1) Allow offerors to request a debriefing within three days of receipt of notice of award and require agencies, to the maximum extent practicable, to conduct the debriefings within five days, and (2) specify minimum requirements for content of the debriefings. (Implementation at FAR 15.1001, 15.1004, 36.607, and 52.215-16.)
- Section 1555 amends 40 U.S.C. 481 to allow nonprofit agencies for the blind or severely disabled providing supplies or services under a Javits-Wagner-O'Day Act contract to use Government supply sources in performing the contract. (Implementation at FAR 51.101 and