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SBA PROPOSES EXTENSIVE CHANGES TO 8(a) PROGRAM AND RELATED SMALL BUSINESS SIZE STANDARDS

The Small Business Administration (SBA) is proposing to make extensive changes to its regulations governing the 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs, and the related small business size regulations, to reflect current practice and experience, to implement statutory changes, to clarify various aspects that have been prone to misinterpretation, and to stress the primary purpose of the 8(a) program – business development.

The following are the proposed changes:

Title 13 of the Code of Federal Regulations, Part 121 (13 CFR Part 121), Small Business Size Regulations

■ *Exception to Affiliation for Mentor/Protégé Programs:* Paragraph (b)(6) of Section 121.103, How does SBA determine affiliation?, currently states, “A protégé firm is not an affiliate of a mentor firm solely because the protégé firm receives assistance from the mentor firm under federal Mentor-Protégé programs.” This has been misconstrued as permitting other federal agencies to establish mentor/protégé programs and exempt protégés from SBA’s size affiliation rules. Since this was intended to apply solely to SBA’s 8(a) Business Development (BD) mentor/protégé program and other federal mentor/protégé programs where the authorizing statute specifically authorizes an exception to affiliation, paragraph (b)(6) would be revised as follows: “An 8(a) BD participant that has an SBA-approved mentor/protégé is not affiliated with a mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a federal mentor-protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in Section 121.903 [How may an agency use size standards for its programs that are different than those established by SBA].”

■ *Joint Ventures:* Section 121.103(h) limits a specific joint venture to submitting no more than three offers over a two year period. While two firms (including an 8(a) protégé and its mentor) are limited to pursuing three contract opportunities under one joint venture, there is nothing in the regulations prohibiting the same two firms from forming a second joint venture and pursuing three additional contract opportunities. Also, some firms misinterpreted the limitation as applying to the number of contracts awarded to the joint venture, not the number of offers made by the joint venture.

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Section 121.103(h) would be revised to change the limit of three offers to a limit of three contract awards under one joint venture agreement. Also, to address the issue of a second (or more) joint venture between the same entities, the following language would be included: “The same two (or more) entities may create additional joint ventures, and each new joint venture entity may be awarded up to three contracts in accordance with this section. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.”

Finally, paragraph (e) of Section 124.513, Under what circumstances can a joint venture be awarded an 8(a) contract?, would be clarified. Currently, it states, “SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.” To this, SBA proposes to add the following: “Where a joint venture has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture provided an addendum to the joint venture agreement, setting forth the performance requirements on that second or third contract, is provided to and approved by SBA prior to contract award.” This would permit SBA to determine whether the work to be done by the joint venture partners on the proposed second or third 8(a) contract meets SBA’s requirements.

■ *Exclusion from Affiliation for Mentor/Protégé Joint Ventures:* Section 121.103(h)(3)(iii) currently states, “Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 [Mentor/Protégé Program (under the 8(a) program)] may joint venture as a small business for any federal government procurement, provided the protégé qualifies as small for the size standard corresponding to the North American Industry Classification System (NAICS) code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519 [Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?].” There has been some confusion as to whether the requirements for 8(a) joint venture agreements apply to non-8(a) procurements. Therefore, SBA is proposing to add the following to (h)(3)(iii): “If the procurement is to be awarded through the 8(a) BD program, SBA must approve the joint venture pursuant to Section 124.513. If the procurement is to be awarded other than through the 8(a) BD program (*e.g.*, small business set aside, HUBZone set aside), SBA need not approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of Sections 124.513(c) and (d) will apply. This means that the joint venture must meet the requirements of Sections 124.513(c) and (d) in order to receive the exception to affiliation authorized by this paragraph.” Section 124.513(c) specifies the contents of joint venture agreements, and Section 124.513(d) requires that joint ventures perform the applicable percentage of work required by Section 124.510, What percentage of work must a Participant perform on an 8(a) contract?, and that the 8(a) partner(s) to the joint venture must perform a significant portion of the contract.

■ *Classification of a Procurement for Supplies:* The last sentence of paragraph (b) of Section 121.402, What size standards are applicable to federal government contracting programs?, currently states, “Procurements for supplies must be classified under the appropriate manufacturing NAICS code, not under the wholesale trade NAICS code.” To clarify this, the last

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sentence would be revised to “under the wholesale trade *or retail trade* NAICS code.” Also, the following would be added: “A concern that submits an offer or quote for a contract or subcontract where the NAICS code assigned to the contract or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it meets the requirements set forth in Section 121.406(b) [How does a small business concern qualify to provide manufactured products or other supply items under small business set-aside or 8(a) contracts?].”

■ *Application of the Nonmanufacturer Rule:* The nonmanufacturer rule in Section 121.406(b) requires that a firm seeking to provide manufactured products under small business set-asides or 8(a) contracts must either manufacture the product or, if it does not manufacture the product (a “nonmanufacturer”), be engaged in retail or wholesale trade, normally sell the type of item being supplied, and will supply the end item of a small business manufacturer or processor made in the United States. Some have misconstrued the nonmanufacturer rule and when it is to be applied. Therefore, paragraph (b)(1) would be revised to state that a small business may qualify as a nonmanufacturer if it “takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement...” In addition, new paragraph (b)(3) would be revised to state, “The nonmanufacturer rule applies only to procurements that have been assigned a manufacturing NAICS code, Sectors 31-33 [Manufacturing Industries]. It does not apply to supply contracts that do not primarily consist of manufacturing.”

To further clarify when to apply the nonmanufacturer rule, paragraph (b)(4) would be added to state, “The nonmanufacturer rule applies only to the supply component of a requirement classified as a manufacturing contract. If a requirement is classified as a service contract, but also has a supply component, the nonmanufacturer rule does not apply to the supply component of the requirement.”

■ *Request for Formal Size Determination:* Paragraph (b) of Section 121.1001, Who may initiate a size protest or request a formal size determination?, would be amended to give the SBA’s Office of Inspector General (OIG) the authority to ask for a formal size determination.

13 CFR Part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations

■ *Completion of Program Term:* Section 124.2, For what length of time may a business participate in the 8(a) BD program?, currently states, “A firm that completes its nine year term of participation in the 8(a) BD program is deemed to graduate from the program.” However, the Small Business Act provides that an 8(a) participant is considered to graduate only if it successfully completes the program by substantially achieving the targets, objectives, and goals contained in the concern's business plan, thereby demonstrating its ability to compete in the marketplace without 8(a) assistance (see 15 U.S.C. 636(j)(10)(H)). Therefore, this sentence would be removed from Section 124.2, and Sections 124.301, What are the ways a business may leave the 8(a) BD program?, and 124.302, What is graduation and what is early graduation? would be amended accordingly (Section 124.302 is currently titled “What is early graduation?”).

Also, a new paragraph (f) would be added to Section 124.112, What criteria must a business meet to remain eligible to participate in the 8(a) BD program?, which would state, “As part of the final annual review performed by SBA prior to the expiration of a participant's nine-year program term, SBA will determine if the participant has met the targets and objectives set forth

in its business plan and, thus, whether the participant will be considered to have graduated from the 8(a) BD program at the expiration of its program term.”

■ *Definitional Changes:* Several definitions in Section 124.3, What definitions are important in the 8(a) BD program?, would be added or amended.

- “‘NAICS code’ means North American Industry Classification System code” would be added. Also, “NAICS code” would replace “SIC code” (Standard Industry Classification) wherever it appears in Part 124 because the SIC system has been replaced by the NAICS.
- The definition of “Primary Industry Classification” would be revised to recognize that a participant may change its primary industry classification if it “can demonstrate that the majority of its revenues during a two-year period have evolved from one NAICS code to another.” Also, a new paragraph (e) would be added to Section 124.112, What criteria must a business meet to remain eligible to participate in the 8(a) BD program?, which would permit a participant to request a change in its primary industry classification with its servicing SBA district office where it can demonstrate that its revenues have evolved from one NAICS code to another.
- A definition of “regularly maintains an office” would be added, which would define the term as “conducting business activities as an on-going business concern from a fixed location on a daily basis. The best evidence of the regular maintenance of an office is documentation that shows that third parties routinely transact business with a participant at a location within a particular geographical area. Such evidence includes advertisements, bills, correspondence, lease agreements, land records, and evidence that the participant has complied with all local requirements concerning registering, licensing, or filing with the state or county where the place of business is located.”

■ *Size for Primary NAICS Code:* Paragraph (a) of Section 124.102, What size business is eligible to participate in the 8(a) BD program?, would be revised to state, “In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program. SBA may graduate a participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code for two successive program years.” Also, a new paragraph (c) would be added to Section 124.302, What is graduation and what is early graduation?, which would permit SBA to “graduate a participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code for two successive program years.”

■ *Economic Disadvantage:* Section 124.104, Who is economically disadvantaged?, would be amended to incorporate certain interpretations and policies that have been followed informally by SBA:

- Paragraph (b)(2), which requires married individuals claiming economic disadvantaged to submit separate financial information for his or her spouse, would be amended to add the following: “SBA may consider a spouse’s financial situation in determining an individual’s access to credit and capital. SBA does not take into consideration community property laws when determining economic disadvantage.”

- Paragraph (c)(2)(ii) would be added, and it would exempt funds in Individual Retirement Accounts (IRAs) and other official retirement accounts from the calculation of net worth provided that the funds cannot currently be withdrawn from the account prior to retirement age without a significant penalty.
- Paragraph (c)(2)(iii) would be added, and it would exempt income from an S corporation from the calculation of both income and net worth to the extent such income is reinvested in the firm or used to pay taxes arising from the normal course of operations of an S corporation.
- Paragraph (c)(3) would be added to provide that SBA presumes an individual is not economically disadvantaged if his or her adjusted gross income averaged over the past two years exceeds \$200,000 (which is the top 2% of all wage earners according to Internal Revenue Service (IRS) statistics). Also, it would establish a two year average income level of \$250,000 for continued 8(a) BD program eligibility.
- Paragraph (c)(4) would be added to provide that “an individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/participant firm) exceeds \$3 million for an applicant concern and \$4 million for continued 8(a) BD eligibility. The only assets excluded from this determination are funds excluded under paragraph (c)(2)(ii) of this section as being invested in a qualified IRA account.”

■ *Changes to Ownership Requirements:* Paragraph (g) of Section 124.105, What does it mean to be unconditionally owned by one or more disadvantaged individuals?, currently states, “The individuals determined to be disadvantaged for purposes of one participant, their immediate family members, and the participant itself, may not hold, in the aggregate, more than a 20% equity ownership interest in any other single participant.” Because of this, SBA has denied 8(a) program admission to companies solely because the owners of those firms have family members who are disadvantaged owners of other 8(a) concerns. In some cases, the two firms are in different industries and are located in different parts of the country. Therefore, Section 124.105(g) would be revised to provide that “an individual may not use his or her disadvantaged status to qualify a firm if such individual has an immediate family member who has used his or her disadvantaged status to qualify another firm for participation in the 8(a) BD program.” However, the SBA’s Associate Administrator for Business Development (AA/BD) would be permitted to “waive this prohibition if the two concerns have no connections, either in the form of ownership, control or contractual relationships, and provided the individual seeking to qualify the second concern has management and technical experience in the industry. Where the concern seeking a waiver is in the same or similar line of business as the current or former 8(a) concern, there is a presumption against granting the waiver.”

■ *Changes to Control Requirements:* Paragraph (a)(2) of Section 124.106, currently requires that “a disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or participant.” To prevent long-distance management (such as a disadvantaged owner living in another country), the following would be added: “Such manager must reside in the United States, and must generally spend at least part of every month physically present in the primary offices of the applicant or participant.”

Also, a new Section 124.106(h) would provide that “a disadvantaged individual upon whom eligibility is based is a reserve component member in the United States military who has been

called to active duty, the participant may elect to designate one or more individuals to control the participant on behalf of the disadvantaged individual during the active duty call-up period. If such an election is made, the Participant will continue to be treated as an eligible 8(a) participant and no additional time will be added to its program term. Alternatively, the participant may elect to suspend its 8(a) BD participation during the active duty call-up period..." A suspension would preserve the firm's full term in the program by adding the time of the suspension to the end of the participant's program term when the individual returns to control its daily business operations.

- *Benchmarks:* Paragraph (f) of Section 124.108, What other eligibility requirements apply for individuals or businesses?, which addresses the achievement of benchmarks, would be deleted because the Department of Commerce was supposed to update industry codes every few years to determine those industries which minority contractors were underrepresented in the federal market. Since Commerce has never revised these industry categories since their initial publication, references to them are outdated.

- *Changes Applying Specifically to Tribally-Owned Firms:* Paragraph (c)(3)(ii) of Section 124.109, Do Indian tribes and Alaska Native Corporations (ANCs) have any special rules for applying to the 8(a) BD program?, would be revised to provide that a newly certified tribally-owned participant cannot receive an 8(a) contract in a secondary NAICS code that is the primary NAICS code of another participant (or former participant that has left the program within two years of the date of application) owned by the tribe for a period of two years from the date of admission to the program.

Also, paragraph (c)(4) currently states, "The management and daily business operations of a tribally-owned concern must be controlled by the tribe, through one or more disadvantaged individual members who possess sufficient management experience of an extent and complexity needed to run the concern..." The word "disadvantaged" would be deleted to allow any tribal member to participate in the management of a tribally-owned firm, not just those who have individually qualified as economically disadvantaged.

In addition, paragraph (c)(6) would be amended to clarify the potential for success requirement for tribally-owned applicants. Currently, the firm must generally be in business for two years and have revenues in its primary industry classification. A firm that is in business for less than two years may be deemed to possess the necessary potential for success if the individuals who manage and control its daily operations have substantial technical and managerial experience, the applicant has a record of successful performance on contracts in its primary industry category, and the applicant has adequate capital to sustain its business operations. SBA would add to these another basis for determining the potential for a tribally-owned firm's success: "The tribe has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so."

Finally, a new paragraph (b)(8) would be added to Section 124.112, What criteria must a business meet to remain eligible to participate in the 8(a) BD program?, to require each participant owned by a tribe, ANC, Native Hawaiian Organizations (NHOs), or Community Development Corporations (CDCs) to submit annually "information showing how its 8(a) participation has benefited the tribal or native members and/or the tribal, native or other community. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services to the affected community..."

■ *Excessive Withdrawals:* Section 124.112(d)(1) defines withdrawals as including the following: officer's salary; cash dividends; distributions in excess of amounts needed to pay S Corporation taxes; cash and property withdrawals; bonuses; loans; advances; payments to immediate family members; investments on behalf of an owner, officer, or key employee; acquisition of a business not merged with the 8(a) participant; charitable contributions; and speculative ventures. If withdrawals are excessive, paragraph (d)(2) permits SBA to initiate termination proceedings, initiate early graduation proceedings, or require a reinvestment of funds or other assets. Paragraph (d)(3) states that "withdrawals are excessive if during any fiscal year of the participant they exceed (i) \$150,000 for firms with sales up to \$1,000,000; (ii) \$200,000 for firms with sales between \$1,000,000 and \$2,000,000; and (iii) \$300,000 for firms with sales over \$2,000,000."

Under these provisions, if the income of all officers in the aggregate exceeds \$300,000 for a multimillion dollar firm, the income alone would be deemed "excessive" and could be a basis for termination or early graduation. Therefore, paragraph (d)(1) would be revised to delete from the definition of "withdrawals" officer's salary, payments to immediate family members employed by the participant, loans, advances, acquisition of a business not merged with the 8(a) participant, charitable contributions, and speculative ventures. However, because some firms might try to circumvent the excessive withdrawal limitations through the distribution of salary or by other means, the following would be added to the paragraph: "SBA will look at the totality of the circumstances in determining whether to include a specific amount as a withdrawal under this paragraph." Also, the sums considered excessive withdrawals in paragraph (d)(3) are revised to \$200,000 for firms with sales up to \$1,000,000; \$250,000 for firms with sales between \$1,000,000 and \$2,000,000; and \$400,000 for firms with sales exceeding \$2,000,000.

■ *Applications to the 8(a) BD Program:* Section 124.202, Where must an application be filed?, would be revised to emphasize SBA's preference that applications for participation in the 8(a) BD program be submitted in an electronic format ("by going to the 8(a) BD page of SBA's Web site (www.sba.gov)"). However, a concern that does not have access to the electronic format or does not wish to file an electronic application would be able to request a hard copy application from the Associate Administrator for Business Development (AA/BD). All applications, whether electronic or hard copy, would be required to include "wet signatures" by those individuals claiming disadvantage status.

Also, a new paragraph (c) would be added to Section 124.204, How does SBA process applications for 8(a) BD program admission?, which would clarify that "the burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the firm or would demonstrate lack of eligibility in the area to which the information relates."

■ *Termination from the 8(a) BD Program:* One of the grounds for termination from the 8(a) program in paragraph (a)(2) of Section 124.303, What is termination?, is "failure by the concern to maintain its eligibility for program participation." To clarify this, the paragraph would be revised as follows: "Failure by the concern to maintain its eligibility for program participation, including failure by an individual owner or manager to continue to meet the requirements for economic disadvantage set forth in Section 124.104 [Who is economically disadvantaged?] where such status is needed for eligibility and the participant has not met the targets and objectives set forth in its business plan."

■ *Effect of Early Graduation or Termination:* Currently, paragraph (f) of Section 124.304, What are the procedures for early graduation and termination?, merely states that a participant, after the effective date of the early graduation or termination, is no longer eligible for 8(a) program assistance, but it is obligated to complete previously awarded 8(a) contracts. SBA proposes to amend Section 124.304(f) to state that a firm that early graduates or is terminated from the 8(a) program is not permitted self-certify that it qualifies as an SDB for future procurement actions. However, if the firm believes it does qualify as an SDB and seeks to certify itself as an SDB, the firm must notify the contracting officer that SBA early graduated or terminated the firm from the 8(a) BD program, and it must demonstrate either that (1) the grounds upon which the early graduation or termination was based do not affect its status as an SDB, or (2) the circumstances upon which the early graduation or termination was based have changed and the firm would now qualify as an SDB. Whenever a firm provides the contracting officer with such notification, the contracting officer must protest the SDB status of the firm so that SBA can make a formal eligibility determination.

■ *Task and Delivery Order Contracts:* Paragraph (h) of Section 124.503, How does SBA accept a procurement for award through the 8(a) BD program?, which addresses task and delivery order contracts, would be amended to allow agencies to receive 8(a) credit for orders placed with 8(a) concerns under contracts that were not set aside for 8(a) concerns provided (1) the order is offered to, and accepted for, the 8(a) BD program, (2) it is competed exclusively among eligible 8(a) concerns, and (3) the limitations on subcontracting provisions apply to the order. If a contracting officer chose not to reserve a specific order for 8(a) concerns, the contracting officer could continue to take SDB credit for the award of an order to an 8(a) firm.

■ *Barriers to Acceptance and Release From the 8(a) BD Program:* Paragraph (a) of Section 124.504, What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?, states that the SBA will not accept a procurement for award through the 8(a) BD program where “the procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business or small disadvantaged business (SDB) set-aside prior to offering the requirement to SBA for award as an 8(a) contract.” This was written prior to legislation authorizing HUBZone and service disabled veteran-owned (SDVO) small business contracts, either through set-asides or where appropriate on a sole source basis. This rule would amend paragraph (a) to state that the SBA will not accept a procurement for award through the 8(a) BD program where “the procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business set-aside or a HUBZone or service disabled veteran-owned award prior to offering the requirement to SBA for award as an 8(a) contract.”

In addition, it has been SBA's policy, and implicit in the regulations, that once a requirement is awarded as an 8(a) contract, any follow-on procurement should also be awarded as an 8(a) contract. However, SBA's 8(a) BD regulations at Section 124.504(e) do not specifically address the release of requirements from the 8(a) program other than those where a firm is graduating and needs the follow-on contract to further its business development. Therefore, Section 124.504(e) (which would be redesignated as paragraph (d)) would be amended to state that follow-on or repetitive 8(a) procurements would generally remain in the 8(a) BD program unless a procuring agency makes a request of the AA/BD and receives the AA/BD's concurrence. The AA/BD will take into account “(i) whether the agency has achieved its SDB goal; (ii) where the agency is in achieving its HUBZone, SDVO, WOSB [woman-owned small business], or small business goal, as appropriate; and (iii) whether the requirement is critical to the business development of the 8(a) participant that is currently performing it... SBA will release a

requirement under this paragraph only where the procuring activity agrees to procure the requirement as a small business, HUBZone, service disabled veteran-owned small business, or women-owned small business set-aside.”

■ *Competitive Threshold Amounts*: To conform SBA’s regulations with the thresholds for competitive 8(a) awards specified in paragraph (a)(2) of Federal Acquisition Regulation (FAR) 19.805-1, General (\$3.5 million, except \$5.5 million for acquisitions assigned manufacturing codes under the North American Industry Classification System (NAICS)), paragraph (a)(2)(ii) of Section 124.506, At what dollar threshold must an 8(a) procurement be competed among eligible participants?, would be amended to change the thresholds from \$3 million and \$5 million to \$3.5 million and \$5.5 million, respectively.

Also, paragraph (b) provides that contracts may be awarded through the 8(a) BD program on a sole source basis to tribally or ANC-owned concerns above the competitive threshold amounts. There have been complaints that non-8(a) firms have received substantial benefits through the performance of large sole source 8(a) contracts as joint venture partners with tribally-owned and ANC-owned 8(a) firms. Therefore, paragraph (b) would be revised to provide that “a joint venture between one or more eligible tribally-owned, ANC-owned or NHO-owned participants and one or more non-8(a) business concerns may be awarded sole source 8(a) contracts above the competitive threshold amount, provided that no non-8(a) joint venture partner also acts as a subcontractor to the joint venture awardee.”

Finally, paragraph (b) would be revised to make permanent the provision in Section 8021 of the Department of Defense (DOD) Appropriations Act for Fiscal Year (FY) 2004 (Public Law 108-87) that gave DOD agencies the authority to make sole source awards for 8(a) contracts above the competitive threshold amounts to 8(a) concerns owned and controlled by Native Hawaiian Organizations (NHOs). This provision was made permanent by Section 8020 of the DOD Emergency Supplemental Appropriation to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Public Law 109-148).

■ *Bona Fide Place of Business*: Some 8(a) contracts are restricted to 8(a) participants having a “*bona fide* place of business” within a particular geographic location. Because there has been some confusion regarding the procedures a participant must follow to establish a *bona fide* place of business in a new location, paragraph (c)(2) of Section 124.507, What procedures apply to competitive procurements?, to clarify that a participant must submit its request to be recognized as having a *bona fide* place of business in a different location to the SBA district office that normally services it. The servicing district office will forward the request to the SBA district office serving the geographic area of the particular location for processing. The SBA district office serving the geographic area of that location must determine if that location in fact qualifies as a *bona fide* place of business under SBA’s requirements. A participant cannot submit an offer for an 8(a) procurement limited to a specific geographic area unless it has received from SBA a determination that it has a *bona fide* place of business within that area.

■ *Competitive Business Mix*: Paragraph (a)(1) of Section 124.509, What are non-8(a) business activity targets?, states, “To ensure that participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, participants must make maximum efforts to obtain business outside the 8(a) BD program.” To clarify that orders off the GSA Schedule and subcontracts on 8(a) contracts counted are not counted as 8(a) awards with regard to this competitive business mix requirement, the following sentence would be added to paragraph (a)(1): “Work performed by an 8(a) participant for any federal department or agency other than through an 8(a) contract,

including work performed on orders under the General Services Administration Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another 8(a) participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program.”

■ *Administration of 8(a) Contracts:* To clarify what SBA is delegating when it delegates “all responsibilities for administering an 8(a) contract to the procuring activity,” paragraph (a) of Section 124.510, Delegation of contract administration to procuring agencies, would be revised to add the following sentence: “Tracking compliance with the performance of work requirements set forth in Section 124.510 [What percentage of work must a Participant perform on an 8(a) contract?] is included within the functions performed by the procuring activity as part of contract administration.”

Also included in the delegation of contract administration is the authority to exercise priced options and issue appropriate modifications. Section 124.510(b) has required contracting officers who issued modifications or exercised options on 8(a) contracts to notify SBA of these actions. However, paragraph (b) gives no clear guidance as to when SBA must be notified, so the following paragraph would be added to paragraph (b): “The contracting officer must, however, submit copies to SBA of all modifications and options exercised within 10 business days of their occurrence.”

Finally, a new paragraph (c) would authorize SBA to “conduct periodic compliance on-site agency reviews of the files of all contracts awarded pursuant to Section 8(a) authority.”

■ *Changes to Joint Venture Requirements:* Paragraph (c)(3) of Section 124.513, Under what circumstances can a joint venture be awarded an 8(a) contract?, currently provides that the 8(a) participant(s) to an 8(a) joint venture must receive at least 51% of the net profits. However, SBA believes that such a requirement may be untenable where more work is done by a non-8(a) joint venture partner than the 8(a) participant partner(s). Under paragraph (d), the joint venture must perform at least 50% of an 8(a) contract and the 8(a) participants must perform a “significant portion” of the amount performed by the joint venture. For example, if a joint venture will perform 60% of an 8(a) contract, with the 8(a) partner performing 25% of the contract and the non-8(a) partner performing 35% of the contract, it does not make sense for the 8(a) partner to receive at least 51% of the net profits of the joint venture where it is performing less than the non-8(a) firm on the contract. Therefore, paragraph (c)(3) would be revised to provide that “8(a) participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) participant(s).”

Also, because “significant portion” is subject to interpretation, paragraph (d) would be revised to require “the 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture. The work performed by 8(a) partners to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.”

Finally, a new paragraph (i) would require that “at the completion of every 8(a) contract awarded to a joint venture, the 8(a) participant(s) to the joint venture must submit a report to the local SBA district office explaining how the performance of work requirements were met for the contract.”

■ *Sole Source Limits for NHO-Owned Concerns:* Paragraph (a) of Section 124.519, Are there any dollar limits on the amount of 8(a) contracts that a participant may receive?, exempts tribally-owned and ANC concerns from the limits on the amount of 8(a) contract dollars a participant may receive on a sole source basis. Since SBA “believes that all three of these types of firms should be treated consistently, and the failure to include NHO-owned concerns in the

exemption in the current regulation was an inadvertent omission,” paragraph (a) would be amended to exempt tribally-owned, ANC, and NHO owned concerns from this limitation.

■ *Changes to the Mentor/Protégé Program:* Several changes would be made to Section 124.520, What are the rules governing SBA’s Mentor/Protégé program?

- Paragraph (a) would be revised to specifically require that assistance provided by the mentor must be intended to “assist the protégé with meeting the goals established in its SBA-approved business plan.”
- Paragraph(b)(2) states that a mentor will usually have no more than one protégé at a time, but that SBA can authorize a mentor to have more than one protégé at a time. To prevent mentors from being able to take advantage of the program by collecting protégés to benefit from 8(a) contracts, paragraph (b)(2) would be amended to provide for an absolute limit of three protégés per mentor.
- Paragraph (b)(3) requires firms seeking to be mentors to submit federal income tax returns to establish its financial health. Paragraph (b)(3) would be revised to require the firm to submit “copies of the federal tax returns it submitted to the IRS, or audited financial statements, including any notes, or in the case of publicly traded concerns the filings required by the Securities and Exchange Commission for the past three years.”
- Paragraph (c)(1) would be amended to clarify that a firm may qualify as a protégé if it is in the developmental stage of program participation, or has never received an 8(a) contract, or has a size standard that is less than half the size standard corresponding to its primary NAICS code. Currently, paragraph (c)(1) requires that a firm, to qualify as a protégé, must “be in the developmental stage of program participation; have never received an 8(a) contract; or have a size that is less than half the size standard corresponding to its primary SIC code.” The absence of the word “or” between the first and second qualifications has been misconstrued as meaning a firm must be in the developmental stage of program participation *and either* have never received an 8(a) contract or have half the applicable size standard. To clarify this, the word “or” would be added after the first qualification.
- To clarify that the exclusion from affiliation enjoyed by joint ventures between protégés and their mentors ends when the protégé leaves the 8(a) BD program, the following sentence would be added to paragraph (c)(2): “Once a firm graduates from or otherwise leaves the 8(a) BD program, it will not be eligible for any further benefits from its mentor/protégé relationship (*i.e.*, the receipts and/or employees of the protégé and mentor will generally be aggregated in determining size for any joint venture between the mentor and protégé after the protégé leaves the 8(a) BD program).”
- Paragraph (c)(3) provides that a protégé firm can have only one mentor. Paragraph (c)(3) would be revised to allow the AA/BD to approve a second mentor for a protégé firm where “(i) the second relationship pertains to an unrelated, secondary NAICS code; (ii) the protégé firm is seeking to acquire a specific expertise that the first mentor does not possess; and (iii) the second relationship will not compete or otherwise conflict with the business development assistance set forth in the first mentor/protégé relationship.”

- Paragraph (c)(4) would be added to prohibit an 8(a) firm from being a mentor and protégé at the same time. It would require the 8(a) firm to give up its status as a protégé if it becomes a mentor.
- Paragraph (c)(5) would be added to prohibit SBA from approving a mentor/protégé agreement if the proposed protégé firm has less than one year remaining in its program term.
- Paragraph (d)(1) currently allows a joint venture between a mentor and protégé to be small for any “government procurement.” Paragraph (d)(1) would be revised to permit such a joint venture to be considered small for any “government prime contract or subcontract.” A similar change would be made to Section 121.103(h)(3)(iii) of the size regulations to ensure consistent implementation throughout SBA’s regulations.
- A new paragraph (d)(1)(i) would clarify that “SBA must approve the mentor/protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract and receive the exclusion from affiliation.”
- A new paragraph (d)(1)(ii) would clarify that “in order to receive the exclusion from affiliation for both 8(a) and non-8(a) procurements, the joint venture must meet the requirements set forth in Section 124.513(c) [Under what circumstances can a joint venture be awarded an 8(a) contract?].”
- A new paragraph (f) would clarify the procedures for requesting reconsideration of SBA’s decision to deny a proposed mentor/protégé agreement.
- A new paragraph (h) would delineates the consequences for a mentor that fails to provide the assistance it agreed to provide in its mentor/protégé agreement: “(i) SBA will recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture pursuant to paragraph (d)(1) of this section; (ii) SBA will terminate its mentor/protégé agreement; and (iii) the firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor/protégé agreement.” In addition, SBA may consider debarring the mentor.

■ *Reporting Requirement and Submission of Financial Statements:* Paragraph (a) of Section 124.601, What reports does SBA require concerning parties who assist participants in obtaining Federal contracts?, currently requires 8(a) concerns to report annually “a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such participant in obtaining a federal contract.” The Small Business Act requires semi-annual reporting, so paragraph (a) would be revised to require semi-annual reporting.

Also, Section 124.602, What kind of annual financial statement must a participant submit to SBA?, would be amended to raise the level above which participants must provide audited financial statements from \$5,000,000 in gross annual receipts to \$10,000,000. In addition, reviewed financial statements would be required of all participants with gross annual receipts between \$2,000,000 and \$10,000,000, instead of between \$1,000,000 and \$5,000,000.

■ *Requirements Relating to SDBs*: Section 124.1002, What is a Small Disadvantaged Business (SDB)? would be revised as follows:

- Paragraph (d) would clarify that the “other eligibility requirements” for 8(a) BD program participation in Section 124.108, What other eligibility requirements apply for individuals or businesses?, do not apply to SDBs.
- A new paragraph (h) would define “full time management” as it applies to the SDB program: “An SDB is considered to be managed on a full-time basis by a disadvantaged individual if such individual works for the concern during all of the hours the concern operates. For example, if a concern operates 20 hours per week and the disadvantaged manager works for the firm during those twenty hours, that individual will be considered as working full time for the firm.” This distinction between the “full time management” for SDBs and for 8(a) participants (in paragraph (a)(2) of Section 124.106, When do disadvantaged individuals control an applicant or Participant?) is that the SDB program is a contracts program and not a business development program like the 8(a) program. Also, 8(a) participants are expected to operate 40 or more hours per week.

Comments on the proposed rule must be submitted no later than December 28, 2009, by any of the following methods: (1) Federal eRulemaking portal: <http://www.regulations.gov>; follow the instructions for submitting comments; (2) mail for paper, disk, or CD-ROM submissions: Joseph Loddio, Associate Administrator, Office of Business Development, 409 Third Street, SW, Mail Code, Washington, DC 20416; or (3) hand delivery/courier: Joseph Loddio, Associate Administrator, Office of Business Development, 409 Third Street, SW, Washington, DC 20416. Cite “RIN: 3245-AF53” in all correspondence.

FY10 DEFENSE AUTHORIZATION RESTRICTS A-76 COMPETITIONS

On October 28, President Obama signed into law the \$680.2 billion National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84). The act makes many changes to Department of Defense (DOD) acquisition procedures, and several changes that apply governmentwide, particularly restrictions on competitions conducted under the Office of Management and Budget (OMB) Circular A-76, Performance of Commercial Activities, and the extension of the authority in Federal Acquisition Regulation (FAR) Subpart 13.5 to apply simplified acquisition procedures to acquisitions of commercial items between \$100,000 and \$5,500,000.

■ **Section 321, Public-Private Competition Required Before Conversion to Contractor Performance:** Previously, Title 10 of the U.S. Code, Section 2461 (10 USC 2461), prohibited functions performed by 10 or more DOD civilian employees from being converted to contractor performance under OMB Circular A-76 unless the conversion is based on a public-private competition. Section 321 amends 10 USC 2461(a)(1) to prohibit *any* functions performed by DOD civilian employees from being converted unless a public-private competition is conducted.

■ **Section 322, Time Limitation on Duration of Public-Private Competitions:** This section adds to 10 USC 2461(a) a new subparagraph (5)(A), which limits the period of a public-private competition to 24 months unless the Secretary of Defense extends the period up to 33 months.

- **Section 325, Temporary Suspension of Public-Private Competitions for Conversion of DOD Functions to Performance by a Contractor:** This section temporarily suspends all studies and competitions conducted under 10 USC 2461 until 30 days after the Secretary of Defense certifies to Congressional committees that DOD has completed a review of DOD policies regarding the conduct of public-private competitions and the Government Accountability Office (GAO) has reviewed DOD’s findings and reported to Congress. Since the Secretary is not permitted to submit the report until June 15, 2010, at the earliest, and GAO has 90 days to review the report (September 15, 2010, at the earliest), the temporary suspension is until at least October 15, 2010.
- **Section 326, Requirement for Debriefings Related to Conversion of Functions from Performance by Federal Employees to Performance by a Contractor:** This section requires Office of Federal Procurement Policy (OFPP) to revise the FAR to permit debriefings of federal employee representatives to the same extent and under the same circumstances as any offeror, in the case of a conversion of any function from performance by federal employees to performance by a contractor.
- **Section 327, Amendments to Protest Procedures by Federal Employees and Agency Officials in Conversions of Functions from Performance by Federal Employees to Performance by a Contractor:** This section amends 31 USC 3551 to revise the definition of “protest” to add that a protest can be a written objection to a “conversion of a function that is being performed by federal employees to private sector performance.”
- **Section 804, Implementation of New Acquisition Process for Information Technology Systems:** This requires DOD to develop and implement a new acquisition process for information technology systems. This new process is to include “(A) early and continual involvement of the user; (B) multiple, rapidly executed increments or releases of capability; (C) early, successive prototyping to support an evolutionary approach; and (D) a modular, open-systems approach.”
- **Section 815, Clarification of Uniform Suspension and Debarment Requirement:** This expands the application of suspensions and debarments to “subcontracts at any tier, other than subcontracts for commercially available off-the-shelf items...except that in the case of a contract for commercial items, such term includes only first-tier subcontracts.”
- **Section 816, Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items:** The FAR Subpart 13.5 authority to use simplified acquisition procedures when acquiring commercial items greater than \$100,000 but less than \$5,500,000 is extended from January 1, 2010, to January 1, 2012.
- **Section 820, Publication of Notification of Bundling of DOD Contracts:** This section requires DOD contracting officers to publish a notification on FedBizOpps.gov at least 30 days prior to the release of any solicitation that consists of bundled requirements.
- **Section 821, Authority for Government Support Contractors to Have Access to Technical Data Belonging to Prime Contractors:** This section authorizes DOD to grant “a covered government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the government in support of the government’s management and oversight

of the program or effort to which such technical data relates.” It goes on to define a “covered government support contractor” as “a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the government in support of the government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort)”.

■ **Section 847, Extension of SBIR and STTR Programs of DOD:** This extends the authority for DOD to carry out the Small Business Innovative Research (SBIR) and Small Business Technology Transfer (STTR) programs through September 30, 2010. (**NOTE:** The SBIR and STTR programs expired for all other participating agencies on September 30, 2009.)

■ **Section 848, Extension of Authority for SBIR Commercialization Pilot Program:** This extends through September 30, 2010, the authority for DOD to accelerate the transition of technologies, products, and services developed under the Phases I and II of the SBIR program to SBIR Phase III.

PRESIDENT SETS SUSTAINABILITY GOALS FOR GOVERNMENT

On October 5, President Obama issued Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, which sets sustainability goals for federal agencies and focuses on making improvements in their environmental, energy and economic performance. The executive order requires agencies to set a 2020 greenhouse gas emissions reduction target within 90 days; increase energy efficiency; reduce fleet petroleum consumption; conserve water; reduce waste; support sustainable communities; and leverage federal purchasing power to promote environmentally-responsible products and technologies.

“This executive order builds on the momentum of the Recovery Act to help create a clean energy economy,” said the president. The executive order builds on and expands the energy reduction and environmental requirements of Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, by making reductions of greenhouse gas emissions a priority of the federal government, and by requiring agencies to develop sustainability plans focused on cost-effective projects and programs. (For more on the Recovery Act, see the March 2009 *Federal Contracts Perspective* article “\$787 Billion Stimulus Package Passed, Spending To Be ‘Transparent and Accountable.’” For more on Executive Order 13423, see the February 2007 *Federal Contracts Perspective* article “President Orders Federal Energy Conservation.”)

The new executive order requires agencies to measure, manage, and reduce greenhouse gas emissions toward agency-defined targets by 2020. Also, the executive order requires agencies to meet a number of energy, water, and waste reduction targets, including:

- 30% reduction in vehicle fleet petroleum use by 2020;
- 26% improvement in water efficiency by 2020;
- 50% recycling and waste diversion by 2015;
- 95% of all applicable contracts will meet sustainability requirements;
- Implementation of the 2030 net-zero-energy building requirement;
- Implementation of the stormwater provisions in Section 438 of the Energy Independence and Security Act of 2007 (Public Law 110-140); and

- Development of guidance for sustainable federal building locations in alignment with the Livability Principles put forward by the Department of Housing and Urban Development, the Department of Transportation, and the Environmental Protection Agency.

Implementation of the executive order will focus on integrating achievement of sustainability goals with agency mission and strategic planning to optimize performance and minimize implementation costs. Each agency will prioritize its actions toward the goals of the executive order based on lifecycle return on investments.

FAC 2005-37 PROVIDES GUIDANCE ON USE OF AWARD FEES

Federal Acquisition Circular (FAC) 2005-37 consists of seven different rules, several of which are of significance to the acquisition community. FAC 2005-37 includes a rule that places restrictions on the use of award fees, minimizes “pass-through” charges that add little or no value, limits the length of contracts awarded noncompetitively under unusual and compelling urgency circumstances, and permits the Government Accountability Office (GAO) to interview current contractor employees when conducting audits on contracts that do *not* involve Recovery Act funds.

■ **Award Fee Language Revision:** This interim rule revises FAR Subpart 16.4, Incentive Contracts, to improve the use of award fee contracts. This rule implements Section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), Section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417), and the December 4, 2007, Office of Federal Procurement Policy memorandum “Appropriate Use of Incentive Contracts.”

The following are the significant changes made by this interim rule:

- FAR 16.001, Definitions, is added, and it includes definitions for the following terms: “Award-Fee Board” (“the team of individuals identified in the award-fee plan who have been designated to assist the Fee-Determining Official in making award-fee determinations”); “Fee-Determining Official (FDO)” (“the designated agency official(s) who reviews the recommendations of the Award-Fee Board in determining the amount of award fee to be earned by the contractor for each evaluation period”); and “Rollover of Unearned Award Fee” (“the process of transferring unearned award fee, which the contractor had an opportunity to earn, from one evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee”).
- Paragraph (d) of FAR 16.401, which stated “Award-fee contracts are a type of incentive contract,” is moved to FAR 16.401(e). New paragraph (d) requires that “a determination and finding, signed by the head of the contracting activity, shall be completed for all incentive- and award-fee contracts justifying that the use of this type of contract is in the best interest of the government.”
- To new FAR 16.401(e) has been added language to: (1) require that award fees be linked to acquisition objectives in the areas of cost, schedule, and technical performance; (2) prohibit award fees if the contractor’s overall performance is judged to be below satisfactory; (3) require that award-fee determinations be documented in the contract file;

(4) state that the determination and methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government; and (5) require that all award-fee contracts have an award-fee plan that establishes the procedures and award-fee board for evaluating award-fee determinations. In addition, paragraph (e) delineates what the required content must be for all award-fee plans, requires the use of adjectival ratings and associated descriptions, and mandates award-fee pool earned percentages in FAR Table 16-1. Finally, paragraph (e) prohibits the rollover of unearned award fee from one evaluation period to another evaluation period.

Comments on this interim rule must be submitted no later than December 14, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-008” into the field “Keyword”; select the link that corresponds with FAR Case 2008-027; follow the instructions provided to complete the “Public Comment and Submission Form”); (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405. Cite “FAR Case 2008-008” in all correspondence.

For more on the acquisition-related provisions of Public Law 110-417, see the November 2008 *Federal Contracts Perspective* article “2009 Defense Authorization Act Includes Clean Contracting Act.” For more on the acquisition-related provisions of Public Law 109-364, see the November 2006 *Federal Contracts Perspective* article “2007 Defense Authorization Addresses Training, Award Fees, Specialty Metals, Small Claims.”

■ **Limitations on Pass-Through Charges:** This interim rule minimizes excessive pass-through charges by contractors from subcontractors that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value. This implements Section 866 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) for civilian agencies, and Section 852 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) for DOD.

The rule is intended to protect the interests of the government when there appears to be an agreement with a contractor to perform the contract scope of work, including managing subcontractors, then after award, the contractor subcontracts substantially all the effort without providing the required value-added subcontract management functions that were expected.

The following are the primary changes made by this interim rule:

- FAR 15.408, Solicitation Provisions and Contract Clauses, is amended by adding a paragraph (n) that requires FAR 52.215-22, Limitations on Pass-Through Charges – Identification of Subcontract Effort, be included in solicitations containing FAR 52.215-23, Limitations on Pass-Through Charges. Civilian agencies are required to include FAR 52.215-23 in all solicitations and contracts, including task or delivery orders, that exceed the simplified acquisition threshold (\$100,000) and are expected to be cost-reimbursement type. DOD is required to include FAR 52.215-23 in all contracts or orders that exceed the cost or pricing data threshold (\$650,000) except when the contract type is expected to be: (1) a firm-fixed-price contract awarded on the basis of adequate price competition; (2) a fixed-price contract with economic price adjustment awarded on the basis of adequate price competition; (3) a firm-fixed-price contract for the acquisition of a commercial item; or (4) a fixed-price contract with economic price adjustment, for the acquisition of a commercial item.

- FAR 31.203, Indirect Costs, is amended by adding a paragraph (i) that states that “excessive pass-through charges” are unallowable.
- The provision at FAR 52.215-22 requires offerors to exclude excessive pass-through charges. It requires the offeror to identify in its proposal how much of the contract effort is to be performed by the contractor and each of its subcontractors under the contract, task order, or delivery order. If the offeror intends to subcontract more than 70% of the total cost of work to be performed, the offeror is required to identify: (i) the amount of the offeror’s indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and (ii) a description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s). This requirement applies if any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70% of the total cost of work to be performed under its subcontract.
- The clause at FAR 52.215-23 contains the following:
 - Definitions:
 - “Added value” means “the contractor performs subcontract management functions that the contracting officer determines are a benefit to the government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions)”.
 - With respect to a contractor or subcontractor that adds no or negligible value to a contract or subcontract, an “excessive pass-through charge” means “a charge to the government by the contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).”
 - “No or negligible value” means “the contractor or subcontractor cannot demonstrate to the contracting officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).”
 - A requirement that the contractor notify the contracting officer if: (1) the contractor changes the amount of subcontract effort after award such that it exceeds 70% of the total cost of work to be performed under the contract, task order, or delivery order; or (2) any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70% of the total cost of the work to be performed under its subcontract.
 - If the contracting officer determines that excessive pass-through charges exist in cost-reimbursement contracts, the excessive pass-through charges are unallowable. For DOD fixed-price contracts other than those that are exempted (see FAR 15.408(n)),

the government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price.

- The contracting officer, or authorized representative, has the right to examine and audit all the contractor’s records necessary to determine whether the contractor proposed, billed, or claimed excessive pass-through charges. This applies to covered subcontractors as well.
- A requirement that the contractor insert the substance of the clause in all cost-reimbursement subcontracts under this contract that exceed the simplified acquisition threshold. However, if the contract is with DOD, then the contractor must insert the clause in all cost-reimbursement subcontracts and fixed-price subcontracts that exceed the threshold for obtaining cost or pricing data in FAR 15.403-4 (except the types of fixed-price subcontracts identified in FAR 15.408(n)). Covered subcontractors must include the clause in its covered lower-tier subcontracts.

Comments on the interim rule must be submitted no later than December 14, 2009, by any of the means mentioned above, except comments are to be identified as “FAC 2005-37, FAR case 2008-031.”

For more on the acquisition-related provisions of Public Law 110-417, see the November 2008 *Federal Contracts Perspective* article “2009 Defense Authorization Act Includes Clean Contracting Act.” For more on the acquisition-related provisions of Public Law 109-364, see the November 2006 *Federal Contracts Perspective* article “2007 Defense Authorization Addresses Training, Award Fees, Specialty Metals, Small Claims.”

■ **Limiting Length of Noncompetitive Contracts in “Unusual and Compelling Urgency”**

Circumstances: This final rule implements Section 862 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) to limit the length of contracts awarded noncompetitively under unusual and compelling urgency circumstances to the minimum contract period necessary to meet the requirements, and no longer than one year, unless the head of the agency determines that exceptional circumstances apply.

On May 31, 2007, the Office of Federal Procurement Policy (OFPP) issued a memorandum titled “Enhancing Competition in Federal Acquisition” to chief acquisition officers and senior procurement executives proposing several initiatives challenging any barriers to federal contract competition. One of the initiatives was “limiting the length of contracts awarded noncompetitively under urgent and compelling circumstances to the minimum contract period necessary to meet requirements, and no longer than one year unless approved by the head of the contracting activity.” In response, a change to FAR 6.302-2, Unusual and Compelling Urgency, was proposed to implement this initiative (see the March 2008 *Federal Contracts Perspective* article “Limit on Urgent Noncompetitive Contracts Proposed”). Two respondents submitted comments on the proposed rule.

Subsequent to the receipt of comments on the proposed rule, Public Law 110-417 was enacted, and Section 862 stated that any contract exceeding the simplified acquisition threshold (that is, \$100,000) that is entered into with other than full and open competition because of unusual and compelling urgency: (1) may not exceed the time necessary to meet the unusual and compelling requirements of the work to be performed under the contract; (2) may not exceed one year unless the head of the agency determines that exceptional circumstances apply; and (3) that follow-on contracts for the required goods or services must be made through competitive procedures (see the November 2008 *Federal Contracts Perspective* article “2009 Defense

Authorization Act Includes Clean Contracting Act”). During the preparation of the FAR changes to implement Section 862, the comments on the proposed rule were considered.

The final rule consists of a new paragraph (d) to FAR 6.302-2 that reiterates the requirements of Section 862. In addition, it states that “the determination of exceptional circumstances is in addition to the approval of the justification in [FAR] 6.304 [Approval of the Justification], [and] the determination may be made after contract award when making the determination prior to award would unreasonably delay the acquisition.”

■ **Government Accountability Office (GAO) Access to Contractor Employees:** This finalizes, without changes, the interim rule in FAC 2005-32 that amended FAR 52.214-26, Audit and Records – Sealed Bidding, and FAR 52.215-2, Audit and Records – Negotiation, to allow the GAO to interview current contractor employees when conducting audits on contracts that do *not* involve Recovery Act funds (FAC 2005-32 included a similar rule that allows GAO to interview contractor and subcontractor personnel when Recovery Act funds *are* used). The interim rule implemented Section 871 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417).

For more on the interim rule, see the April 2009 *Federal Contracts Perspective* article “FAC 2005-32 Implements Recovery Act.” For more on the acquisition-related provisions of Public Law 110-417, see the November 2008 *Federal Contracts Perspective* article “2009 Defense Authorization Act Includes Clean Contracting Act.”

■ **Use of Commercial Services Item Authority:** This interim rule implements Section 868 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417), which provides that purchases of commercial services that are not offered and sold competitively in substantial quantities in the commercial marketplace may be considered commercial items only if the contracting officer determines that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services. This provision is in new paragraph (c)(3)(ii) of FAR 15.403-1, Prohibition on Obtaining Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b).

Comments on the interim rule must be submitted no later than December 14, 2009, by any of the means mentioned above, except comments are to be identified as “FAC 2005-37, FAR case 2008-034.”

For more on the acquisition-related provisions of Public Law 110-417, see the November 2008 *Federal Contracts Perspective* article “2009 Defense Authorization Act Includes Clean Contracting Act.”

■ **Registry of Disaster Response Contractors:** This interim rule implements Section 697 of the Fiscal Year 2007 Department of Homeland Security (DHS) Appropriations Act (Public Law 109-295), which requires the Federal Emergency Management Agency (FEMA), a component of DHS, to establish and maintain a registry of contractors that are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities, and requires contracting officers to consult the Registry during market research and acquisition planning.

The Registry of Disaster Response Contractors consists of business information that is in the Central Contractor Registration (CCR) (<http://www.ccr.gov>) with two additional categories added to reflect the area served by the business, and the bonding level of the business concern. The CCR has been updated to include these changes. In addition, the FEMA website at <http://www.fema.gov/business/index.shtm> has been updated with a link to the Registry search feature at the CCR website.

This interim rule makes the following changes to the FAR:

- A definition of “Disaster Response Registry” is added to FAR 2.101, Definitions (“a voluntary registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities established in accordance with 6 U.S.C. 796, Registry of Disaster Response Contractors. The Registry contains information on contractors who are willing to perform disaster or emergency relief activities within the United States and its outlying areas”).
- New FAR 4.1104, Disaster Response Registry, requires contracting officers to consult the Registry at <http://www.ccr.gov> (FAR 4.1104, Solicitation Provisions and Contract Clauses, is redesignated as FAR 4.1105).
- Paragraph (v) is added to FAR 7.103, Agency-Head Responsibilities, which requires agency heads or designees to prescribe procedures which ensure that contracting officers consult the Registry as a part of acquisition planning for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas.
- Paragraph (a)(2)(v) of FAR 10.001, Policy, is revised to add language requiring agencies, in the conduct of their market research, to identify prospective contractors registered in the Registry when researching sources for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief supplies and services.
- FAR 18.102, Central Contractor Registration, is revised to state that, though contractors are not required to be registered in the CCR for contracts awarded to support unusual and compelling needs or emergency acquisitions, contractors *are required* to register with CCR to gain access to the Disaster Response Registry.
- New FAR 26.205, Disaster Response Registry, requires contracting officers to consult the Registry to determine the availability of contractors for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas. Also, it informs contracting officers how to locate vendors on the Registry: “A list of prospective vendors voluntarily participating in the Disaster Response Registry can be retrieved using the CCR Search tool on the CCR webpage. These vendors may be identified by selecting the criteria for ‘Disaster Response Contractors’. Contractors are required to register with CCR in order to gain access to the Disaster Response Registry.” (FAR 26.205, Solicitation Provision and Contract Clauses is redesignated as FAR 26.206.)

Comments on the interim rule must be submitted no later than December 14, 2009, by any of the means mentioned above, except comments are to be identified as “FAC 2005-37, FAR case 2008-035.”

■ **National Response Framework:** This final rule amends FAR 18.204, Resources, to reflect the reissuance of the FEMA National Response Plan (NRP) as the National Response Framework (NRF). With the reissuance, the term “Incidents of National Significance” was eliminated. These changes became effective on March 22, 2008. Both the NRP and the term

“Incidents of National Significance” are now obsolete. To reflect these changes, FAR 18.204(a) is revised accordingly. Also, it provides the website where the NRF is available: <http://www.fema.gov/emergency/nrf/>.

DOD MEMOS AND DFARS CHANGES ABOUND

DOD continues to be busy issuing directives to its acquisition workforce and making changes to the DOD FAR Supplement (DFARS), particularly direction to appoint ombudsmen for procurement integrity, preparation of a warranty guide, and nut’s publication of service contract inventories.

■ **Ombudsman for Procurement Integrity:** A memorandum from the Defense Procurement and Acquisition Policy (DPAP) director orders all DOD components to designate an ombudsman for procurement integrity by January 1, 2010. The ombudsman is to be an experienced senior official who is independent of the contracting officer and program manager functions, and will provide “a neutral, informal, confidential, and independent alternative for employees, managers, and customers, to seek assistance in resolving procurement integrity issues.”

The ombudsman is to “act upon complaints and questions about alleged acts, omissions, improprieties, and systemic problems regarding procurement integrity issues...” However, the ombudsman is not to “interfere with or usurp normal procurement and related authorities (*e.g.*, CO [contracting officer]/source selection authority, program manager (PM), Suspension and Debarment Official, or Designated Agency Ethics Official (DAEO).”

■ **Defense Warranty Guide:** Because “DOD relies heavily on warranties to support mission critical needs and must ensure a capability to track warranties for Item Unique Identification (IUID) required items, government furnished property and items covered by the Procurement Data Standard (PDS),” DOD announced that it has developed a “Department of Defense Warranty Guide” that is available at <http://www.acq.osd.mil/dpap/pdi/uid/guides.html> (direct access at [http://www.acq.osd.mil/dpap/pdi/uid/docs/departmentofdefensewarrantyguide\[1\].doc](http://www.acq.osd.mil/dpap/pdi/uid/docs/departmentofdefensewarrantyguide[1].doc)). The guide, which is based on the Air Force Materiel Command (AFMC) Warranty Guide and Army Warranty Regulation 700-139, “should be used by program managers, project officers, logistics managers, contracting officers, and others within DOD who may be responsible for warranty development and implementation.”

■ **Inventories of Contracts for Services:** Section 807 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) requires DOD to prepare “an annual inventory of the activities performed during the preceding fiscal year pursuant to contracts for services for or on behalf of the DOD.” This inventory is to be submitted to Congress and made available to the public.

In compliance with Section 807, the Defense Contract Management Agency (DCMA) and the Missile Defense Agency (MDA) have prepared and published their Fiscal Year 2008 inventories of services. The DCMA inventory is available at <http://www.dcma.mil/siteindex.cfm#I>, and the MDA inventory is available at <http://www.mda.mil/barbb/barbb.htm>.

■ **Extension of 8(a) Partnership Agreement Between the Small Business Administration (SBA) and DOD:** A memorandum from the DPAP director announced that the partnership agreement between the SBA and DOD that allows DOD contracting officers to award 8(a) contracts directly to 8(a) program participants, is extended until November 30, 2009. It was to expire September 30, 2009.

■ **Deletion of Obsolete Restriction on Research and Development:** This final rule removes DFARS 225.7016, Restriction on Research and Development, because the statutory provision it implemented – Section 744 of the DOD Appropriations Act for Fiscal Year 1973 (Public Law 92-570) is no longer in effect. Section 744 (and DFARS 225.7016) prohibited the use of DOD appropriations “to make an award to any foreign corporation, organization, person, or entity, for research and development in connection with any weapon system or other military equipment, if there is a U.S. corporation, organization, person, or entity (1) equally competent; and (2) willing to perform at a lower cost.”

Because of the removal of DFARS 225.7016, DFARS 225.7017, Restriction on Ballistic Missile Defense Research, Development, Test, and Evaluation, is redesignated as DFARS 225.7016.

■ **DOD Inspector General Address:** This final rule amends DFARS 203.1003, Requirements, to add the address of the DOD Inspector General office designated for receipt of information relating to a possible contractor violation of federal criminal law or the civil False Claims Act. The address is in new paragraph (b): DOD Inspector General, Investigative Policy and Oversight, Contractor Disclosure Program, 400 Army Navy Drive, Suite 1037, Arlington, VA 22202-4704; toll-free telephone: 866-429-8011.

OMB/OFPP MEMOS ABOUND, TOO

DOD isn't the only agency issuing directives to the acquisition workforce – the Office of Management and Budget (OMB) and its Office of Federal Procurement Policy (OFPP) are busy issuing memoranda, too.

■ **Increasing Competition and Structuring Contracts for the Best Results:** To help agencies comply with the requirement in OMB Memorandum M-09-25, “Improving Government Acquisition,” that agencies reduce by at least 10% the combined share of dollars obligated through new contracts in FY 2010 that are awarded non-competitively and/or receive only one bid in response to a solicitation or a request for quote, cost-reimbursement contracts, or time-and-materials (T&M)/Labor Hour (LH) contracts, OFPP has established initial guidelines to help Chief Acquisition Officers (CAOs) and Senior Procurement Executives (SPEs) evaluate the effectiveness of their agency's competition practices and processes for selecting contract types.

The OFPP guidelines focus around three key questions and a set of considerations for addressing each question:

- How is the agency maximizing the effective use of competition and choosing the best contract type for the acquisition?

A. *Maximizing the Effective Use of Competition*

1. Focus on requirements development and outreach to potential vendors
2. Use performance based acquisitions and commercial solutions
3. Evaluate alternative competition strategies for larger and more complex requirements
4. Use strategic sourcing
5. Ensure consistent maximization of competition at the task and delivery order level

6. Give maximum practicable consideration to small businesses, including minority businesses, and businesses owned by women and veterans
- B. *Choosing the best contract type for the acquisition*
 1. Determine the level of uncertainty
 2. Use incentives to motivate lower costs with improved delivery or technical performance and to discourage contractor inefficiency and waste
- How is the agency mitigating risk when noncompetitive, cost-reimbursement, or T&M/LH contracts are used?
 - A. *Mitigating the risk of noncompetitive contracts*
 1. Limit the length of the contract
 2. Ensure price reasonableness
 3. Regularly assess contractor performance
 - B. *Mitigating risk of cost-reimbursement and T&M/LH contracts*
 1. Be forward leaning in management and oversight of cost-reimbursement and T&M/LH contracts
 2. Link payment to performance on cost-plus-award-fee contracts
 3. Determine the appropriateness of T&M/LH contracts in commercial item acquisitions
 4. Provide for the necessary skills and capacity in the acquisition workforce to award and manage a cost-type contract
 - How is the agency creating opportunities to transition to more competitive and lower risk contracts?
 - A. *Transitioning to more competitive contracting*
 1. Engage the marketplace to determine how barriers to competition can be removed
 2. Do a spend analysis of the agency's largest spend categories
 - B. *Transitioning to lower risk contract types*
 1. Use appropriate mechanisms, such as contract review boards, peer reviews, or contract type advocates to bring additional expertise to bear in determining the best contract type
 2. Award contracts that allow the agency to choose between a fixed-price, cost-reimbursement, or T&M/LH basis for the payment of different contract requirements

For more on OMB Memorandum M-09-25, see the August 2009 *Federal Contracts Perspective* article "OMB Issues Five Memos Providing Contracting Guidance."

■ **Acquisition Workforce Development Strategic Plan for Civilian Agencies for Fiscal Years 2010-2014:** This OFPP memorandum provides a "structured approach to improve both the capacity and capability of the civilian acquisition workforce" to guide the growth in capacity and capability of the civilian agency acquisition workforce over the next five years. Specifically, the Acquisition Workforce Development Strategic Plan establishes: (1) the need for workforce growth; (2) a comprehensive annual workforce planning process to be managed by OFPP

through FY 2014; (3) a blueprint for increasing the use of intern programs and other training and development initiatives; and (4) a five-year action plan to improve workforce development efforts and the workforce management infrastructure.

Each agency is to develop an annual Acquisition Human Capital Plan that identifies specific strategies and goals for increasing both the capacity and capability of the workforce for the period ending in FY 2014. The plan is to be submitted to OFPP annually, starting March 31, 2010, and the March 31, 2010, plan is to reflect specific hiring and training needs for FY 2011 and will serve as a component of the agency's budget preparation beginning with the FY 2012 budget cycle.

■ **Improving Acquisition Data Quality for Fiscal Years 2009 and 2010:** The Federal Procurement Data System (FPDS) Data Quality Working Group analyzed agencies' FY 2008 data quality plans and certification reports and found three areas where the validation and reporting guidance and processes could be improved:

- Agencies should be required to provide more explicit information in their planning and certification reports to support a complete assessment of their data quality improvement activities and the identification and sharing of best practices.
- The sampling methodology should be refined. The FY 2008 guidance was not sufficient for determining the accuracy of specific data elements by agency with the statistical precision required by our guidance. There were also some ambiguities in the sampling guidance that appear to have contributed to inconsistencies in agencies' sampling approaches.
- OFPP should focus the FY 2009 and FY 2010 data quality efforts on data elements whose quality is dependent on the agency's internal data entry and control procedures. Agencies pointed out that, for FY 2008, they were required to validate data downloaded into FPDS from other databases whose accuracy was dependent on other agencies or contractors.

To address these issues, this year's "Agency FPDS Data Quality Report," which is due to OFPP by January 5, 2010: (1) requires that agencies' data quality improvement and validation activities be described more explicitly; (2) asks agencies to consider data element accuracy when developing their sampling methodologies and eliminates ambiguous language in the prior year's guidance; and (3) focuses agency validation efforts on internally generated data elements whose quality is best controlled by the agency itself (agencies pointed out that, for FY 2008, they were required to validate data downloaded into FPDS from other databases whose accuracy was dependent on other agencies or contractors).

To improve efficiency and reduce administrative burden, OFPP is consolidating the data quality planning, validation, and reporting requirements for FY 2009 and 2010. Instead of submitting separate planning and certification reports, agencies will submit annually a single FPDS Data Quality Report that includes the agency's certification of the completeness and accuracy of its FPDS data for the previous fiscal year, a description of activities to assure data input accuracy, and a summary of its policies and procedures for measuring and reporting data accuracy.

■ **Interim Guidance on Reviewing Contractor Reports on the Use of Recovery Act Funds in Accordance with FAR Clause 52.204-11:** FAR 52.204-11, American Recovery and

Reinvestment Act – Reporting Requirements, requires contractors to report each calendar quarter on their use of Recovery Act funds through **FederalReporting.gov** (<https://www.FederalReporting.gov>) (see the October 2009 *Federal Contracts Perspective* article “Recovery Act Reporting Website Available”). This OFPP memorandum forwards 20 “Frequently Asked Questions” (FAQs) that describe the requirements for certain agency personnel to register in the system, review reports (for consistency with award information, significant errors, material omissions), and take appropriate action as necessary. Also, the FAQs provide reporting and review timeframes.

- **FederalReporting.gov Recipient Reporting System Webinars:** In a related action, OMB announced the development of a series of webinars on the use of **FederalReporting.gov** (<https://www.federalreporting.gov/federalreporting/downloads.do#webinars>). The webinars of most interest to contractors are “Recipient Reporting Overview,” “Site Navigation Overview,” and “Federal Contractors – Excel.”

- **Performance-Based Management Systems:** OFPP is required to report to Congress annually on the progress of civilian agencies in their implementation of performance-based management systems (PBMS) for major acquisition programs. Performance-based management requires that major acquisition programs in each agency achieve, on average, 90% of their cost and schedule goals without reducing the performance or capabilities of the items being acquired.

PBMS requires agencies to integrate acquisition, project, and program activities. Guidance on the use of PBMS is in OMB Circular A-11, Preparation, Submission and Execution of the Budget, particularly Part 7, Planning, Budgeting, Acquisition, and Management of Capital Assets, and its supplement, the Capital Programming Guide. These emphasize the importance of project and acquisition planning, Earned Value Management (EVM), and operational analysis. In addition, OFPP has developed a reference document, “Strengthening Outcomes Through the Alignment of Acquisition, Project, and Program Activities,” that agencies may use to evaluate where opportunities for improved alignment in agency activities may exist. The document is posted at http://www.whitehouse.gov/omb/procurement_index_gov_contracting/.

OFPP’s memorandum requests that agencies provide budget and performance data for their 10 largest planned and/or current major real property asset construction projects by December 10, 2009. Attached to the memorandum is a set of questions to obtain general information on the state of civilian agency PBMS practices and a spreadsheet to gather information on select major construction projects. “The responses will be used, in part, to help identify programs where PBMS practices are strong and may serve as a model for other agencies. The responses will further be used to begin defining portfolios of non-IT investments, similar to the portfolio for IT found at Exhibit 53 in Circular A-11, that will lay the foundation for more comprehensive evaluations of program performance.”

SBA PROPOSES SMALL BUSINESS SIZE STANDARD INCREASES

As part of its ongoing initiative to review all small business size standards, the Small Business Administration (SBA) is proposing increases in the following industry groups, based on its “Size Standards Methodology” (available at <http://www.sba.gov/contractingopportunities/officials/size/ssm/index.html>), which it uses for developing and modifying size standards:

- **North American Industry Classification System (NAICS) Sectors 44-45, Retail Trade**

NAICS 441110, New Car Dealers, to **\$30.0 million** (from \$29.0 million)

NAICS 441210, Recreational Vehicle Dealers, to **\$30.0 million** (from \$7.0 million)

NAICS 441221, Motorcycle, ATV, and Personal Watercraft Dealers, to **\$14.0 million** (from \$7.0 million)

NAICS 441222, Boat Dealers, to **\$14.0 million** (from \$7.0 million)

NAICS 441229, Aircraft Dealers, Retail, to **\$25.5 million** (from \$10.0 million)

NAICS 441310, Automotive Parts and Accessories Stores, to **\$14.0 million** (from \$7.0 million)

NAICS 441320, Tire Dealers, to **\$14.0 million** (from \$7.0 million)

NAICS 442110, Furniture Stores, to **\$19.0 million** (from \$7.0 million)

NAICS 442299, All Other Home Furnishings Stores, to **\$19.0 million** (from \$7.0 million)

NAICS 443111, Household Appliance Stores, to **\$10.0 million** (from \$9.0 million)

NAICS 443112, Radio, Television and Other Electronics Stores, to **\$25.5 million** (from \$9.0 million)

NAICS 443120, Computer and Software Stores, to **\$25.5 million** (from \$9.0 million)

NAICS 443130, Camera and Photographic Supplies Stores, to **\$19.0 million** (from \$7.0 million)

NAICS 444110, Home Centers, to **\$35.5 million** (from \$7.0 million)

NAICS 444120, Paint and Wallpaper Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 444190, Other Building Material Dealers, to **\$19.0 million** (from \$7.0 million)

NAICS 444220, Nursery and Garden Centers, to **\$10.0 million** (from \$7.0 million)

NAICS 445110, Supermarkets and Other Grocery (except Convenience) Stores, to **\$30.0 million** (from \$27.0 million)

NAICS 446110, Pharmacies and Drug Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 446120, Cosmetics, Beauty Supplies and Perfume Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 446130, Optical Goods Stores, to **\$19.0 million** (from \$7.0 million)

NAICS 446191, Food (Health) Supplement Stores, to **\$14.0 million** (from \$7.0 million)

NAICS 447190, Other Gasoline Stations, to **\$14.0 million** (from \$9.0 million)

NAICS 448110, Men's Clothing Stores, to **\$10.0 million** (from \$9.0 million)

NAICS 448120, Women's Clothing Stores, to **\$25.5 million** (from \$9.0 million)

NAICS 448130, Children's and Infants' Clothing Stores, to **\$30.0 million** (from \$7.0 million)

NAICS 448140, Family Clothing Stores, to **\$35.5 million** (from \$9.0 million)

NAICS 448150, Clothing Accessories Stores, to **\$14.0 million** (from \$7.0 million)

NAICS 448190, Other Clothing Stores, to **\$19.0 million** (from \$7.0 million)

NAICS 448210, Shoe Stores, to **\$25.5 million** (from \$9.0 million)

NAICS 448310, Jewelry Stores, to **\$14.0 million** (from \$7.0 million)

NAICS 448320, Luggage and Leather Goods Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 451110, Sporting Goods Stores, to **\$14.0 million** (from \$7.0 million)

NAICS 451120, Hobby, Toy and Game Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 451130, Sewing, Needlework and Piece Goods Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 451140, Musical Instrument and Supplies Stores, to **\$10.0 million** (from \$7.0 million)

NAICS 451211, Book Stores, to **\$25.5 million** (from \$7.0 million)

NAICS 451220, Prerecorded Tape, Compact Disc and Record Stores, to **\$30.0 million** (from \$7.0 million)

NAICS 452111, Department Stores (except Discount Department Stores), to **\$30.0 million** (from \$27.0 million)

NAICS 452990, All Other General Merchandise Stores, to **\$30.0 million** (from \$11.0 million)

NAICS 453210, Office Supplies and Stationery Stores, to **\$30.0 million** (from \$7.0 million)

NAICS 453910, Pet and Pet Supplies Stores, to **\$19.0 million** (from \$7.0 million)

NAICS 453930, Manufactured (Mobile) Home Dealers, to **\$14.0 million** (from \$13.0 million)

NAICS 454111, Electronic Shopping, to **\$30.0 million** (from \$25.0 million)

NAICS 454112, Electronic Auctions, to **\$35.5 million** (from \$25.0 million)
NAICS 454113, Mail Order Houses, to **\$35.5 million** (from \$25.0 million)
NAICS 454210, Vending Machine Operators, to **\$10.0 million** (from \$7.0 million)

■ **NAICS Sector 72, Accommodation and Food Services:**

NAICS 721110, Hotels (except Casino Hotels) & Motels, to **\$30.0 million** (from \$7.0 million)
NAICS 721120, Casino Hotels, to **\$30 million** (from \$7.0 million)
NAICS 722211, Limited Service Restaurants, to **\$10 million** (from \$7.0 million)
NAICS 722212, Cafeterias, to **\$25.5 million** (from \$7.0 million)
NAICS 722310, Food Service Contractors, to **\$35.5 million** (from \$20.5 million)

■ **NAICS Sector 81, Other Services**

NAICS 811122, Automotive Glass Replacement Shops, to **\$10.0 million** (from \$7.0 million)
NAICS 811213, Communication Equipment Repair and Maintenance, to **\$10.0 million** (from \$7.0 million)
NAICS 811219, Other Electronic and Precision Equipment Repair and Maintenance, to **\$19.0 million** (from \$7.0 million)
NAICS 811412, Appliance Repair and Maintenance, to **\$14.0 million** (from \$7.0 million)
NAICS 812191, Diet and Weight Reducing Centers, to **\$19.0 million** (from \$7.0 million)
NAICS 812220, Cemeteries and Crematories, to **\$19.0 million** (from \$7.0 million)
NAICS 812320, Dry-cleaning and Laundry Services (except Coin-Operated), to **\$5.0 million** (from \$4.5 million)
NAICS 812331, Linen Supply, to **\$30.0 million** (from \$14.0 million)
NAICS 812332, Industrial Launderers, to **\$35.5 million** (from \$14.0 million)
NAICS 812921, Photo Finishing Laboratories (except One-Hour), to **\$19.0 million** (from \$7.0 million)
NAICS 812922, One-Hour Photo Finishing, to **\$14.0 million** (from \$7.0 million)
NAICS 812930, Parking Lots and Garages, to **\$35.5 million** (from \$7.0 million)
NAICS 813211, Grantmaking Foundations, to **\$30.0 million** (from \$7.0 million)
NAICS 813212, Voluntary Health Organizations, to **\$25.5 million** (from \$7.0 million)
NAICS 813219, Other Grant Making and Giving Services, to **\$35.5 million** (from \$7.0 million)
NAICS 813311, Human Rights Organizations, to **\$25.5 million** (from \$7.0 million)
NAICS 813312, Environment, Conservation and Wildlife Organizations, to **\$14.0 million** (from \$7.0 million)
NAICS 813920, Professional Organizations, to **\$14.0 million** (from \$7.0 million)

Comments on these proposed changes must be submitted no later than December 21, 2009, by either of the following methods: (1) Federal eRulemaking portal: <http://www.regulations.gov>; follow the instructions for submitting comments; or (2) mail/hand delivery/courier to: Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW, Mail Code 6530, Washington, DC 20416. Cite “RIN 3245-AF69” in all correspondence pertaining to the proposed Sectors 44-45 size changes, “RIN 3245-AF71” in all correspondence pertaining to the proposed Sector 72 size changes, and “RIN 3245-AF70” in all correspondence pertaining to the proposed Sector 81 size changes. Comments on the “Size Standards Methodology” may be submitted at any time by either of the methods mentioned above – cite “Docket number SBA-2009-0008” in all correspondence pertaining to the methodology.

GSAR PARTS 503 AND 532 REWRITTEN

The General Services Administration (GSA) has finalized GSA Acquisition Regulation (GSAR) Part 503, Improper Business Practices and Personal Conflicts of Interest, and GSAR Part 532, Contract Financing, as part of its GSAR rewrite project.

■ **GSAR Part 503, Improper Business Practices and Personal Conflicts of Interest:** The following revisions are made to GSAR Part 503:

- GSAR 503.104-3, Definitions; GSAR 503.104-9, Contracts Clauses; GSAR 503.404, Contract Clauses; GSAR 552.203-5, Covenant Against Contingency Fees; and GSAR 552.203-70, Price Adjustment for Illegal or Improper Activity, are deleted. All of them addressed leasehold interests in real property, which is covered in GSA Acquisition Manual (GSAM) Part 570, Acquiring Leasehold Interests in Real Property.
- In paragraph (c) of GSAR 503.204, Treatment of Violations, “the Chairman of the GSA Board of Contract Appeals” is replaced with “the Suspension and Debarment Official in accordance with GSAR 509.403” because the GSA Board of Contract Appeals no longer exists.
- GSAR 503.702, Definition, is removed because the terms “Notice” and “Voiding and rescinding official” do not require definition. Instead, GSAR 503.703, Authority, is added to identify the Senior Procurement Executive as having the authority to void and rescind contracts in accordance with FAR 3.703 and paragraph (b) of FAR 3.705, Procedures.
- GSAR 503.705, Procedures, is removed and relocated to the GSAM because it relates to internal administrative procedures.
- GSAR Subpart 503.10, Contractor Code of Business Ethics and Conduct, is added. It consists of GSAR 503.1004, Contract Clauses, which reduces the threshold for the inclusion of FAR 52.203-14, Display of Hotline Poster(s), from \$5,000,000 to \$1,000,000 (paragraph (a)), and includes the name of the poster and where the poster may be obtained (paragraph (b) – “FraudNet Hotline” and “the contracting officer,” respectively).

One respondent submitted comments on the proposed rule, and a editorial change was made. For more on the proposed rule, see the September 2008 *Federal Contracts Perspective* article “GSAR Rewrite Begins to Show Results.”

■ **GSAR Part 532, Contract Financing:** The following revisions are made to GSAR Part 532:

- GSAR Subpart 532.1, Non-Commercial Item Purchase Financing, which consists of GSAR 532.111, Contract Clauses for Non-Commercial Purchases, is revised to remove the prescriptions for GSAR 552.232-70, Invoice Requirements, and GSAR 552.232-71, Adjusting Payments, which are deleted because they are redundant to the FAR and/or Standard Form 26, Award/Contract. The prescription for GSAR 552.232-72, Final Payment Under Building Services Contracts (formerly “Final Payment”), is moved to new GSAR 532.904, Determining Payment Due Dates. Also, the prescription for use of GSA Form 2419, Certification of Progress Payments Under Fixed-Price Construction

Contracts, is added (moved from GSAR 532.905-70, Certification of Payment to Subcontractors and Suppliers Under Fixed-Price Construction Contracts).

- GSAR Subpart 532.2, Commercial Items Purchase Financing, is deleted because it consists solely of prescriptions for four clauses that are deleted.
- GSAR Subpart 532.7, Contract Funding, is removed.
- GSAR Subpart 532.9, Prompt Payment, is revised as follows:
 - GSAR 532.902, Definitions, which consists of a definition for “full cycle electronic commerce,” is deleted because the term is not used elsewhere in the GSAR except in paragraph (a)(2) of GSAR 552.232-25, Prompt Payment.
 - GSAR 532.904, Determining Payment Due Dates, is added. It consists of the prescription for GSAR 552.232-72, Final Payment Under Building Services Contracts (the prescription was formerly in GSAR 532.111, Contract Clauses for Non-Commercial Purchases), and procedures that apply to construction and building service contracts (moved from GSAR 532.905-71, Final Payment – Construction and Building Service Contracts).
 - GSAR 532.905, Payment Documentation and Process, replaces GSAR 532.905, Invoice Payments. The text of GSAR 532.905-70 is moved to GSAR 532.111, and the text of GSAR 532.905-71 is moved to GSAR 532.904.
 - GSAR 532.908, Contract Clauses, is revised to remove the prescriptions for GSAR 552.232-75, Prompt Payment, and GSAR 552.232-76, Electronic Funds Transfer Payment, which will be transferred to GSAR Part 570, Acquiring Leasehold Interests in Real Property, because they apply to contracts for leasehold interests.
- In GSAR Subpart 532.70, Authorizing Payment by Government Charge Card (formerly titled “Authorizing Payment of Governmentwide Commercial Purchase Card”), the following changes are made:
 - GSAR 532.7001, Definition, which consists of a definition of “Governmentwide commercial purchase card,” is deleted because it merely refers to the definition in FAR 13.101, General [Simplified Acquisition Procedures].
 - GSAR 532.7002, Solicitation Requirements, is deleted, and much of the language is incorporated into GSAR 552.232-77, Payment by Government Charge Card.
 - GSAR 532.7003, Contract Clause, is revised to delete the information regarding Federal Supply Schedule contracts, instead referring to GSAR Part 538.
- GSAR Subpart 532.71, Payments for Recurring Services, is deleted because it consists of a definition for “fixed-roll payments,” which is no longer used by GSA.
- Alternate II of GSAR 552.212-4, Contract Terms and Conditions – Commercial Items, is added. It consists of the text of GSAR 552.232-74, Invoice Payments, which is deleted.

- The following clauses are deleted: GSAR 552.232-8, Discounts for Prompt Payment; GSAR 552.232-70, Invoice Requirements; GSAR 552.232-71, Adjusting Payments; GSAR 552.232-73, Availability of Funds; GSAR 552.232-74, Invoice Payments; GSAR 552.232-75, Prompt Payment; GSAR 552.232-76, Electronic Funds Transfer Payment; GSAR 552.232-78, Payment Information; GSAR 552.232-79, Payment by Credit Card; GSAR 552.232-81, Payments by Non-Federal Ordering Activities; GSAR 552.232-82, Contractor's Remittance (Payment) Address; and GSAR 552.232-83, Contractor's Billing Responsibilities.

Three respondents submitted comments on the proposed rule. Many of the comments apply solely to construction and architect-engineer contracts. These comments were referred to the team rewriting GSAM Part 536, Construction and Architect-Engineer Contracts, for consideration. Other differences between the proposed and final versions of the rule are:

- GSAR Subpart 532.8, Assignment of Claims, which was proposed for deletion, is retained.
- The proposed paragraph (a) of GSAR 532.904, Determining Payment Due Dates, referenced GSA Form 1142, Release of Claims. However, a commenter asserted that the form is unauthorized since there is no Office of Management and Budget (OMB) control number and no indication that a Regulatory Flexibility Act analysis was ever performed on the form. GSA agrees, so it deleted the GSA Form 1142 and GSAR 532.904(a) from the final version.
- The proposed paragraph (a) of GSAR 532.905, Payment Documentation and Process, would have required contractors to submit invoices or vouchers concurrently to the Office of the Chief Financial Officer and the contracting officer for approval. However, since the contracting officer is considered to be the "one-face" to the public, paragraph (a) has been revised to require contractors to submit invoices or vouchers to the contracting officer.
- The proposed new GSAR 552.232-7007, Limitation of Government's Obligation, would have authorized incremental funding of fixed-price, time-and-materials, and labor-hour contracts. However, a commenter thought this would be ill-advised. Because GSA could not find any agency FAR supplement that authorizes use of incremental funding on time-and-materials or labor-hour contracts, and DOD circumscribes the use of incremental funding on fixed-price contracts, the proposed GSAR 552.232-7007 is deleted from the final rule.

For more on the proposed rule, see the November 2008 *Federal Contracts Perspective* article "GSAR Rewrite Keeps Rolling Along."

USDA ADDS NINE MORE BIOBASED ITEMS

The United States Department of Agriculture (USDA) is adding nine sections to Title 7 of the Code of Federal Regulations (CFR), Part 2902, Guidelines for Designating Biobased Products for Federal Procurement (7 CFR Part 2902), to add nine more biobased products to be given preference in federal procurements as provided under Section 9002 of the Farm Security

and Rural Investment Act of 2002 (FSRIA), and to specify the minimum level of biobased content to be contained in the procured products.

The following are the proposed new designated items and their Title 7 section numbers:

2902.43, Chain and cable lubricants
2902.44, Corrosion preventatives
2902.45, Food cleaners
2902.46, Forming lubricants
2902.47, Gear lubricants
2902.48, General purpose household cleaners
2902.49, Industrial cleaners
2902.50, Multipurpose cleaners
2902.51, Parts wash solutions

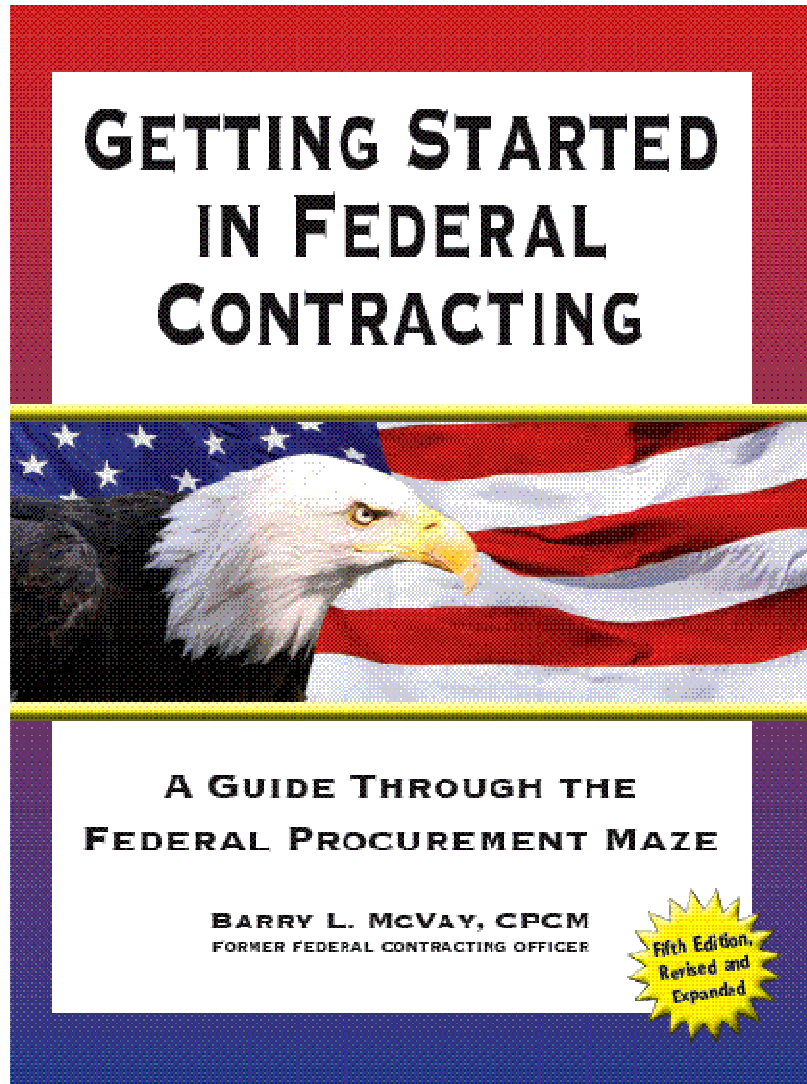
As a general rule, procuring agencies must purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more, unless products within a designated item: (1) are not reasonably available within a reasonable period of time; (2) fail to meet the reasonable performance standards of the procuring agencies; or (3) are available only at an unreasonable price. The \$10,000 threshold applies to federal agencies as a whole and not to agency subgroups such as regional offices or subagencies of the larger federal department or agency.

For more information on the biobased program and all 51 of its products, go to <http://www.biopREFERRED.gov/>. For more on the proposal to add these nine products to the biobased program, see the November 2008 *Federal Contracts Perspective* article “Nine More Biobased Items Proposed.” Also see the February 2005 *Federal Contracts Perspective* article “USDA Publishes Biobased Products Guidelines,” the April 2006 *Federal Contracts Perspective* article “USDA Designates Six Biobased Products for Procurement,” the September 2006 *Federal Contracts Perspective* article “USDA Proposes 20 More Biobased Products,” the November 2006 *Federal Contracts Perspective* article “10 More Biobased Items Proposed,” and the June 2008 *Federal Contracts Perspective* article “USDA Adds 27 Items to Biobased Products List, Exempts DOD and NASA from Requirements.”

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