

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 31.205-46 is amended by revising paragraph (a)(3)(iv) to read as follows:

31.205-46 Travel costs.

- (a) * * *
(3) * * *

(iv) Documentation to support actual costs incurred shall be in accordance with the contractor's established practices, subject to paragraph (a)(7) of this subsection, and provided that a receipt is required for each expenditure of \$75.00 or more. The approved justification required by paragraph (a)(3)(ii) and, if applicable, paragraph (a)(3)(iii) of this subsection must be retained.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 33

[FAC 97-03; FAR Case 97-009; Item X]

RIN 9000-AH81

Federal Acquisition Regulation; Protests to GAO

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 conform with revisions to the General Accounting Office (GAO) Bid Protest Regulations. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: February 9, 1998.

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 FAC 97-03, FAR case 97-009.

SUPPLEMENTARY INFORMATION:

A. Background

The GAO published a final rule amending its Bid Protest Regulations in the **Federal Register** on July 26, 1996 (61 FR 39039). Several conforming amendments to FAR Part 33 are necessary to reflect the current GAO Bid Protest Regulations. The definition of "day" in FAR 33.101 is amended to exclude Saturdays, Sundays, and Federal holidays from being counted if such day is the last day of the period after the act, event, or default. FAR 33.104 is amended to require agencies to include a best estimate of the contract value in an agency report of a protest; and to require agencies to provide to all parties, at least 5 days prior to the filing of a report, a list of documents the agency intends to release or withhold, and reasons for proposed withholding. The time within which agencies are required to provide additional documents requested by a protester is reduced from 5 to 2 days. The time within which protesters or other interested parties are required to furnish comments on an agency report is reduced from 14 to 10 days, or from 7 to 5 days if an express option is used; or, if a hearing is held, from 7 to 5 days. Language is added to require a protester to file its claim for costs with the contracting agency within 60 days after receipt of GAO's recommendation that the agency pay the protester its costs.

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. 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 should cite 5 U.S.C. 601, *et seq.* (FAC 97-03, FAR case 97-009), 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 33

Government procurement.

Dated: December 1, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR part 33 is amended as set forth below:

PART 33—PROTESTS, DISPUTES, AND APPEALS

1. The authority citation for 48 CFR part 33 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).

33.101 [Amended]

2. Section 33.101 is amended in paragraph (b)(1) under the definition of "Day" by removing the word "legal" and inserting "Federal" in its place; and by removing paragraph (c).

3. Section 33.104 is amended by—

- a. Redesignating (a)(3)(iii) as (a)(3)(iv), and adding a new (a)(3)(iii);
- b. Revising newly designated (a)(3)(iv)(B); removing (a)(3)(iv)(C); redesignating (a)(3)(iv)(D) as (a)(3)(iv)(C);
- c. Replacing "5" with "2" in paragraphs (a)(4)(ii)(A) and (a)(4)(ii)(B);
- d. Replacing "14" with "10" and "7" with "5" each time it appears in paragraph (a)(6);
- e. Adding "the agency" before the word "report" in the third sentence of paragraph (e);
- f. Revising paragraph (h) to read as follows:

33.104 Protests to GAO.

* * * * *

- (a) * * *
(3) * * *

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

- (iv) * * *
(A) * * *

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest

file that may be necessary to determine the merits of the protest; and

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

(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) 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 19.001, "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 pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorney's 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 a "reasonable" level for attorney's fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the

subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward 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 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.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 42 and 53

[FAC 97-03; FAR Case 95-034; Item XI]

RIN 9000-AH18

Federal Acquisition Regulation; Novation and Related Agreements

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 facilitate the processing of novation and related agreements. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: February 9, 1998.

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 Ms. Linda Klein, Procurement Analyst, at (202) 501-3775. Please cite FAC 97-03, FAR case 95-034.

SUPPLEMENTARY INFORMATION:

A. Background

The purpose of this rule is to facilitate the process of novating contracts and to provide guidelines for contracting officers, while preserving the Government's interests in business combinations affecting its contracts. A proposed rule was published in the **Federal Register** on August 21, 1996 (61 FR 43294). Eighteen comments were received from six respondents. All comments were considered in the development of 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 novation agreements generally affect only a relatively small number of large and small business entities.

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 42 and 53

Government procurement.

Dated: December 1, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR parts 42 and 53 are amended as set forth below:

1. The authority citation for 48 CFR parts 42 and 53 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 42—CONTRACT ADMINISTRATION

2. Section 42.1203 is amended by revising paragraphs (b) and (c); redesignating paragraphs (d) through (f) as (f) through (h), respectively; and adding new paragraphs (d) and (e) to read as follows:

42.1203 Processing agreements.

* * * * *

(b) The responsible contracting officer shall—