### **DEPARTMENT OF DEFENSE**

# GENERAL SERVICES ADMINISTRATION

# NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 28, 32, and 52 [FAR Case 94–762] RIN 9000–AG35

# Federal Acquisition Regulation; Subcontractor Payments

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

**ACTION:** Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103–355 (the Act). The Federal Acquisition Regulatory Council is considering amending the Federal Acquisition Regulation (FAR) to implement Sections 2091 and 8105 of the Act which address subcontractor payments, requests for information, and bonds. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**DATES:** Comments should be submitted on or before April 3, 1995 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4037, Washington, DC 20405.

Please cite FAR case 94–762 in all correspondence related to this case. FOR FURTHER INFORMATION CONTACT: Mr. John S. Galbraith, Finance/Payment Team Leader, at (703) 697–6710, in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501–4755. Please cite FAR case 94–762.

## SUPPLEMENTARY INFORMATION:

### A. Background

The Federal Acquisition Streamlining Act of 1994, Public Law 103–355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition,

Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network (FACNET). In order to promptly achieve the benefits of the provisions of the Act, the Government is issuing implementing regulations on an expedited basis. We believe prompt publication of proposed rules provides the public the opportunity to participate more fully in the process of developing regulations.

This notice announces FAR revisions developed under FAR case 94–762. The following sections of the Federal Acquisition Streamlining Act are implemented by this proposed rule:

Section 2091 of the Act changed section 806 subsection (c) of the Fiscal Years 1992 and 1993 Defense Authorization Act by striking the existing subsection (c) and inserting a new subsection (c). The stricken words had permitted the FAR Council to substitute FAR coverage for coverage otherwise required from the Secretary of Defense. The substituted words require the FAR Council to place in the FAR, for Government-wide applicability, the coverage required of the Secretary of Defense.

Additionally, Section 8105 of the Act changed section 806 of the Fiscal Years 1992 and 1993 Defense Authorization Act by striking the existing subsection (b) and inserting a new subsection (b). The stricken words dealt with deadlines for the implementation in regulations of the statutory requirements, and that coverage is not longer pertinent. The substituted language creates an exemption from the requirements of the statute for the acquisition of commercial items. Therefore, the clause prescription at FAR 28.106–4(b) has been revised to reflect this exemption.

The proposed rule is, except for minor adjustments, the same language which was previously in the Defense Federal Acquisition Regulation Supplement, at DFARS 228.106–4–70, 228.106–6, 232.970, and 252.228–7006.

It should be noted that Section 4104(b) of the Act concerning subcontractor payments under smaller construction contracts is being addressed in a separate case. This case, 94-762, addresses only the changes required by Sections 2091 and 8105. It should also be noted that the duplication of responsibilities for furnishing copies of bonds in 28.106-6(d)(3) and the clause in 52.228-00 is intentional. The statute assigns this responsibility to both the Government and contractor. Finally, the language in 32.112-1(c) concerning "administrative and other remedial action" deliberately does not go into detail as to what these

are. The specifics of these areas and especially the regulations and procedures are peculiar to each agency. The wording is derived from the underlying statute.

In addition to the changes proposed here, there are changes being proposed to FAR Part 32 by other cases. FAR Subpart 32.1 (which will include the proposed 32.112) will apply only to purchases of non-commercial items. This will give effect to the exclusion provided for in Section 8105 of the Act. Coverage concerning financing and payment for purchases of commercial items will be provided in its own Subpart 32.2. It should also be noted that purchases of construction are not commercial purchases under the FAR.

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94-762) because of the clarity and noncontroversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see ADDRESSES caption) on or before March 6, 1995

The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

### **B. Regulatory Flexibility Act**

The proposed rule 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., although it is not possible to estimate the number of Federal contractors or subcontractors that will be affected. A previous DOD analysis estimated that, based on data available for Fiscal Year 1991, less than 20 percent of all, or a total of 1,100 small business construction contractors under DOD construction contracts would have been impacted. The requirement to provide a copy of the payment bond to prospective subcontractors and suppliers applies to all businesses that enter into a construction prime contract which is subject to the Miller Act (40 U.S.C. 270a-270d). An Initial Regulatory Flexibility Analysis (IFRA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. The IRFA states that it is impossible to accurately