



University of California
Office of the President

Office of the
Associate Vice President —
Business and Finance

Contracts and Grants Office

Memo

Operating Guidance

No. 85-20
August 5, 1985

VICE CHANCELLORS — BUSINESS AND FINANCE/ADMINISTRATION* CONTRACTS AND GRANTS OFFICERS (NON-LAB) OFFICE OF THE PRESIDENT FUNCTIONAL MANAGERS

Subject: Protest After Award (FAR 52.233-3)

Federal Acquisition Circular 84-9 has issued to the FAR a new clause, FAR 52.233-3, PROTEST AFTER AWARD (JUN 1985) effective June 20, 1985. This clause is prescribed for use "in all solicitations and contracts." Where a cost reimbursement contract is awarded, the clause is to be used with its Alternate I. A full text copy of the clause with its Alternate I is enclosed.

BACKGROUND

This clause is an implementation of the General Accounting Office "stay" provisions of the Competition in Contracting Act of 1984 (CICA). Until recently the "stay" provision was considered unconstitutional by the Department of Justice. OMB issued OMB Bulletin 85-8 directing Executive Branch agencies not to comply with the provision. However, on May 28, 1985, the CICA "stay" provision was ruled to be constitutional in a decision in Ameron, Inc. V. U.S. Army Corps of Engineers, Civil No. 85-1064 (D.C.N.J.). On June 5, 1985 the Department of Justice reversed itself and advised Federal agencies to comply with the disputed provision.

STOP WORK

Under provisions of CICA, when a Federal funding agency receives a notice from GAO within ten (10) calendar days of award that a protest of award has been filed with GAO, the Contracting Officer must immediately suspend performance under the contract or terminate the contract. Only in limited and rare circumstances can the Contracting Officer allow work to continue. When the Contracting Officer moves to suspend work, the order must "be specifically identified as a stop-work order issued under this clause [FAR 52.233-3]." Once a final decision is made on the award protest, the Contracting Officer will either cancel the stop work order or terminate the work under the contract's termination clause.

IMPACT ON UNIVERSITY CONTRACTS

The overwhelming majority of Federal contracts with the University are as a result of unsolicited proposals or proposals submitted in response to a broad agency announcement of funding opportunities. Under these circumstances, it is unlikely that a competitive offeror would file a protest of award made to the University. Therefore, we expect a minimal impact from the CICA stay provision and from this

*Note: The addressees above represent the standard distribution of Contract and Grant Memos. Additional addressees, if any, may be added based on the subject of the Memo. See cc's.

clause in particular on the University. Should a stop work order under this clause be issued, however, please notify this office immediately so we can monitor its impact.

Refer: Joe Acanfora
8-582-1638
(415)642-1638

Subject Index: 13, 22
Organization Index: F-005
F-622



David F. Mears
University Contracts and
Grants Coordinator

Enclosure

FAR 52.233-3

PROTEST AFTER AWARD (JUN 1985) and
ALTERNATE I (JUN 1985)

(a) Upon receipt of a notice of protest (as defined in 33.101 of the FAR) the Contracting Officer may by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either:

- (1) Cancel the stop-work order; or
- (2) Terminate the work covered by the order as provided in the Termination clause of this contract.

(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected, and the contract shall be modified, in writing, accordingly, if:

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor requests an adjustment within 30 days after the end of the period of work stoppage provided that if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the request at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting for the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(e) The Government's rights to terminate this contract at any time are not affected by action taken under this clause.