

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. X, No. 1

January 2009

## COURT STRIKES DOWN DOD'S SMALL AND DISADVANTAGED BUSINESS CONTRACT GOAL

The United States Court of Appeals for the Federal Circuit declared unconstitutional the Department of Defense's (DOD's) goal of awarding 5% of its contract dollars to small disadvantaged businesses (SDBs) on the grounds that it violates the right to equal protection in that it bases the preferential treatment on race. This decision brings into question the validity of other socio-economic programs, particularly the 8(a) program for companies owned and managed by socially and economically disadvantaged individuals.

The case involves Section 1207 of the National Defense Authorization Act of 1987 (Public Law 99-661) (codified at 10 U.S.C. 2323), which first established the 5% goal for contract awards by DOD to SDBs, defined at the time as Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. Section 1207 went on to direct that "the Secretary of Defense may enter into contracts using less than full and open competitive procedures (including awards under section 8(a) of the Small Business Act), but shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors." DOD implemented this directive by applying a price evaluation adjustment to bids submitted by non-SDB bidders, increasing those bids by 10% percent before comparing them to the bids submitted by SDBs. This statutory provision has been reenacted by Congress several times since then – in 1989, 1992, 1999, 2002, and 2006. It is set to expire in 2009 if not reenacted again.

### CONTENTS

Court Strikes Down DOD's SDB Contract Goal .....	1
USD(AT&L) Permits Certain Foreign Products.....	3
GSAR Regs on Protests Proposed for Rewrite .....	5
NASA to Rewrite It's Government Property Regs ...	6
Safavian Convicted for Second Time .....	7
GAO Protests Increase 17% in Fiscal Year 2008.....	7
Nonmanufacturer Rule Waived for Cables .....	8
Prompt Payment Rate Set at 5 5/8% .....	8

This decision, *Rothe Development Corporation v. Department of Defense and Department of the Air Force* (CAFC 2008-1017, November 4, 2008), involves a case filed in 1998 by Rothe Development Corporation against DOD and the Air Force when the Air Force awarded a contract to an Asian-American-owned business despite the fact that Rothe, which is owned by a Caucasian woman, was the lowest bidder. Since then, the Court of Appeals has remanded the case to the District Court twice without reaching the ultimate question of Section 1207's constitutionality. This is the Court of Appeal's third decision in the case.

Starting in the late 1980's, the Department of the Air Force contracted with Rothe to maintain, operate, and repair computer systems at Columbus Air Force Base in Mississippi. In the late 1990's, the Air Force decided to consolidate Rothe's contract with a contract for communications services, to issue a solicitation for competitive bids, and to award the contract under the Section 1207 program. Rothe bid \$5.57 million. International Computer and Telecommunications, Inc. ("ICT"), a competitor to Rothe owned by a Korean-American couple and certified as a SDB, bid \$5.75 million. Although Rothe's bid was lower than ICT's bid and was in

fact the lowest bid, the Air Force considered Rothe's bid to be \$6.1 million, higher than ICT's bid, because of the 10% evaluation adjustment. The Air Force awarded the contract to ICT.

Because Section 1207 incorporates an explicit racial classification – the presumption that members of certain minority groups are “socially disadvantaged” for purposes of obtaining SDB status – Section 1207 is subject to “strict scrutiny.” The Court stated, “The Supreme Court has held that government may have a compelling interest in ‘remedying the effects of past or present racial discrimination.’ However, ‘an effort to alleviate the effects of societal discrimination is not a compelling interest.’ Therefore, before resorting to race-conscious measures, the government must ‘identify [the] discrimination [to be remedied], public or private, with some specificity,’ and must have a ‘strong basis in evidence’ upon which ‘to conclude that remedial action [is] necessary.’ Section 1207 ‘must serve a compelling governmental interest, and must be narrowly tailored to further that interest.’”

The government bears the burden of producing strong evidence supporting the legislature's decision to employ race-conscious action, according to the Court. “We hold that Section 1207, on its face...violates the equal protection component of the Fifth Amendment right to due process. Because the statute authorizes DOD to afford preferential treatment on the basis of race, we must apply strict scrutiny. And because Congress did not have a ‘strong basis in evidence’ upon which to conclude that DOD was a passive participant in pervasive, nationwide racial discrimination – at least not on the evidence produced by DOD and relied on by the district court in this case – the statute fails strict scrutiny.” Therefore, according to the Court of Appeals, Section 1207 is unconstitutional, and DOD may not apply it in the award of contracts.

**EDITOR'S NOTE:** While this decision affects only DOD's SDB preference program, the same arguments can be made against any of the socio-economic programs Congress has enacted to remedy discrimination, including other agencies' SDB and woman-owned small business programs, and the Small Business Administration's 8(a) program, which provides business development assistance to SDBs. It is conceivable that *Rothe* will be cited in challenges to these and other similar programs.

However, the Court of Appeals pointed to a way out: “If Congress reenacts Section 1207 again before it is set to expire in 2009 – as Congress is free to do – we cannot now predict, nor do we intend to prejudge, whether any such new enactment will be supported by a ‘strong basis in evidence.’” In other words, if Congress sets out the evidence of racial discrimination, evidence of the government's participation in that discrimination, the compelling governmental interest the remedy is addressing, and how that remedy is narrowly tailored to further that interest, then Section 1207 may pass the “strict scrutiny” test and be constitutional.

**Visit <http://www.FedGovContracts.com>  
for more information on the rapidly-changing world  
of federal contracting!**

Vivina McVay, Editor-in Chief

©2009 by Panoptic Enterprises. All rights reserved. Reproduction, photocopying, storage, or transmission by any means is prohibited by law without the express written permission of Panoptic Enterprises. Under no circumstances should the information contained in *Federal Contracts Perspective* be construed as legal or accounting advice. If a reader feels expert assistance is required, the services of a professional counselor should be retained.

The *Federal Contracts Perspective* is published monthly by Panoptic Enterprises, P.O. Box 11220, Burke, VA 22009-1220. Loose-leaf subscription rates are \$197 a year in the United States and Canada, \$245 a year elsewhere.

## USD(AT&L) PERMITS CERTAIN FOREIGN PRODUCTS

The Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) has extended for one year the waiver permitting certain items manufactured by the United Kingdom (UK) to be acquired by the Department of Defense (DOD), and extended the waiver of the restriction on foreign-made para-aramid fibers and yarns to all qualifying countries. Also, a little cleaning-up of the DFARS was conducted to remove a reference to a law that is now covered by the FAR.

▪ **Waiver of 10 U.S.C. 2534 for Certain Defense Items Produced in the United Kingdom:**

The USD(AT&L) is waiving the limitation of Title 10 of the U.S. Code (U.S.C.), Section 2534, Miscellaneous Limitations on the Procurement of Goods Other than United States Goods (10 U.S.C. 2534) for certain defense items produced in the UK. 10 U.S.C. 2534 limits the DOD to procuring items listed in that section only if the manufacturer of the item is part of the national technology and industrial base. However, the Secretary of Defense may waive this restriction for a particular item listed in Section 2534 and for a particular foreign country if the Secretary determines that application of the limitation “would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items” and if “that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.” The Secretary of Defense has delegated this waiver authority to the USD(AT&L).

The USD(AT&L) has extended for one year, from December 17, 2008, to December 16, 2009, the waiver of the limitation on procurement of the following products from the UK:

- Air circuit breakers
- Welded shipboard anchor and mooring chain with a diameter of four inches or less
- Gyrocompasses
- Electronic navigation chart systems
- Steering controls
- Pumps
- Propulsion and machinery control systems
- Totally enclosed lifeboats

The USD(AT&L) granted this waiver because the UK does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in the UK. DOD has had a Reciprocal Defense Procurement Memorandum of Understanding (MOU) with the UK since 1975.

▪ **Para-Aramid Fibers and Yarns Manufactured in a Qualifying Country:** This interim rule implements a determination made by the USD(AT&L) authorizing DOD to acquire articles containing para-aramid fibers and yarns manufactured in foreign countries that have entered into a defense MOU with the United States.

10 U.S.C. 2533a restricts DOD procurement of foreign synthetic fabric or coated synthetic fabric, including textile fibers and yarns for use in such fabrics. However, Section 807 of the National Defense Authorization Act for Fiscal Year 1999 (Public Law 105-261) provides DOD with the authority to waive the restriction at 10 U.S.C. 2533a with regard to para-aramid fibers and yarns.

On February 12, 1999, the Under Secretary of Defense (Acquisition and Technology) waived the restriction at 10 U.S.C. 2533a for para-aramid fibers and yarns manufactured in the Netherlands. On August 15, 2008, the USD(AT&L) expanded the existing waiver to permit the acquisition of para-aramid fibers and yarns manufactured in any qualifying country listed in DFARS 225.872-1, General.

To implement this expansion, the following amendments are made to the DFARS:

- The definition of “qualifying country” in DFARS 225.003, Definitions, is revised to strike the cross-reference to DFARS 225.872-1 and include the list of qualifying countries: Australia, Austria, Belgium, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom of Great Britain and Northern Ireland.
- Paragraph (o)(2) of DFARS 225.7002-2, Exceptions, had stated that an exception applied for para-aramid fibers and yarns applied to the Netherlands and to other qualifying countries when the USD(AT&L) made the determination authorized by Public Law 105-261. Paragraph (o)(2) is revised to merely state that the exception applies to para-aramid fibers and yarns manufactured in a qualifying country.
- To paragraph (a) of DFARS 252.225-7012, Preference for Certain Domestic Commodities, is added the definition of “qualifying country” along with the list in DFARS 225.003. Also, (c)(6)(ii) had stated that the clause does not apply to para-aramid fibers and yarns manufactured in the Netherlands. This rule strikes “the Netherlands” and substitutes “a qualifying country.”

Comments on the interim rule must be submitted no later than February 17, 2009, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: [dfars@osd.mil](mailto:dfars@osd.mil); (3) fax: 703-602-7887; (4) mail: Defense Acquisition Regulations System, Attn: Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062; or (5) hand-delivery/courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402. Identify comments as “DFARS Case 2008-D024.”

▪ **Payment Protections for Subcontractors and Suppliers:** This final rule amends DFARS Part 212, Acquisition of Commercial Items, to remove Section 806 of Public Law 102-190, Payment Protections for Subcontractors and Suppliers, from the lists in paragraph (a) of DFARS 212.503, Applicability of Certain Laws to Executive Agency Contracts for the Acquisition of Commercial Items, and paragraph (a) of DFARS 212.504, Applicability of Certain Laws to Subcontracts for the Acquisition of Commercial Items, since this law was added to the lists in FAR 12.503 and 12.504 by Federal Acquisition Circular (FAC) 2005-27 (see the “Subcontractor Requests for Bonds” rule in the October 2008 *Federal Contracts Perspective* article “FAC 2005-27 Requires ‘Enhanced Competition’ for Task and Delivery Orders”). Also, the final rule removes the paragraphs that were designated as “Reserved” in DFARS 212.504(a).

▪ **Technical Amendment:** In paragraph (h) of DFARS 252.203-7001, Prohibition on Persons Convicted of Fraud or Other Defense-Contract-Related Felonies, the telephone number of the Office of Justice Programs, The Denial of Federal Benefits Office, is changed to 301-937-1542, and its website is added: <http://www.ojp.usdoj.gov/BJA/grant/DPFC.html>.

## GSAR PROTESTS, DISPUTES, AND APPEALS REGS REWRITTEN

The General Services Administration (GSA) is finalizing, with changes, the rewrite of GSA Acquisition Regulation (GSAR) Part 533, Protests, Disputes, and Appeals, as part of the GSAR rewrite initiative.

No comments were submitted in response to the proposed changes. However, the GSA Office of General Counsel requested that certain language be retained and not deleted as proposed.

The new GSAR Part 533:

- Deletes GSAR 533.103-72, Solicitation Provisions, because it consists of the prescription for GSAR 552.233-70, Protests Filed Directly with the General Services Administration. GSAR 552.233-70 is deleted because it repeats much of FAR 33.103, Protests to the Agency. However, the GSA Office of General Counsel proposed to reinstate some material from GSAR 552.233-70 to clarify GSA's rules in the context of the FAR protest process. Therefore, this text has been added as new GSAR 533.103-1, Filing a Protest.
- GSAR 533.209, Suspected Fraudulent Claims, is added. It states, "In GSA, the agency official responsible for investigating fraud is the Office of Inspector General."
- GSAR 533.211, Contracting Officer's Decision, is revised to delete information that is included in FAR 33.211, and to recognize that the GSA Board of Contract Appeals (GSBCA) duties are now vested in the Civilian Board of Contract Appeals (CBCA).
- GSAR 552.233-71, Disputes (Utility Contracts), and its prescription at GSAR 533.215, Contract Clause, are deleted at the request of the GSA Public Buildings Service.

For more on the proposed rule, see the July 2008 *Federal Contracts Perspective* article "GSAR Undergoing Rewrite."

In addition to the rewrite of GSAR Part 533, GSA published a proposed rewrite of GSAR Part 536, Construction and Architect-Engineer Contracts. This proposed rewrite would:

- Revise GSAR 536.101, Applicability, to clarify the applicability of the part when contracting for construction and architect-engineer services and contracts for construction management services (construction management services are addressed in GSA Acquisition Manual (GSAM) Part 537, Service Contracting).
- Delete paragraph (c) of GSAR 536.270, Exercise of Options, because the FAR coverage is adequate. Paragraph (c) states, "Before exercising an option, you must determine that the action complies with the option's terms and this section's requirements. Include your written determination in the contract file."
- Delete 536.271, Project Labor Agreements, because the Executive Order of June 5, 1997, on project labor agreements is no longer in effect. Likewise, GSAR 552.236-83, Requirement for a Project Labor Agreement, would be deleted.
- Delete the following clauses: GSAR 552.236.72, Specialist; GSAR 552.236-74, Working Hours; GSAR 552.236-75, Use of Premises; GSAR 552.236-76, Measurements; GSAR 552.236-

79, Samples; GSAR 552.236-80, Heat; and GSAR 552.236-81, Use of Equipment by the Government, because the substance of the clauses is covered in GSA's technical specifications. Because these clauses are deleted, the clause prescriptions at GSAR 536.570-3, GSAR 536.570-5 through GSAR 536.570-7, and GSAR 536.570-9 through GSAR 536.570-12 would be removed.

- Combine GSAR 552.236-77, Specifications and Drawings, and GSAR 552.236-78, Shop Drawings, Coordination Drawings, and Schedules, into one clause – GSAR 552.236-77, Shop Drawings and Other Submittals. The clause prescription at GSAR 536.570-8, Specifications and Drawings, would be retitled “Shop Drawings and Other Submittals” and revised accordingly.
- Add GSAR 552.236-XX, Project Schedule, to take the place of FAR 52.236-15, Schedules for Construction Contracts, because FAR 52.236-15 does not provide the protection needed by GSA. The clause prescription would be added as GSAR 536.570-XX, Project Schedule.
- Delete paragraph (d) of GSAR 536.602-1, Selection Criteria, because it duplicates existing FAR coverage. Also, in paragraph (b) “Commerce Business Daily notice” would be revised to “FedBizOpps notice.”

Comments on the proposed rule must be submitted no later than February 2, 2009, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-501-4067; or (3) mail to: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405. Identify comments as “GSAR Case 2008-G509.”

## NASA TO REWRITE GOVERNMENT PROPERTY, IT SECURITY REGS

The National Aeronautics and Space Administration (NASA) is proposing to rewrite NASA FAR Supplement (NFS) Part 1845, Government Property, and the associated property-related provisions, clauses, prescriptions, and procedures to bring it into alignment with changes made to FAR Part 45 by Federal Acquisition Circular (FAC) 2005-17, which simplified government property procedures, clarified language, eliminated obsolete requirements related to the management and disposition of government property in the possession of contractors, and reduced 19 clauses to three (for more on FAC 2005-17, see the June 2007 *Federal Contracts Perspective* article “FAR Coverage on Government Property Simplified, Clarified, Trimmed”).

Also, this proposed NFS Part 1845 rewrite includes agency-level procedures and provision and clause language requiring that contractor-acquired assets which become capital assets of the government be identified. This is a requirement of the Statement of Federal Financial Accounting Standard (SFFAS) No. 6.

Comments on the proposed rule must be submitted no later than February 2, 2009, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: [carl.c.weber@nasa.gov](mailto:carl.c.weber@nasa.gov); or (3) mail to: Carl Weber (Mail Stop 5K80), NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546. Identify comments as “RIN number 2700-AD37.”

In addition, NASA would revise NFS 1804.470, Security Requirements for Unclassified Information Technology (IT) Resources, and the corresponding clause NFS 1852.204-76, to update requirements related to IT security, consistent with federal policies for the security of

unclassified information and information systems. The proposed rule would impose no new requirements. It would define applicability more clearly, update procedural processes, eliminate the requirement for contractor personnel to meet the NASA System Security Certification Program, and provide a website link to a library where contractors can find all underlying regulations and referenced documents (new paragraph (b) of revised NFS 1804.470-3, IT Security Requirements – <https://itsecurity.nasa.gov/policies/index.html>).

Comments on the proposed rule must be submitted no later than February 2, 2009, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: [ken.stepka@nasa.gov](mailto:ken.stepka@nasa.gov); or (3) mail to: Ken Stepka (Mail Stop 5P86), NASA Headquarters, Office of Procurement, Contract Analysis Division, Washington, DC 20546. Identify comments as “RIN number 2700-AD46.”

## SAFAVIAN CONVICTED FOR SECOND TIME

On December 19, 2008, David Safavian, the former Office of Federal Procurement Policy (OFPP) administrator and former General Services Administration (GSA) chief of staff, was found guilty of obstructing a GSA internal investigation and making false statements regarding his relationship with Jack Abramoff, who pleaded guilty in 2006 to charges of conspiracy, mail fraud, and tax evasion and was sentenced to four years in prison. Safavian was convicted in 2006, but the conviction was overturned in June 2008, and Safavian was retried in October 2008.

The jury found Safavian guilty on four of the five counts. He faces a maximum sentence of five years in prison on each of the four counts, a \$250,000 fine, and three years of supervised release. A sentencing date has not been set by the court.

For more on Safavian and his case, see the July 2008 *Federal Contracts Perspective* article “Safavian Conviction Overturned,” which has links to six previous *Federal Contracts Perspective* articles.

## GAO PROTESTS INCREASE 17% IN FISCAL YEAR 2008

The Government Accountability Office (GAO) has reported to Congress that the number of protests filed with it increased by 17% between Fiscal Years (FY) 2007 and 2008, up from 1,411 cases to 1,652 cases. This is the highest number of protests filed with GAO since 1997, when 1,707 protests were filed. In addition, the “effectiveness rate” (the number of protestors obtaining some form of relief) increased from 38% in FY 2007 to 42% in FY 2008. The rate had been within 34% to 39% between FY 2004 and FY 2008.

There are several factors that probably have contributed to this increase. One is the increasing amount of money the government is spending through contracts, either economic stimulus or increased contracting-out of government functions, means there are more contracts to protest. Another is the economic troubles many companies are facing has made them desperate to use any means to obtain a government contract. Finally, the GAO’s jurisdiction has expanded so it now can entertain protests against task orders (see the December 2008 *Federal Contracts Perspective* article “GAO Reasserts Authority on Task Order Protests”).

While the number of protests increased, the number of protests that GAO decided actually decreased from 335 in FY 2007 to 291 in FY 2008 (a protest may not be decided if it is withdrawn by the protester, is dismissed by GAO because it was not filed in a timely manner, etc.). And the “sustain rate” (GAO rules in favor of the protester), dropped from 27% in FY 2007 (91 out of 335) to 21% in FY 2008 (60 out of 291).

## NONMANUFACTURING RULE WAIVED FOR CABLES, TRAILERS

The Small Business Administration (SBA) is waiving the nonmanufacturer rule for the following industries: control cable and conductors under North American Industry Classification System (NAICS) code 335931, product service code 6145; trailers and heavy duty truck tractors, NAICS code 333924, product service code 2330; and line hardware (insulator strings), NAICS code 335932, product service code 5975. SBA invited the public to comment on these proposed waivers or to provide information on potential small business sources for these products. No comments were submitted in response to the proposed waivers, so the waivers are granted. For more on the proposed waivers, see the November 2008 *Federal Contracts Perspective* article "Nonmanufacturer Rule Waivers Proposed."

The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; Part 121, Small Business Size Standards; under paragraph (b) of 121.406, How Does a Small Business Concern Qualify to Provide Manufactured Products Under Small Business Set-Aside or MED [Minority Enterprise Development] Procurements? The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products?

## PROMPT PAYMENT INTEREST RATE SET AT 5 5/8%

The Treasury Department has established 5 5/8% (5.625%) as the interest rate for the computation of payments made between January 1 and June 30, 2009, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations. The interest rate for the prior six-month period (July 1, 2008, through December 31, 2008) was 5 1/8% (5.125%). The interest rate for January 1, 2008, through June 30, 2008, was 4 3/4% (4.75%).

All prompt payment interest rates since 1980 (in six-month increments) are available at [http://www.treasurydirect.gov/govt/rates/tcir/tcir\\_opdprmt2.htm](http://www.treasurydirect.gov/govt/rates/tcir/tcir_opdprmt2.htm).

FAR Subpart 32.9, Prompt Payment; FAR Subpart 33.2, Disputes and Appeals; FAR 31.205-10, Cost of Money; and Cost Accounting Standard (CAS) 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, are affected by this interest rate.