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The Contractor Responsibility Regulation: Needed Clarification or a Potential Blacklist?

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The Contractor Responsibility Regulation: Needed Clarification or a Potential Blacklist?

Summary

This report analyzes the controversy, for the most part now concluded, surrounding a Clinton Administration revision of the Federal Acquisition Regulation to clarify the meaning and application of a statutory requirement that federal contracting officers must determine that a prospective contractor has "a satisfactory record of integrity and business ethics." The new rule issued in the Clinton Administration's final days, instructed contracting officers to consider compliance with a wide range of tax, employment, environmental, antitrust, and consumer protection laws in deciding whether a contractor is "responsible," and thus eligible for a contract award.

During a drafting and comment period lasting more than 2 years, the proposed rule came under unprecedentedly heavy criticism from business and contracting groups, academic institutions, and two federal agencies. They said the proposed regulation was unnecessary and could lead to a "blacklist" of contractors who run afoul of myriad federal laws in the normal course of business. The Clinton Administration, supported by environmental, union, civil rights, and consumer watchdog groups, defended the proposal as needed to clarify the application of existing law and weed out contractors who may discredit the government.

One of the reasons the rule was so controversial was that it offered (to proponents) or threatened (to opponents) an opportunity to affect the behavior of contractors outside the realm of competition for government contracts. Labor, environmental, and corporate watchdog groups believed it would provide a positive incentive to improve business ethics and promote voluntary compliance with a broad range of tax, environmental, labor, civil rights, and consumer laws. Business groups, however, warned that it would upset a delicate balance in regulatory and litigation arenas, by adding the threat of federal contract losses to current penalties arising from common disputes with government, employees, and watchdog organizations.

On December 20, 2000, the contractor responsibility regulation was published as a final rule to become effective January 19, 2001. Business and contracting groups voiced their objections to the incoming Bush Administration. On January 31, 2001, the Civilian Agency Acquisition Council authorized agencies to use an unusual "class deviation" procedure to suspend application of the rule. On April 3, 2001, the Bush Administration took more definitive action to stay the Clinton Administration's rule for 270 days. Exactly 268 days later, on December 27, 2001, the rule was revoked in its entirety in a new rule-making procedure.

Representative Albert Wynn introduced H.R. 4081 on March 20, 2002. The bill would put the provisions of the contractor responsibility rule into legislation. No action was taken on the bill. Nevertheless, GSA barred both Enron and Arthur Andersen, LLP from federal contracts by invoking the underlying statutory provision.

This report is no longer being maintained but remains available to Congress as a record of the controversy.

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The Contractor Responsibility Regulation: Needed Clarification or a Potential Blacklist?

Background

In awarding federal contracts, procurement officials are required to determine not only that a winning bid represents the best value to the government, but also that the prospective contractor is a "responsible source." Legislation passed in 1984 defines contractor responsibility in terms of such characteristics as solvency, experience, qualifications, capability, and having a satisfactory performance record, but it also requires "a satisfactory record of integrity and business ethics."[1] For many years the Federal Acquisition Regulation (FAR), the basic regulation governing federal procurement, simply repeated this latter phrase and offered no guidance in applying it or interpreting its meaning.[2] In the waning days of the Clinton Administration, however, the Federal Acquisition Regulatory Council issued an amendment to the FAR that instructs federal contracting officers (COs) in how to make this determination. The proposed amendment had generated consternation among business and contracting groups during a lengthy rulemaking process, and its issuance as a final rule, though expected, did not quell objections. The amendment took effect on January 19, 2001. Within days the Bush Administration took action to suspend implementation of the new contractor responsibility rule for up to 6 months. There was some question about the legal basis for this action, however, and it did not apply to the largest contracting agency, the Department of Defense. On April 3, 2001, the FAR Council used the formal rulemaking process to stay the rule for up to 270 days, and to seek comments on a rule to rescind the final contractor responsibility regulation permanently. On December 27, 2001, the FAR Council formally rescinded the contractor responsibility rule.

This report summarizes the rationale for the contractor responsibility regulation given by its proponents, describes its evolution through the rulemaking process, and explains the major points of difference and controversy over the need for such a rule. Finally, the report discusses actions in the executive branch, Congress, and the courts to delay implementation of the rule and, eventually, to rescind it.

Rationale for the Contractor Responsibility Rule

Businesses that run afoul of the law have often been found among government contractors. For example, the Environmental Protection Agency (EPA) has been

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[1] 41 U.S.C. 403(7)(D).

[2] 48 C.F.R. 9.104-1(d).

embarrassed to find among its many contractors some companies with records of substantial pollution violations. The General Accounting Office (GAO) reported in 1995 that 80 firms that had violated the National Labor Relations Act (NLRA) received more than $23 billion in federal contracts in FY 1993, or about 13% of the $182 billion in contracts awarded that year.[3] The following year, by matching lists of federal contractors to a 1994 database of inspections by the Occupational Safety and Health Administration (OSHA), GAO reported that $38 billion (about 22% of contract value that year) was awarded to 261 federal contractors that had been cited by OSHA for 5,121 violations, many of which were both serious and willful. At the worksites of 50 federal contractors, 35 fatalities and 85 injuries occurred.[4] In both of these reports, GAO said that its methodology probably underestimated both the numbers of violators and contract dollars involved.

Vice President Al Gore, in a news conference at the February 1997 meeting of the AFL-CIO executive council, announced that the Clinton Administration would seek to remedy this situation by issuing proposed procurement regulations to have contracting officers take into account a company's adherence to labor laws. "If you want to do business with the federal government," he announced, "you'd better maintain a safe workplace and respect civil, human, and union rights."[5]

This position was arguably consistent with the existing statutory requirement that a responsible contractor was one that exhibited a satisfactory record of integrity and business ethics. For years, however, this requirement had been regarded as a tool to protect the government against unscrupulous contractors who could not be trusted to follow through on contractual terms.[6] Reputable, well-established companies did not need to be worried about being found irresponsible. Indeed, some of the contractors found by the GAO studies to be violators of NLRA or OSHA laws were among the largest and best-known companies in the country.[7] Only a few determinations of non-responsibility had ever been made in connection with individual contract awards.[8] According to the FAR Council, the reason for this was simple. The FAR had never provided COs with a framework to guide them in making the statutorily-required determination of responsibility, and as a consequence,

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[3] U.S. General Accounting Office, *Worker Protection: Federal Contractors and Violators of Labor Law*, GAO Report HEHS-96-8 (Washington, Oct. 24, 1995), pp. 1-2.

[4] U.S. General Accounting Office, *Occupational Safety and Health: Violations of Safety and Health Regulations by Federal Contractors*, GAO Report HEHS-96-157 (Washington, Aug. 23, 1996), p. 3.

[5] Steven Greenhouse, "Gore Informs Labor of New Restrictions on U.S. Contractors," *The New York Times,* Feb. 19, 1997, sec. A, p.1.

[6] Craig S. King, "Legal and Policy Issues Surrounding the Proposed FAR Revision Regarding Contractor Responsibility and Allowability of Certain Costs," *Federal Contracts Report (*Bureau of National Affairs, Washington) Oct. 25, 1999, p. 490.

[7] For example, General Electric Co., Lockheed-Martin Corp., Westinghouse Electric Corp., General Motors Corp., AT&T, and Exxon Corp. were prominently cited in the 1996 GAO report, p.11.

[8] Michael B. Gerrard, "New Federal Procurement Regulations May Disqualify Violators," *New York Law Journal*, Jan. 26, 2001, p. 3.

"contracting officers are extremely reluctant, absent clear guidance, to exercise their discretion in making this determination."[9]

Evolution of the Contractor Responsibility Rule

To remedy the lack of guidance, in July, 1999 the FAR Council first published in the *Federal Register* a proposed amendment to section 9 of the FAR intended to "clarify what constitutes a 'satisfactory record of integrity and business ethics' for a federal contractor."[10] It sought to ensure that the government would do business only with companies maintaining a good record of compliance with laws that extended well beyond those relating to contract performance. Specifically, it emphasized that COs could regard a prospective contractor's lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws, or consumer protection laws as indicating an unsatisfactory record of integrity and business ethics.[11]

Because the FAR amendment was termed a clarification of existing requirements, the proposed rule was not to be subject to procedural hurdles that would be required of a "significant regulatory action" or a "major rule," such as review by the Office of Management and Budget (OMB) under Executive Order 12866, or a 60-day review period by Congress under the Congressional Review Act.

In fact, however, the proposal generated substantial controversy and the FAR Council received more than 1,500 letters during a 4-month comment period. It would later term the proposal "the most controversial ever published by the FAR Council."[12] While organizations like the AFL-CIO, the Leadership Conference on Civil Rights, the National Environmental Trust, and OMB Watch supported the rule, the vast majority of comments were received from business and contracting groups and were critical. They said the proposed rule was unduly vague and subjective, and could lead to abuse or inconsistent application of the law by permitting consideration of unsubstantiated allegations by contracting officers who were unfamiliar with the laws in such areas as antitrust and environmental and consumer protection. Critics

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[9] *Federal Register,* vol. 65, no. 245, Dec. 20, 2000, p. 80256.

[10] *Federal Register*, vol. 64, no. 131, July 9, 1999, pp. 37360-37361. The FAR Council comprises the Secretary of Defense, and the Administrators of the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), and the Office of Federal Procurement Policy (which is part of the Office of Management and Budget.)

[11] The rule also contained sections revising contract cost principles to disallow charging certain costs to the government, including costs of influencing unionization decisions and litigating proceedings brought by the government if there is a finding that the contractor violated a law or regulation. These provisions were far less controversial than the contractor responsibility provisions, revised a different section of the FAR, and are not dealt with in this report.

[12] *Federal Register,* vol. 66, no. 64, Apr. 3, 2001, p.17758.

also saw the rule as an unwarranted substitute for contractor debarment actions, for which an established appeal process was in place.

On October 21, 1999, the House Small Business Committee held a hearing on the initial proposed rule.[13] It established that the rule was not based on a study or empirical data, and raised questions about the FAR Council's finding that no regulatory flexibility analysis was required.

Proposed Rule Withdrawn and Revised

Considering these objections, the FAR Council withdrew its initial proposal and, on June 30, 2000, issued a revision that substantially changed the proposed rule's provisions.[14] The June 2000 revised rule retained the original purpose of "clarifying" that a satisfactory record of integrity and business ethics included satisfactory compliance with federal laws, including tax, labor and employment, environmental, antitrust, and consumer protection laws. However, it sharpened the guidance on what contracting officers could consider in making a responsibility determination. The revised proposed rule said that COs, while they "may consider all relevant credible information," should give greatest weight to decisions within the past 3 years involving convictions or civil judgments against the prospective contractor in cases brought by the government, but it also instructed COs to consider administrative law judge decisions or "complaints" issued by any federal agency, board, or commission, indicating the contractor has been found to have violated federal tax, labor and employment, antitrust, or consumer protection law.

Another significant change was the addition of a certification requirement closely related to the above standards. Each prospective contractor would be required to certify that it had not been convicted of or indicted for violating, found to have violated, or had any adverse judgments in any civil cases arising from, any federal tax, labor and employment, environmental, antitrust, or consumer protection laws, in which the United States brought the action. If the bidder answered that it had, then it is asked to explain the nature of the violation and whether any fines, penalties, or damages were assessed. In partial response to the assertion that some COs are ill-prepared to draw compliance conclusions in a broad range of legal areas, the revised proposal specified that they should coordinate their non-responsibility decisions with legal counsel.

The revised proposal also contained an initial regulatory flexibility analysis. It revealed that 171,000 small entities would be affected by the rule, but concluded that the impact on them would not be significant since the role of the Small Business Administration in granting certificates of competency would not be changed.

Revisions that the FAR Council made to the proposed regulation on contractor responsibility did little to satisfy critics of the initiative. During the 60-day comment

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[13] U.S. Congress, House Committee on Small Business, *Proposed Changes to Part 9 of the Federal Acquisition Regulation Relating to Contractor Responsibility,* 106th Cong., 1st sess., Serial No. 106-37, Oct. 21, 1999 (Washington, GPO, 1999.)

[14] *Federal Register*, vol. 65, no.127, June 30, 2000, pp. 40830-40834.

period that ended August 29, 2000, formal opposition to the regulation came from three principal sources. First, business and contracting groups organized coalitions to oppose the regulation. Second, some academic coalitions and institutions weighed in, pointing out that American colleges and universities frequently compete for federal contracts and sometimes run afoul of federal employment regulations. Third, two federal agencies heavily involved in contracting – the General Services Administration (GSA) and EPA – both used the formal comment process to register opposition to the proposed FAR changes.[15]

Supportive groups were not as active in commenting on the revised proposal. Their comments on the original proposal had generally supported the need for a strong statement on business ethics and integrity, and had raised few objections to particular provisions. The AFL-CIO did comment extensively on the revision. While it remained supportive, the AFL-CIO predicted that concessions to critics of the original proposal would do little to mollify their criticism.[16]

Congressional Action on the Revised Proposed Rule

Three weeks after publication of the revised proposed rule, Representatives Thomas M. Davis and James P. Moran introduced a floor amendment to the Treasury, Postal Service, Executive Office of the President, and General Government FY 2001 appropriations bill, H.R. 4871 (106th Congress).[17] The amendment provided that none of the funds in the bill could be used to carry out the FAR proposal. Representative Davis said that the intention was to prohibit issuance of final regulations until GAO had issued a report on the matter.[18] The amendment was adopted by a roll call vote of 228-190.[19] However, the amendment was dropped early in the end-of-session parliamentary maneuvering that led to eventual passage of the final Treasury FY 2001 funding measure (P.L.106-554).

On July 27, 2000, Senator Tim Hutchinson introduced S. 2986 (106th Congress), which was referred to the Senate Governmental Affairs Committee. It would have denied legal effect to both the original and the revised proposed regulations, and prohibited issuance of final regulations until the comptroller general

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[15] Memorandum for the FAR Secretariat from Al Matera, Director, Acquisition Policy Division, General Services Administration, Aug. 29, 2000. Letter to the FAR Secretariat from Judy S. Davis, Acting Director, Office of Acquisition Management, Environmental Protection Agency, Aug. 28, 2000.

[16] AFL-CIO, letter to FAR Secretariat from Jonathan P. Hiatt, general counsel, and Lynn Rhinehart, associate general counsel, Aug. 29, 2000.

[17] Treasury and General Government Appropriations Act, 2001, Amendment Offered by Rep. Davis of Virginia, *Congressional Record*, daily edition, vol. 146, July 20, 2000, pp. H6672-H6684, and H6706-H6707, hereafter referred to as Davis Amendment.

[18] At about the same time, Reps. Davis and Steve Horn asked GAO to determine the extent to which federal contractors have violated tax, labor, and environmental laws, including the nature and seriousness of the violations.

[19] Davis Amendment, pp. H6706-H6707.

submitted to Congress a report on the level of contractor compliance with federal law. No action was taken on the legislation.

The Clinton Administration's Final Rule Issued

Although the FAR Council could have issued a final rule as early as August 29, 2000, it did not do so until December 20, 2000.[20] The effective date of the final rule was January 19, 2001, the final full day of the Clinton Administration.

The final rule made two substantial changes from the provisions of the second proposal. The first was to add detail and specificity to the guidance on how COs should "weigh the evidence" in making responsibility determinations. The final rule strengthened the standard that COs "must consider all relevant credible information," and provided a hierarchy of violations for consideration by the COs. At the top of the hierarchy were federal and state offenses (convictions, civil judgments, and administrative rulings) in matters that are relevant to involvement in public contracting, such as contract fraud, bid rigging, embezzlement, and bribery. Second were indictments for these offenses. Relegated to a third category were violations or civil judgments related to tax, labor and employment, environmental, antitrust, and consumer protection laws. The rule newly specified that "(n)ormally, a single violation of law will not give rise to a determination of nonresponsibility, but evidence of repeated, pervasive, or significant violations of the law may indicate an unsatisfactory record of integrity and business ethics." The guidance also placed greatest emphasis on violations within the past 3 years, and said that corrective action taken by contractors should be taken into account.

The second major change was in response to assertions that the requirement for bidders to list all such findings, judgments, and indictments would be an unconscionable paperwork burden. The final rule's requirement was that only a "check-the-box" certification would be needed from prospective contractors at the pre-award stage. Only when a tentative selection had been made would the CO ask the apparently successful bidder for specific details of any violations or judgments (if that box had been checked).

Points of Contention With the Rule

While debate on the FAR revision was far-ranging, five major points of contention generated the most controversy. A brief discussion of these controversial issues follows. It is drawn from comments to the FAR Secretariat, the Secretariat's response in the preamble to the final rule, position statements circulated to Members of Congress,[21] and letters to President Bush from Members of Congress and interest groups.

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[20] *Federal Register,* vol. 65, no. 245, Dec. 20, 2000, pp. 80256-80266.

[21] See *Congressional Record*, daily edition, vol. 46, July 20, 2000, pp. H6673-H6680.

Contracting Officer Discretion. Opponents of the rule consistently said that it would place COs in the unaccustomed position of judging whether prospective contractors are sufficiently compliant with an extremely broad range of laws, most of them involving considerations that have never been part of the procurement decision or context. They regarded the first version of the rule as amounting to unlimited discretion for subordinate government officials to "blacklist" companies from receiving government contracts. GSA argued that more specific guidance would not resolve the problem that government "COs will not have a 'feel' for how serious many of the offenses are" that would be brought to their attention.[22]

A counter argument was that the discretion already exists in the law requiring a responsibility determination, and that the FAR revision provided much-needed guidance in how to make it. The added requirement to consult with legal counsel, and the limitation of a responsibility determination to a single contract decision, proponents of the revision said, disputed the "blacklist" contention. Also, procedural safeguards were put in place so that prospective contractors labeled nonresponsible would be told of that determination and be able to contest it before GAO or the courts.

Consideration of All Relevant Credible Information. The basic standard that COs "must consider all relevant credible information" was criticized as vague, and as raising the prospect that allegations of poor corporate ethics from competitors, unions, and third-party advocacy groups would become a routine part of the procurement process. Defenders of the final rule pointed out that nothing prevented third parties from intervening before, and that the rule had become progressively more precise in describing what information was to be regarded as most relevant. Nevertheless, critics noted that "complaints" and administrative law judge findings were still included as a basis for determination of responsibility, thus signaling that contracts could be denied to companies based on unproved allegations and pending decisions that are still under appeal. They also voiced objections to the inclusion in the final rule of the observation that a prospective contractor's record of compliance with foreign laws and regulations, to the extent that the CO becomes aware of them, can constitute "relevant and credible information" which the CO must consider.

Certification Requirements. By reducing the certification requirement from a listing of all violations by all bidders to a simple "check-the-box" requirement, the estimated paperwork burden associated with the rule was reduced, but not by much. Removal of the requirement to list all violations led to a reduction of 190,000 hours of estimated burden, but this was nearly offset by the Secretariat's recognition that most large and some small businesses would need to set up a system to track compliance with disparate legal mandates. Large and diverse corporations, and even some universities argued that there are likely to be many such situations in their far-flung and often decentralized operations, and that they could not be expected to keep track of them all without an information system for that purpose. In the end, the overall burden estimate was reduced from 607,000 hours to 597,000 hours, a total that some of the rule's opponents believed was understated. GSA believed that the

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[22] Memorandum for the FAR Secretariat, from Al Matera, Director, GSA Acquisition Policy Division, Aug. 29, 2000, p. 2.

rule would have a negative impact on competition, since many commercial firms are wary of doing business with the government and erroneous certifications could open them to criminal sanctions, or to nuisance suits and liability under the civil provisions of the False Claims Act.

The AFL-CIO, on the other hand, commented that the burden would be minimal because small firms would generally have little to report, and firms of all sizes would need to collect similar information in connection with liability insurance, required disclosures on financial statements and Securities and Exchange Commission filings, and to compete for some state contracts.[23]

Effect on Dispute Resolution and Prevention. One of the reasons the rule was so controversial was that it offered (to proponents) or threatened (to opponents) an opportunity to affect the behavior of contractors beyond the realm of competition for government contracts. The rule's proponents believed it would provide a positive incentive to improve business ethics and promote voluntary compliance with a host of tax, environmental, labor, civil rights, and consumer laws. (The U.S. Chamber of Commerce circulated a count of more than 300 statutes that might be involved in the contractor responsibility determination.) Business groups warned that the rule would upset a careful balance in regulatory and litigation arenas, by adding the threat of federal contract losses to current penalties arising from disputes with the government, employees, and watchdog groups that are already too frequent and contentious.

Relationship to Debarment Proceedings. One of the objections to the proposed rule was that the procedure it outlined duplicated a remedy that already exists for contractor misbehavior. GSA already maintains a list of some 24,000 firms and individuals that are barred for varying periods from competition for federal contracts.

EPA's comments on the rule maintained that existing debarment regulations "presently provide sufficient authority and a far more efficient remedy for making a decision regarding business honesty and integrity, considering the same information. For example, EPA routinely takes suspension and debarment actions for a wide range of environmental misconduct that address a contractor's business integrity or competency."[24] Proponents of the rule argued that the debarment list shows the need for better contractor responsibility decisions before contracts are awarded to bidders who later prove themselves to be irresponsible. The AFL-CIO said the rule was properly viewed as debarment *prevention*.

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[23] AFL-CIO, letter to FAR Secretariat from Jonathan P. Hiatt, general counsel, and Lynn Rhinehart, associate general counsel, Aug. 29, 2000, pp. 13-15.

[24] Letter to the FAR Secretariat from Judy S. Davis, Acting Director, Office of Acquisition Management, Environmental Protection Agency, Aug. 28, 2000.

Interim Actions to Stay Implementation

On December 22, 2000, a coalition of business and contracting associations filed suit in the U.S. District Court for the District of Columbia seeking to overturn the final rule issued 2 days earlier.[25] The plaintiffs asserted that the rule would create arbitrary and subjective standards for awarding federal contracts, which would be applied inconsistently throughout the government. They also challenged, among other things, the paperwork burden estimate. If the true costs were included, the suit maintained, the FAR Council would have had to term its action a "significant rule" (defined as a regulatory action likely to have an annual effect on the economy of $100 million or more). This in turn would have triggered the preparation of a cost-benefit analysis, along with an assessment of the costs and benefits of any reasonably feasible alternatives, for review by the Office of Information and Regulatory Affairs.

Even before the Bush Administration took office, opponents of the rule began to urge the new Administration to overturn the rule. On December 22, 2000, the Council of Defense and Space Industry Associations wrote the President-elect urging intervention to block the rule, and followed up with another letter to the President on February 1, 2001.[26] But is not a simple matter to rescind a final rule that has entered the *Code of Federal Regulations* through a formal rulemaking process.[27] The normal expectation is that changes to such a rule need to go through the same process, with a notice of proposed rulemaking and public comment period. One of the first actions taken by the incoming Bush Administration, however, was to put a freeze on new regulations, barring that route at least temporarily.[28]

On January 31, 2001, the Chairman of the Civilian Agency Acquisition Council (CAAC), Al Matera, issued a memorandum to all civilian agencies (other than NASA) authorizing them to suspend implementation of the new contractor responsibility rule until July 19, 2001, "or until issuance of an appropriate FAR change, whichever occurs first." In explanation, the memorandum cited the filing of the *Business Roundtable* v. *United States* lawsuit, noted that under Section 705 of the Administrative Procedure Act (APA), 5 U.S.C. 705, "when an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review", and concluded that "in the interest of justice, the General Services Administration believes implementation of the final rule should be voluntarily stayed."

The mechanism actually chosen to permit agencies to exempt themselves from the rule's provisions was a "class deviation" under the FAR, approved in advance. The FAR section that authorizes class deviations specifies that they are to be used

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[25] *Business Roundtable, et al.,*v. *United States,* D.D.C., No. 1:00CV3088.

[26] These letters can be found on the Council's Web site: [http://www.codsia.org], visited Jan. 8, 2002.

[27] Michael B. Gerrard, "New Federal Procurement Regulations May Disqualify Violators," *New York Law Journal*, Jan. 26, 2001, p. 1.

[28] Dan Davidson, "Contractor Rule Takes Effect Despite Opposition," *Federal Times*, Feb. 5, 2001, p.3.

"when necessary to meet the specific needs and requirements of each agency."[29] The purpose of this authority is to allow individual agencies to develop and test new techniques and acquisition methods. It requires consultation with the chairperson of the Civilian Agency Acquisition Council, but in issuing its memorandum, the chair said that agencies could regard the memorandum itself as evidence of consultation.

GSA itself and several other agencies (for example, the Departments of Transportation and the Interior) issued individual class deviations under this authority. NASA also did so under its own authority in an internal memorandum. The Department of Defense, however, is not under the CAAC and took no action to deviate from the contractor responsibility regulation.

The CAAC's memorandum authorizing deviations from the final rule generated objections from Members of Congress. Twenty-one Democrats on the House Education and Workforce Committee wrote President Bush on February 13, 2001, urging that the Administration's decision be reconsidered.[30] On February 20, 2001, three Democratic Senators wrote the Director of OMB, terming the suspension of the requirement "unwise and possibly unlawful." In support of the latter point, they enclosed a CRS memorandum addressing the question whether the CAAC's action was legally sufficient to effect a 6-month suspension of the rule. The memorandum pointed to several problems with using either Section 705 of the Administrative Procedure Act, or the FAR's class deviation authority, absent a rulemaking proceeding, to effect suspension of a rule already in effect. "While the matter is not free from doubt," the CRS memorandum concluded, "it is likely that a reviewing court could find the suspension legally deficient for any or all these reasons."[31]

Formal Rule Issued to Rescind the Clinton Administration's Rule

On April 3, 2001, the FAR Council published two actions in the *Federal Register* and invited comment on them. The first was an interim rule staying the implementation of the contractor responsibility rule, and restoring the text of the FAR as it existed before January 19, 2001.[32] It instructed COs to amend contract solicitations issued in the interim to delete the certification provisions. The interim rule was to be in effect for 270 days or until "finalization" of the proposed rule that immediately followed it in the *Federal Register*.

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[29] *Federal Acquisition Regulation,* Section 1.402.

[30] The text can be found at the Web site of the Democratic Members of the Education and Workforce Committee [http://edworkforce.house.gov/democrats/relb21301.html], visited April 26, 2002.

[31] U.S. Library of Congress, Congressional Research Service, *Legal Sufficiency of the Suspension on January 31, 2001 of a Final Federal Acquisition Regulation on Contractor Responsibility Which Became Effective on January 19, 2001,* by (name redacted), memorandum to Honorable Joseph Lieberman, Ranking Member, Senate Governmental Affairs Committee (Washington, D.C., Feb. 14, 2001), p. 7.

[32] *Federal Register,* vol. 66, no. 64, Apr. 3, 2001, pp.17754-17756.

That proposed rule, on which comment was invited, would revoke the contractor responsibility regulation altogether.[33] The discussion indicated that complaints had continued to come in objecting to the rule, and that the FAR Council was "reassessing the advantages and disadvantages of the ... final rule, to determine if the benefits of the rule are outweighed by the burdens imposed by the rule."

On December 27, 2001, the FAR Council issued a final rule revoking the contractor responsibility rule in its entirety.[34] The FAR Council noted that it had received 4698 public comments since its April 3 invitation, even more than the 1800 comments it received on the Clinton Administration's proposed rule, which was in turn about 100 times as many comments as the typical rule generates. While the Council expressed agreement with the principle that the government should conduct its business with corporations that adhere to the law, it found the vehicle of the contractor responsibility rule "unworkable and defective." Suspension and debarment procedures, the Council said, provided adequate protection to address "serious threats of waste, fraud, abuse, poor performance, and noncompliance," and assure that "officials with both the training and the expertise will resolve these matters."

Any Further Action on Contractor Responsibility Depends on Congress

Congress could have passed a joint resolution to disapprove the December 27 rule under the Congressional Review Act.[35] The Act provides expedited procedures for consideration in Congress, but it has been successfully used only once. Such a resolution would also have been subject to presidential veto. None was ever introduced.

Representative Albert Wynn, however, introduced legislation on March 20, 2002 that would give statutory weight to the requirements of the contractor responsibility regulation. H.R. 4081 would amend Title 10 (referring to defense contractors) and Title 41 (referring to civilian contractors) of the United States Code with language very similar to the final rule that was promulgated by the Clinton Administration on December 20, 2000. It would require contracting officers to consider the same array of violations, convictions, indictments, adverse judgments in civil cases, and adverse decisions by administrative law judges that the final regulation would have required. The bill was referred to the Committee on Government Reform and to the Committee on Armed Services. Neither Committee took action on H.R. 4081.

The Enron failure provided a reminder that the government does not necessarily need detailed criteria to determine that a contractor lacks a satisfactory record of business ethics and integrity. Less than a month after rescinding the contractor responsibility rule, OMB Director Mitch Daniels ordered GSA to review the

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[33] *Federal Register,* vol. 66, no. 64, Apr. 3, 2001, pp.17758-17760.

[34] *Federal Register,* vol. 66, no. 248, Dec. 27, 2001, pp.66986-66990.

[35] Title II of Public Law 104-121, 5 U.S.C. Chapter 8.

government's contracts with both Enron and Arthur Andersen, LLP. On the grounds that document shredding and misleading accounting practices "could reflect poorly" on the two companies, Mr. Daniels asked for a determination whether the companies met the integrity standard.[36] The day after Arthur Andersen's indictment for corruptly destroying documents, GSA suspended both Enron and Arthur Andersen from new contracts. "An indictment for such a criminal offense," GSA said, is adequate evidence of misconduct to support suspension of a government contractor."[37]

On October 30, 2002, a group of organizations that included the National Consumers League, the Gray Panthers, and the 700,000-member Communications Workers of America, sent the administrator of GSA a letter urging that WorldCom should be barred from federal contracts because of its faulty accounting and subsequent bankruptcy. WorldCom had $425 million worth of federal contracts in 2001.[38]

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[36] Ron Fournier, "Gov't Orders Review of Enron Contracts," AP Online, Jan. 25, 2002.

[37] General Services Administration, press release GSA#9930, March 15, 2002.

[38] Teri Rucker, "Union, Activists Urge GSA to Suspect WorldCom," *Government Executive,* Oct. 30, 2002, available at [http://207.27.3.29/dailyfed/1002/103002tdpm2.htm].

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