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GSA Office of Governmentwide Policy

CIVILIAN AGENCY ACQUISITION COUNCIL LETTER 2001-1

MEMORANDUM FOR CIVILIAN AGENCIES OTHER THAN NASA

FROM: AL MATERA
CHAIRMAN
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation from Federal Acquisition Circular 97-21 (Final Rule, Final Rule FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings.

A final rule was published in the Federal Register on December 20, 2000 (Federal Acquisition Circular (FAC) 97-21, Federal Acquisition Regulation (FAR) Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 FR 80255). The final rule, among other things, revised the FAR guidance for making responsibility determinations and added a new certification requirement requiring the prospective contractor to certify regarding certain violations adjudicated within the last three years. An affirmative responsibility determination must be made before the award of every contract. The certification applies to all procurements over $100,000.

The following FAR sections were affected: 9.103(b), 9.104-1(d), 9.104-3 new paragraph (c), 14.404-2(i), 15.503(a), 31.205-21, 31.205-47(a) and (b), 52.209-5, and 52.212-3(h).

The Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors, Inc., filed a lawsuit in the United States District Court for the District of Columbia on December 22, 2000, seeking to overturn the final rule.

The Administrative Procedure Act, 5 U.S.C. 705, gives authority for a stay of the final rule: "When an agency

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finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." In the interest of justice, the General Services Administration believes implementation of the final rule should be voluntarily stayed.

The FAR Council has received letters from industry and Congress requesting an effective date extension from January 19, 2001, to July 19, 2001. The effective date extension will allow the Federal Government and Federal Contractors sufficient time to meet the new obligations and responsibilities imposed by the final rule. The Federal Government has similar concerns with the 30-day effective date of the final rule.

Accordingly, civilian agencies may immediately authorize a class deviation in accordance with FAR 1.404 and 31.101 to deviate from the requirements of Federal Acquisition Circular (FAC) 97-21 (Federal Acquisition Regulation (FAR) Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (65 FR 80255)) and immediately restore the previous FAR text including certification language. (See enclosure) The class deviation shall remain in effect until July 19, 2001 or until issuance of an appropriate FAR change, whichever occurs first. This letter serves as evidence of consultation with the Chairperson of the Civilian Agency Acquisition Council, as provided in 1.404, and approval by the Civilian Agency Acquisition Council as provided in 31.101.

Enclosure

Enclosure

CLASS DEVIATION FROM
FEDERAL ACQUISITION CIRCULAR 97-21
(Final Rule FAR Case 1999-010,
Contractor Responsibility, Labor
Relations Costs, and Costs Relating to
Legal and Other Proceedings)

Action: A final rule was published in the Federal Register on December 20, 2000 (Federal Acquisition Circular (FAC) 97-21, Federal Acquisition Regulation (FAR) Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 FR 80255). The final rule is immediately suspended. The previous FAR text including certification language is immediately restored. The suspension is until July 19, 2001 or until issuance of an appropriate FAR change whichever occurs first.

Contracting Officers are directed to amend solicitations already issued that incorporated a certification provision from that final rule. Instead, the previous version of the certification is to be used. Amended solicitations should use the March 1996 edition of 52.209-5, or for commercial items, the October 2000 edition of 52.212.3(h), as appropriate. Electronic versions of the FAR as it existed before FAC 97-21 is posted under "FAR (Archived) HTML" for FAC 97-20 at:

http://www.arnet.gov/far/

The following sections were affected: 9.103(b), 9.104-1(d), 9.104-3 new paragraph (c), 14.404-2(i), 15.503(a), 31.205-21, 31.205-47(a) and (b), 52.209-5, and 52.212-3(h).

Rationale: The final rule, among other things, revised the FAR guidance for making responsibility determinations and added a new certification requirement requiring the prospective contractor to certify regarding certain violations adjudicated within the last three years. An affirmative responsibility determination must be made

before the award of every contract. The certification applies to all procurements over $100,000.

The Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors, Inc., filed a lawsuit in the United States District Court for the District of Columbia on December 22, 2000, seeking to overturn the final rule.

The Administrative Procedure Act, 5 U.S.C. 705, gives authority for a stay of the final rule: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." In the interest of justice, the *(agency name)* believes implementation of the final rule should be voluntarily stayed.

The FAR Council has received letters from industry and Congress requesting an effective date extension from January 19, 2001, to July 19, 2001.

Based on these concerns and other concerns expressed within the Federal Government, I have determined that the 30-day effective date did not give Federal contractors and the Federal Government sufficient time to meet the new obligations and responsibilities imposed by the December 20, 2000, final rule.

Consultation: In accordance with FAR 1.404 and 31.101, I have consulted with the Civilian Agency Acquisition Council Chairman before approving this class deviation to the FAR, who agrees with this deviation as does the Civilian Agency Acquisition Council. The appropriate consultation and approval have been accomplished under the authority granted to the civilian agencies under Civilian Agency Acquisition Letter 2001-1.

Approved: _____ Date: _____
(Name, Title)