

March 15, 2001

MEMORANDUM TO: Division of Contracts and Property Management

FROM: Timothy F. Hagan, Director **/RA/**  
Division of Contracts and Property Management

SUBJECT: CLASS DEVIATION FROM FEDERAL ACQUISITION CIRCULAR 97-21  
(FINAL RULE - CONTRACTOR RESPONSIBILITY, LABOR RELATIONS  
COSTS, AND COSTS RELATING TO LEGAL AND OTHER  
PROCEEDINGS)

A final rule, effective January 19, 2001, revised FAR guidance for making responsibility determinations. In addition to having a satisfactory record of integrity and business ethics, the final rule now requires contractors to have a satisfactory record of complying with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws. The final rule also adds a new certification requirement which is effective for acquisitions over the simplified acquisition threshold.

A lawsuit has been filed in the United States District Court for the District of Columbia seeking to overturn the final rule. The Administrative Procedure Act gives authority for 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 U.S. Nuclear Regulatory Commission believes implementation of the final rule should be voluntarily stayed. Therefore, I am immediately authorizing a class deviation in accordance with FAR 1.404 and 31.101 to deviate from the requirements of Federal Acquisition Circular (FAC) 97-21. This suspension is in effect until July 19, 2001, or until issuance of an appropriate FAR change whichever comes first.

DCPM staff shall utilize the March 1996 edition of FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, or the October 2000 edition of 52.212-3, Offeror Representations And Certifications - Commercial Items, as appropriate. PAOB staff will work with the DCPM Project Officer for the in-house contract writing system, *Pro-Doc*, to ensure that the earlier language for FAR 52.209-5 and 52.212-3 certification clauses is retained in the system until July 19, 2001, or until issuance of an appropriate FAR change whichever comes first.

The attached enclosure to Civilian Agency Acquisition Council letter 2001-1 serves as evidence of my consultation with the Chairperson of the Civilian Agency Acquisition Council, as provided in FAR 1.404, and approval for this deviation action by the Civilian Agency Acquisition Council as provided in FAR 31.101.

Attachment: as stated

Attachment  
Enclosure to Civilian Agency Acquisition  
Council Letter 2001-1

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 are 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 U.S. Nuclear Regulatory Commission 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. The Civilian Agency Acquisition Council Chairman 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: \_\_\_\_\_/s/\_\_\_\_\_ Date: 03/15/2001  
Timothy F. Hagan, Director  
Division of Contracts and Property  
Management

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Attachment: as stated

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