

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 6, 24, 33, and 52

[FAR Case 97-015]

RIN 9000-AH72

**Federal Acquisition Regulation;
Alternative Dispute Resolution—1996**

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

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to implement the Administrative Dispute Resolution Act of 1996 (Pub. L. 104-320) and Section 4321(a)(7) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). 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: Comments should be submitted on or before December 26, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.97-015@gsa.gov.

Please cite FAR case 97-015 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAR case 97-015.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed rule amends FAR Parts 6, 24, 33, and 52 to implement the Administrative Dispute Resolution Act of 1996 (Pub. L. 104-320) and Section 4321(a)(7) of the Clinger-Cohen Act of 1996 (Pub. L. 104-106). The rule makes clear the authority to contract with a

neutral person as an exception to requirements for full and open competition, revises requirements for certification of a claim under the Administrative Dispute Resolution Act to conform to the requirements under the Contract Disputes Act, allows for binding arbitration in certain circumstances, and specifies that certain dispute resolution communications are exempt from disclosure under the Freedom of Information Act.

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 rule adds guidance pertaining to, but does not significantly alter the procedures for, alternative dispute resolution. Alternative dispute resolution procedures allow voluntary resolution of issues in controversy without the need to resort to litigation. 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 97-015), 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.* However, it does reduce the information collection requirements relating to certification of claims (OMB Control Number 9000-0135).

List of Subjects in 48 CFR Parts 6, 24, 33, and 52

Government procurement.

Dated: October 21, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 6, 24, 33, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 6, 24, 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 6—COMPETITION
REQUIREMENTS****6.302-3 [Amended]**

2. Section 6.302-3 is amended in paragraph (a)(2)(iii) by inserting "or neutral person" after the word "expert".

**PART 24—PROTECTION OF PRIVACY
AND FREEDOM OF INFORMATION:**

3. Section 24.202 is amended by adding paragraph (c) to read as follows:

24.202 Prohibitions.

* * * * *

(c) A dispute resolution communication that is between a neutral person and a party to alternative dispute resolution proceedings, and that may not be disclosed under 5 U.S.C. 574, is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(3)).

**PART 33—PROTESTS, DISPUTES,
AND APPEALS**

4. Section 33.201 is amended by revising the definition "Alternative dispute resolution (ADR)" to read as follows:

33.201 Definitions.

* * * * *

Alternative dispute resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

* * * * *

33.204 [Amended]

5. Section 33.204 is amended in the fifth sentence by removing "Public Law 100-522," and inserting in its place "(5 U.S.C. 571, *et seq.*),".

6. Section 33.207 is amended by revising paragraph (a) to read as follows:

33.207 Contractor certification.

(a) Contractors shall provide the certification specified in 33.207(c) when submitting any claim exceeding \$100,000.

* * * * *

7. Section 33.214 is amended in paragraph (a)(3) by inserting "and" after "litigation;" in (a)(4) by removing "; and" and inserting a period in its place; removing (a)(5); revising the first sentence of paragraph (b); and adding paragraphs (f) and (g) to read as follows:

33.214 Alternative dispute resolution (ADR).

* * * * *

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. * * *

(f)(1) A solicitation shall not require arbitration as a condition of award, unless arbitration is otherwise required by law. Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other

conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines shall provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.233-1 is amended by revising the date of the clause and paragraphs (d)(2)(i) and (g) to read as follows:

52.233-1 Disputes.

* * * * *

DISPUTES (DATE)

* * * * *

(d)(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

* * * * *

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

* * * * *

[FR Doc. 97-28328 Filed 10-24-97; 8:45 am]

BILLING CODE 6820-EP-P