

**Headquarters
Policy Flash**

FLASH 2002-04

DATE: January 14, 2002
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circulars (FACs) 2001-02 and 2001-03**

SUMMARY: This Policy Flash summarizes the items in FACs 2001-02 and 2001-03, which were published in the Federal Register on December 18, 2001, at 66 FR 65348 and December 27, 2001, at 66 FR 66984, respectively. Contracting personnel should review the details of each item in the full text of the FACs.

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A. Federal Acquisition Circular (FAC) 2001-02

The following nine items are in FAC 2001-02, which was published in the Federal Register on December 18, 2001, at 66 FR 65348. Items 1-6 are effective February 19, 2002, and items 7-9 are effective December 18, 2001. The FAC is available via the internet at <http://www.arnet.gov/far/facsframe.html>

Effective Date: February 19, 2002(Items 1-6)

Applicability: The FAR coverage, as amended by this rule, is applicable to solicitations issued on or after February 19, 2002.

1. Definitions of “Component” and “End Product” (FAR Case 2000-015)

This final rule amends FAR Part 2, Definitions, Part 25, Foreign Acquisition, and Part 52, Solicitation Provisions and Contract Clauses. The rule restores unique Part 25 definitions of “component” and “end product” for acquisition of supplies. Also, makes minor revisions to the definitions of “component” and “cost of components” for the acquisition of construction.

2. Energy Efficiency of Supplies and Services (FAR Case 1999-011)

The final rule amends FAR Part 2, Definitions, Part 11, Describing Agency Needs, Part 15, Contracting By Negotiation, Part 23, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug Free Workplace. The rule implements in FAR Executive Order 13123, Greening the Government through Efficient Energy Management. This final rule-

- Directs the contracting officer to acquire energy efficient products if life-cycle cost-effective and available;
- Requires that the contracting officer use Internet sources for more detailed information on ENERGY STAR and other energy-efficient products;
- Provides guidance on energy-savings performance contracts (ESPCs) including an explanation of what they are and when they should be used; and procedures for the solicitation and award of ESPCs, and the evaluation of unsolicited proposals; and

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- Impacts only those contracting officers that acquire energy-using products or services, contract for design, construction, renovation, or maintenance of public buildings that will include energy-using products, or use energy-savings performance contracts to reduce energy use and cost in an agency's facilities or operations.

3. Prompt Payment and the Recovery of Overpayment (FAR Case 1999-023)

The final rule amends FAR Part 32, Contract Financing, and Part 52, Solicitation Provisions and Contract Clauses. The rule-

- Revises prompt payment policies simplifying and clarifying prompt payment coverage that currently exist in the FAR;
- Revises the information that must be on an invoice in order to be considered a proper invoice;
- Establishes the requirement in the prompt payment clauses for contractors to notify the contracting officer if the contractor becomes aware of an overpayment of an invoice; and
- Applies to all Government contracts (including contracts at or below the simplified acquisition threshold) except contracts with payment terms and late payment penalties established by other governmental authority.

4. Javits-Wagner-O'Day Act (JWOD) Subcontract Preference under Service Contracts (FAR Case 1999-017)

This final rule amends the FAR to add a new preference for award of subcontracts under service contracts to non-profit workshops designated by JWOD. The rule-

- Requires that all contractors providing services to the Government use and subcontract services giving preference in awarding subcontracts to nonprofit workshops, if the services are on the Committee for Purchase From People Who Are Blind or Severely Disabled procurement list;

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- Directs contracting officers to consider the preference for subcontracting with non-profit workshops when reviewing a subcontract for services that is subject to the procedures at FAR Subpart 44.2, Consent to Subcontracts; and
- Informs offerors and contractors that certain services provided to the Government are required by law to be obtained from the Committee for Purchase From People Who Are Blind or Severely Disabled as well as amends FAR 52.208-9, Contractor Use of Mandatory Sources of Supply.

5. Discussion Requirements (FAR Case 1999-022)

The rule amends FAR 15.306(d) to clarify that the existing policy providing for discussions beyond the minimum elements, as stated in FAR, are a matter of contracting officer judgement. The rule-

- Provides that the contracting officer is not required to discuss every area where the proposal could be improved; and
- Expresses that the contracting officer must discuss deficiencies, significant weaknesses, and adverse past performance information, to which the offeror has not yet had an opportunity to respond, and other aspects of the offeror's proposal.

6. Definition of Subcontract in FAR Subpart 15.4 (FAR Case 2000-017)

This final rule excludes FAR 15.407-2, Make-or-buy programs, from the application of the expanded definition of "subcontract" at FAR 15.401. The application of the expanded definition creates a conflict with the definitions of "buy item" and "make item" in FAR 15.407-2. This rule is a clarification and does not change any policy.

Effective Date: December 18, 2001 (Items 7, 8, and 9)

Applicability: The FAR coverage, as amended by this rule, is applicable to solicitations issued on or after December 18, 2001.

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7. North American Industry Classification System (FAR Case 2000-604)

This rule finalizes the interim rule, with minor changes, which amends the FAR to convert size standards and other programs that were based on the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS).

8. Iceland Newly Designated Country under Trade Agreements Act (FAR Case 2001-025)

The final rule adds Iceland as a designated country under the Trade Agreements Act (TAA). The definition of "Designated Country" at FAR 25.003 and the clause at 52.225-11, Buy American Act-Balance of Payments Program-Construction Materials under Trade Agreements is amended. The rule-

- Provides that contracting officers may now consider offers of end products or construction materials from Iceland in acquisitions subject to the TAA. Currently, the TAA threshold for the acquisition of supplies is \$177,000 and construction is \$6,806,000.
- Requires that if TAA applies, Executive Order 13126 of June 12, 1999, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor does not apply to contracts for the acquisition of products from foreign countries that are party to the Agreement on Government Procurement. As a consequence, this rule adds Iceland to the list of excepted countries of origin at 22.1503(b)(4) and the clause at 52.222-19, Child Labor-Cooperation with Authorities and Remedies.

9. Contractor Personnel in the Procurement of Information Technology Services (FAR Case 2000-609)

The final rule adopts, without change, the interim rule published in the Federal Register on May 1, 2001. The FAR is amended at subpart 39.1 to address the use, in the procurement of information technology services, of requirements regarding the experience and education of contractor personnel.

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B. Federal Acquisition Circular (FAC) 2001-03.

The following two items are in FAC 2001-03, which was published in the Federal Register on December 27, 2001, at 66 FR 66984. The FAC is available via the Internet at <http://www.arnet.gov/far/facsframe.html>

Effective Date: December 27, 2001 (Items 1-2)

Applicability Date: The FAR coverage, as amended by this rule, is applicable to solicitations issued on or after December 27, 2001.

☐ Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (FAR Case 1999-010 (Stay))

This final rule terminates the stay issued as an interim rule published in the Federal Register at 66 FR 17754, April 3, 2001. The interim rule stayed a final rule published in the Federal Register at 65 FR 80255 addressing contractor responsibility and cost incurred in legal and other proceedings.

☐ Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings-Revocation (FAR Case 2001-014)

This final rule revokes the final rule published in the Federal Register at 65 FR 80255, December 20, 2000, addressing responsibility and cost incurred in legal and other proceedings.

What is the impact of these changes?

The final result is that policies regarding Contractor Responsibility that had been published on December 20, 2000, have been revoked. Policies which had been in effect prior to the December 20, 2000, final rule were restored. In addition, AL 2001-02 "FAR Class Deviation Addressing Contractor Responsibility" dated February 15, 2001, is cancelled. The following background chronology is provided to assist in understanding the changes:

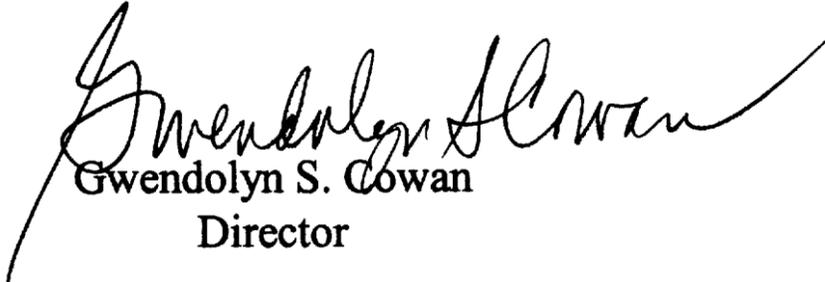
- ☐ A final rule was published at 65 FR 80255, December 20, 2000, addressing contractor responsibility, labor relations costs, and costs incurred in legal and other proceedings. The rule was to be effective January 19, 2001. One of the more controversial provisions of the final rule was an amendment to FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed

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Debarment, and Other Responsibility Matters", to require offerors to certify to additional violations (violations of tax, labor and employment, environmental, antitrust or consumer protection laws) adjudicated within the last three years.

- ☞ As a result of the issuance of the final rule, legal action was taken by several business associations seeking to overturn the final rule.
- ☞ The Civilian Agency Acquisition Council advised agencies that they may issue a class deviation to the new FAR requirements in the final rule. The AL 2001-02 dated February 15, 2001, was issued to forward a FAR class deviation. This action resulted in the FAR effectivity being delayed until July 19, 2001 or until issuance of an appropriate FAR change, whichever occurs first.
- ☞ Additional actions were also taken in response to the legal action. An interim rule was published at 66 FR 17754, April 3, 2001, which "stayed" the December 20, 2000, rule resulting in a further delay of the FAR effective date until December 29, 2001. A separate proposed rulemaking was also issued concurrently at 66 FR 17758, April 3, 2001, to propose revoking the final rule issued December 20, 2000.
- ☞ Both the interim rule and the proposed rule were finalized in FAC 2001-02.

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