

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 17, 22, and 36

[FAC 2001-05; FAR Case 2001-016 (stay)]

RIN 9000-AJ14

**Federal Acquisition Regulation;
Executive Order 13202, Preservation of
Open Competition and Government
Neutrality Towards Government
Contractors' Labor Relations on
Federal and Federally Funded
Construction Projects**

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

ACTION: Interim rule; stay with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published an interim rule in the **Federal Register** at 66 FR 27414, May 16, 2001, implementing Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, which prohibits including requirements for affiliation with a labor organization as a condition for award of any contract or subcontract for construction or construction management services. Executive Order 13202, as amended, is currently the subject of litigation in the Federal courts, and an appeal is pending in the United States Court of Appeals for the District of Columbia Circuit. Pending resolution of this litigation, the Councils are now issuing a stay of a paragraph of the rule. After final judicial resolution of the dispute, the Councils will, as appropriate, issue a notice regarding the status of the rule. The Councils request comments on this action.

DATES: *Effective Date:* Effective March 7, 2002 paragraph 36.202(d) of the interim rule published in the **Federal Register** at 66 FR 27414, May 16, 2001, is stayed indefinitely.

Comment Date: Interested parties must submit comments to the FAR Secretariat at the address shown below on or before May 6, 2002 to be considered in the formulation of a rule concerning the stay and the length of the stay.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: *farcase.2001-016stay@gsa.gov*. Please submit comments only and cite FAC 2001-05, FAR case 2001-016 (stay), 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 Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-05, FAR case 2001-016 (stay).

SUPPLEMENTARY INFORMATION:**A. Background**

On February 17, 2001, President George W. Bush signed Executive Order 13202 revoking Executive Order 12836 of February 1, 1993, and Presidential Memorandum of June 5, 1997, entitled "Use of Project Labor Agreements for Federal Construction Projects." The Executive order was published in the **Federal Register** at 66 FR 11225, February 22, 2001, and was amended by Executive Order 13208, which was published in the **Federal Register** at 66 FR 18717, April 11, 2001. Executive Order 13202, as amended, is intended to improve the internal management of the Executive branch by—

- Promoting and ensuring open competition on Federal and federally funded or assisted construction projects;
- Maintaining Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects;
- Reducing construction costs to the Government and to the taxpayers;
- Expanding job opportunities, especially for small and disadvantaged businesses;
- Preventing discrimination against Government contractors or their employees based upon labor affiliation or lack thereof, thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects; and
- Preventing the inefficiency that may result from the disruption of a previously established contractual relationship in particular cases.

To implement Executive Order 13202, as amended, an interim rule was published in the **Federal Register** on May 16, 2001, 66 FR 27414, as Item II of FAC 97-26. Consistent with

Executive Order 13202, as amended, FAR 36.202(d) of that interim rule specified that agencies could not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to agreements with one or more labor organizations. It also permitted agency heads to exempt a project from the requirements of the Executive order under special circumstances, but specified that such an exemption could not be related to a possible or an actual labor dispute. FAR 36.202(d) also provided for the exemption of a project governed by a project labor agreement in place as of February 17, 2001, which had a construction contract awarded as of February 17, 2001.

Public comments were received from 179 respondents.

Executive Order 13202, as amended, is currently the subject of litigation in the Federal courts, and an appeal is pending in the United States Court of Appeals for the District of Columbia Circuit. *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, 172 F.Supp. 2d 138 (D.D.C. 2001), appeal pending, No. 01-5436 (D.C. Cir.).

Based on guidance received from the Administrator of the Office of Federal Procurement Policy, Office of Management and Budget, the Councils are issuing this notice staying FAR 36.202(d), pending resolution of the litigation. After final judicial resolution of the dispute, the Councils will, as appropriate, issue a notice regarding the status of FAR 36.202(d).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration believe that this stay may 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 action stays a rule that would have assisted in expanding job opportunities for small and small disadvantaged businesses in Federal construction projects. Therefore, we have prepared an Initial Regulatory Flexibility Analysis:

Description of the reasons why action by the agency is being considered: An interim rule was published in the **Federal Register** on May 16, 2001, 66 FR 27414, as Item II of

FAC 97-26. That interim rule amended the FAR to implement Executive Order 13202, as amended. Consistent with the Executive Order, FAR 36.202(d) provides that agencies may not require or prohibit offerors, contractors, or subcontractors from entering into or adhering to agreements with one or more labor organizations. It also permits agency heads to exempt a project from these requirements under special circumstances, as long as the exemption is not related to the possibility of or an actual labor dispute. FAR 36.202(d) also allows for exemption of a project governed by a project labor agreement in place as of February 17, 2001, which had a construction contract awarded as of February 17, 2001. Public comments were received from 179 respondents. There were no public comments received in response to the Initial Regulatory Flexibility Analysis.

Executive Order 13202, as amended, is currently the subject of litigation in the Federal courts, and an appeal is pending in the United States Court of Appeals for the District of Columbia Circuit. See *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, 172 F.Supp. 2d 138 (D.D.C. 2001), appeal pending, No. 01-5436 (D.C. Cir.). Based on guidance received from the Administrator of the Office of Federal Procurement Policy, Office of Management and Budget, the Councils are staying FAR 36.202(d) pending resolution of the litigation. After final judicial resolution of the dispute, the Councils will, as appropriate, issue a notice regarding the status of FAR 36.202(d).

Succinct statement of the objectives of, and legal basis for, the interim rule stay: This action stays FAR 36.202(d), which implemented Executive Order 13202, as amended, pending judicial resolution of litigation related to the Executive Order.

Description of, and where feasible, estimate of the number of small entities to which the interim rule stay will apply: The stay applies to all large and small entities that seek construction contracts that are awarded by executive agencies. For fiscal year 2001, through the third quarter, there were 1,143 construction contract actions awarded. It is not known how many were union or nonunion. The interim rule published as Item II of FAC 97-26 had an Initial Regulatory Flexibility Act statement that said it was likely to have an economic impact on entities that had nonunion shops because it would have provided additional work opportunities.

Description of projected reporting, recordkeeping, and other compliance requirements of the interim rule stay, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record: The interim rule stay imposes no reporting, recordkeeping, or other compliance requirements.

Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the interim rule stay: The interim rule stay does not duplicate, overlap, or conflict with any other Federal rules.

Description of any significant alternatives to the interim rule stay that accomplish the

stated objectives of applicable statutes and that minimize any significant economic impact of the interim rule stay on small entities: There are no practical alternatives that will accomplish the objectives of this stay.

We invite comments from small businesses and other interested parties. We will consider comments from small entities concerning the affected FAR Parts 17, 22, and 36 in accordance with 5 U.S.C. 610. Small entities must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-05, FAR Case 2001-016 (stay)), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim stay does not impose or remove information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Stay

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim stay without prior opportunity for public comment. This action is necessary because Executive Order 13202, as amended, which FAR 36.202(d) implements, is currently the subject of litigation in the Federal courts, and an appeal is pending in the United States Court of Appeals for the District of Columbia Circuit. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule stay will be considered in formulating a final rule.

List of Subjects in 48 CFR Parts 17, 22, and 36

Government procurement.

Dated: March 1, 2002.

Al Matera,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001-05 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 2001-05 are effective March 7, 2002.

Dated: February 28, 2002.

Deidre A. Lee,

Director, Defense Procurement.

Dated: February 27, 2002.

David A. Drabkin,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: February 27, 2002.

Anne Guenther,
Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

Accordingly, paragraph 36.202(d) of the interim rule amending 48 CFR parts 17, 22, and 36, which was published on May 16, 2001 in the **Federal Register** at 66 FR 27414 as Item II of FAC 97-26, is stayed indefinitely.

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

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121). It consists of a summary of rule appearing in Federal Acquisition Circular (FAC) 2001-05 which amends the FAR. A regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 603. Interested parties may obtain further information regarding this rule by referring to FAC 2001-05 which precedes this document. This document is also available via the Internet at <http://www.arnet.gov/far>.

FOR FURTHER INFORMATION CONTACT:

Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, General Services Administration, at (202) 501-1900.