



U. S. Chemical Safety and Hazard Investigation Board RECOMMENDATIONS STATUS CHANGE SUMMARY

Report:	Donaldson Enterprises, Inc. Fatal Fireworks Disassembly Explosion and Fire
Recommendation Number:	2011-06-I-HI-R1
Date Issued:	January 17, 2013
Recipient:	Federal Acquisition Regulatory (FAR) Council
New Status:	Closed-Unacceptable Response/ No Response Received
Date of Status Change:	March 1, 2017

Recommendation Text:

Establish an additional contractor responsibility determination requirement under Subpart 9.104-1 of the Federal Acquisition Regulation (FAR) addressing contractor safety performance. The analysis under this requirement should focus on incident prevention, and environmental and system safety. At a minimum, the language should specifically require the review of a prospective contractor's:

- *Environmental and safety programs;*
- *Safety record and incident history;*
- *Ability to use safe methods for any work involving hazardous materials (including explosives); and*
- *Suitable training and qualifications for the personnel involved in the work including prior relevant safety experience.*

Board Status Change Decision:

A. Rationale for Recommendation

On January 17, 2013, the United States Chemical Safety and Hazard Investigation Board (CSB) released its final report on the April 8, 2011, explosion and fire of a storage magazine leased by Donaldson Enterprises, Inc. (DEI) at Waikele Self Storage located in Waipahu, Hawaii. DEI was using the magazine for seized fireworks storage and disposal-related activities. As a result of the explosion and fire, five DEI personnel inside the magazine were fatally injured and a sixth sustained minor injuries. The CSB determined that the DEI personnel disposing of the fireworks lacked training, experience and knowledge of procedural safeguards for the safe conduct of fireworks disposal.

DEI was selected as a subcontractor for this work by the prime contractor, VSE Corporation, under a federal seized property management contract administered by the Treasury Executive Office of Asset Forfeiture (TEOAF). The Federal Acquisition Regulations (FAR) governed this contract and the process for awarding subcontracts under it. As part of its investigation, the CSB reviewed the FAR with respect to the considerations used when determining the qualifications of a prospective contractor or subcontractor. The CSB determined that the FAR does not specifically require a contracting officer to consider safety performance measures and qualifications when determining the "responsibility" of a potential government contractor or subcontractor to handle, store and dispose of hazardous materials, such as fireworks. Based on

the findings of the investigation, the CSB Board issued one recommendation to the Federal Acquisition Regulatory (FAR) Council to amend the FAR.

B. Response to the Recommendation

Although the CSB met with the FAR Council on September 23, 2013, and was promised a letter outlining approaches that the FAR Council would consider to potentially address the CSB Recommendation made in the DEI case, no letter was ever received by the CSB.

On May 28, 2015, the FAR Council published a Proposed Rule in the *Federal Register* seeking comments on newly proposed federal acquisition regulations (Subpart 22.20) pertaining to the President's Executive Order 13673, *Fair Pay and Safe Workplaces*, which partially addressed¹ bullet two of the CSB recommendation. On August 26, 2015, the CSB submitted comments on this Proposed Rule asking the FAR Council to consider making changes in the Final Rule to address the provisions listed in the CSB recommendation.²

On August 25, 2016, the FAR Council published its Final Rule in the *Federal Register* containing new federal acquisition regulations (Subpart 22.20) addressing the President's Executive Order 13673, *Fair Pay and Safe Workplaces*. In the preamble³ to the Final Rule, the FAR Council stated that the CSB's proposed changes were beyond the scope of the rule. The Executive Order's specific coverage concerned only labor law violations and not the preventive provisions envisioned by the CSB.

C. Board Analysis and Decision

The FAR Council has never formally replied to the CSB Recommendation. Also, the FAR Council has indicated by comments published in the *Federal Register* that a recently promulgated FAR regulation, Subpart 22.20, covers only labor law violations and does not address any of the preventive measures pertaining to contractor responsibility determinations listed in the CSB Recommendation. As further dialogue or advocacy is unlikely to persuade the FAR Council to act and more than 270 days have passed since the CSB Recommendation was issued, in accordance with the provisions listed in Board Order 22, the Board voted to change the status of CSB Recommendation No. 2011-06-I-HI-R1 to: "**Closed-Unacceptable Response/No Response Received.**"

¹ The CSB Recommendation applies to all contracts issued under the FAR and does not contain a \$500,000 threshold regarding its applicability.

² Available at: http://www.csb.gov/assets/1/7/CSB_Comments_on_FAR_Proposed_Rule_8-26-2015.pdf

³ See 81 FR 58628-29