

The FAR Council published in the Federal Register at 65 FR 80255, December 20, 2000, a final rule addressing contractor responsibility, labor relations costs, and costs incurred in legal and other proceedings. This rule required contracting officers to consider a company's satisfactory compliance with tax, labor and employment, environmental, antitrust and consumer protection laws before awarding a contract and required contractors to certify whether within the preceding three years they have violated such laws. The rule also amended the FAR to prevent contractors from recovering certain previously allowable costs relating to legal defense and costs incurred in responding to unionization campaigns.

The FAR Council realized that there was a high degree of controversy about the merits of the December final rule (there were 1800 public comments). The typical FAR rule generates about 1 percent of that amount. There was widespread opposition to this rule, including many large and small businesses and business associations, lawyers, members of the Federal procurement community, and members of Congress. Labor unions and various environmental groups supported the rule.

After the publication of the December final rule, the FAR Council continued to receive information that the December final rule was not in the best interests of industry or the Government. After further review, the FAR Council published an interim rule in the Federal Register at 66 FR 17754, April 3, 2001, staying that December rule and published at the same time a proposed revocation of the December rule. The stay would expire on December 29, 2001, unless other action is taken prior to that date.

Under the April proposed rule, the FAR Council requested public comments to reassess the advantages and disadvantages of the December final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule. In this regard, it was not clear to the FAR Council that the rule provided contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation, or that the final rule was justified from a cost-benefit perspective. Almost 4700 public comments were received in response to the April proposed rule. After review and analysis of the comments, the FAR Council determined that the December final rule should be revoked in its entirety.

The FAR Council fully supports the proposition that Government contracts should be awarded to law-abiding entities. Entities whose behavior reflects negatively on their responsibility have always been subject to scrutiny and the possibility of being disqualified for award of Government contracts. In fact, the very last thing a contracting officer must do before awarding a Government contract is determine whether the company is responsible. This requirement has been a long-standing policy and process of Government contracting dating prior to the Civil War. Ferreting out companies who are not responsible has been a responsibility shared by a number of individuals in the Government's contracting process. The FAR Council supports the principle that the Government should do business only with those entities willing and able to comply with the laws enumerated in the December final rule.

With the revocation of the December final rule, contracting officers will continue to have the authority and duty to make responsibility decisions. Agency debarring officials will continue to have the authority and duty to make determinations whether to suspend and debar a contractor. The requirement that contractors must be responsible is statutory. Offerors must have a satisfactory record of integrity and business ethics.