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PROPOSED RULE WOULD REQUIRE CONTRACTORS TO PREVENT EMPLOYEES' PERSONAL CONFLICTS OF INTEREST

A proposed change to the Federal Acquisition Regulation (FAR) would require each contractor that has employees performing acquisition functions closely associated with inherently governmental functions to identify and prevent personal conflicts of interest for such employees. In addition, the proposed rule would make contractors responsible for having procedures to screen for potential conflicts of interest, informing covered employees of their obligations with regard to these policies, maintaining effective oversight to verify compliance, reporting any personal conflict-of-interest violations to the contracting officer, and taking appropriate disciplinary action with employees who fail to comply with these policies.

This proposed FAR change would implement Section 841(a) of the Fiscal Year 2009 National Defense Authorization Act (Public Law 110-417), which addresses "Policy on Personal Conflicts of Interest by Employees of Federal Government Contractors." Section 841(a) requires the Office of Federal Procurement Policy (OFPP) to "develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, and administration of government contracts) for or on behalf of a federal agency or department." It goes on to require OFPP to develop and issue "a personal conflicts-of-interest clause or a set of clauses for inclusion in solicitations and contracts (and task or delivery orders) for the performance of acquisition functions closely associated with inherently governmental functions that sets forth the personal conflicts-of-interest policy developed under this subsection and that sets forth the contractor's responsibilities under such policy." For more on Section 841 of Public Law 110-417, see the November 2008 *Federal Contracts Perspective* article "2009 Defense Authorization Act Includes Clean Contracting Act."

This proposed rule does *not* address personal conflicts of interest by contractor employees with respect to other functions, nor does it address the issue of additional FAR coverage addressing organizational conflicts of interest. Those issues will be addressed in a separate rule change (for more on this, see the April 2008 *Federal Contracts Perspective* article "Personal and Organizational Conflicts of Interest for Contractors Under Consideration").

To implement Section 841(a), new FAR Subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, would be added. FAR Subpart 3.11 would contain the following provisions and requirements:

CONTENTS	
Contractors to Prevent Conflicts of Interest.....	1
DOD Ties Up Some Loose Ends	4
"HUBZone Employee" Definition Revised.....	9
50% SBVOSB Performance Does Not Apply	10
Social Media Makes Acquisition More Effective	11
HSAR Prohibits Guard Services by Felons	12
Direct Hire Authority Extended.....	14
Gordon New OFPP Administrator.....	14
Rewritten HHSAR Unveiled	15

■ FAR 3.1101, Definitions, would include the following definitions:

– “Acquisition function closely associated with inherently governmental functions” means “supporting or providing advice or recommendations with regard to the following activities of a federal agency: (1) planning acquisitions; (2) determining what supplies or services are to be acquired by the government, including developing statements of work; (3) developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria; (4) evaluating contract proposals; (5) awarding government contracts; (6) administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services); (7) terminating contracts; [or] (8) determining whether contract costs are reasonable, allocable, and allowable.”

– “Covered employee” means “an individual who (1) is an employee of the contractor or subcontractor, a consultant, a partner, or a sole proprietor; and (2) performs an acquisition function closely associated with inherently governmental functions.”

– “Non-public government information” means “any information that a covered employee gains by reason of work under a government contract and that the covered employee knows, or reasonably should know, has not been made public. It includes information that: (1) is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, executive order, or regulation; or (2) has not been disseminated to the general public and is not authorized by the agency to be made available to the public.”

– “Personal conflict of interest” means “a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee’s ability to act impartially and in the best interest of the government when performing under the contract. Among the sources of personal conflicts of interest are: (i) financial interests of the covered employee, of close family members, or of other members of the household; (ii) other employment or financial relationships (including seeking or negotiating for prospective employment or business); and (iii) gifts, including travel. Financial interests may arise from: (i) compensation, including wages, salaries, commissions, professional fees, or fees for business referrals; (ii) consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation); (iii) services provided in exchange for honorariums or travel expense reimbursements; (iv) research funding or other forms of research support; (v) investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments); (vi) real estate investments; (vii) patents, copyrights, and other intellectual property interests; or (viii) business ownership and investment interests.”

Vivina McVay, Editor-in Chief

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■ FAR 3.1102, Policy, would state that “it is government policy to require contractors to: (a) Identify and prevent personal conflicts of interest of their covered employees; and (b) prohibit covered employees who have access to non-public government information from using such information for personal gain.”

■ Paragraph (a) of FAR 3.1103, Procedures, would require the inclusion of new FAR 52.203-16, Preventing Personal Conflicts of Interest, in solicitations and contracts that exceed the simplified acquisition threshold (\$100,000) and include a requirement for services that involve performance of acquisition functions closely associated with inherently governmental functions for or on behalf of a federal agency or department.

FAR 52.203-16 would require “each contractor whose employees perform acquisition functions closely associated with inherently government functions to:

“(1) Have procedures in place to screen covered employees for potential personal conflicts of interest including: (i) obtaining and maintaining a financial disclosure statement from each covered employee when the employee is initially assigned to the task under the contract; (ii) ensuring that the disclosure statements are updated by the covered employees at least on an annual basis; and (iii) requiring each covered employee to update the disclosure statement whenever a new personal conflict of interest occurs;

“(2) For each covered employee: (i) prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract if the contractor has identified a personal conflict of interest for the employee that the contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency; (ii) prohibit use of non-public government information for personal gain; and (iii) obtain a signed non-disclosure agreement to prohibit disclosure of non-public government information;

“(3) Inform covered employees of their obligation: (i) to disclose changes in personal or financial circumstances and prevent personal conflicts of interest; (ii) not to use non-public government information for personal gain; and (iii) to avoid even the appearance of personal conflicts of interest;

“(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

“(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this section; and

“(6) Report to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified. This report shall include a description of the violation and the actions taken by the contractor in response to the violation.”

Paragraph (b) provides that, if a contractor reports a personal conflict-of-interest violation to the contracting officer, the contracting officer would be required to “review the actions taken by the contractor; (2) decide whether the contractor has resolved the violation satisfactorily; and (3) take any other appropriate action in consultation with agency legal counsel.”

■ FAR 3.1104, Mitigation or Waiver, would provide that “in exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict-of-interest...the contractor may submit a request, through the contracting officer, for the head of the contracting activity to: (1) agree to a plan to mitigate the personal conflict of interest; or (2) waive that requirement.” This authority cannot be delegated.

■ FAR 3.1105, Violations, would provide that “if the contracting officer suspects violation of a requirement of the [FAR] clause 52.203-16...the contracting officer shall contact the agency legal counsel for advice and/or recommendations on a course of action. If there is sufficient evidence of a violation, the contracting officer shall pursue appropriate remedies as specified in paragraph (d) of the clause. These remedies are in addition to any other remedies available to the government.” The remedies in FAR 52.203-16(d) are: “(1) suspension of contract payments; (2) loss of award fee, consistent with the award fee plan, for the performance period in which the government determined contractor non-compliance; (3) termination of the contract for default or cause, in accordance with the termination clause of this contract; (4) disqualification of the contractor from subsequent related contractual efforts; or (5) suspension or debarment.”

FAR 52.203-16 would reflect all the requirements specified in FAR Subpart 3.11. In addition, FAR 52.203-16(e) would require that the clause be included in all subcontracts that exceed \$100,000, and in which subcontractor employees may perform acquisition functions closely associated with inherently governmental functions.

Comments on this proposed rule must be submitted no later than January 12, 2010, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-025” under the heading “Comment or Submission,” select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-025; 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 2008-025” in all correspondence.

Comments are welcomed “on additional controls or remedies to help deter noncompliance, such as annual reporting requirements to verify compliance with the clause requirements, or certification by the contractor or by the contractor’s employees.”

EDITOR’S NOTE: See the next article for information on the Department of Defense memorandum addressing personal conflicts-of-interest.

DOD TIES UP SOME LOOSE ENDS

During November, the Department of Defense (DOD) finalized five interim rules, issued two new interim rules, announced the further extension of the 8(a) partnership with the Small Business Administration (SBA), issued two class deviations, and issued one guidance memorandum.

■ **Senior DOD Officials Seeking Employment With Defense Contractors:** This rule finalizes, without change, the interim rule that implemented Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), by adding DFARS 203.171, Senior DOD Officials Seeking Employment with Defense Contractors, and DFARS 252.203-7000, Requirements Relating to Compensation of Former DOD Officials, to addresses requirements for senior DOD officials to obtain a post-employment ethics opinion before accepting a position from a DOD contractor within two years after leaving DOD service. A covered “senior DOD official” is one who left service on or after January 28, 2008, and who has participated personally and substantially in a DOD acquisition exceeding \$10 million, or who has held a key acquisition position (that is, program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team). These

senior DOD officials must obtain a written opinion from a DOD ethics counselor regarding the activities that the official may undertake on behalf of a DOD contractor within two years after leaving DOD service. In addition, a DOD contractor is prohibited from providing compensation to such a DOD official without first determining that the official has received or appropriately requested a post-employment ethics opinion. Failure by the contractor to do so may subject the contractor to rescission of the contract, suspension, or debarment.

One respondent submitted a comment on the interim rule, but DOD decided not to adopt the comment, so the interim rule is finalized without change. For more on the interim rule, see the February 2009 *Federal Contracts Perspective* article “Fifteen DFARS Rules for the New Year.”

■ **Whistleblower Protections for Contractor Employees:** This rule finalizes, without change, the interim rule that added DFARS Subpart 203.9, Whistleblower Protections for Contractor Employees, to implement Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417), both of which addressed protections for contractor employees who disclose information to government officials with regard to waste or mismanagement, danger to public health or safety, or violation of law related to a DOD contract.

FAR Subpart 3.9 prohibits contractors from discharging, demoting, or otherwise discriminating against employees as a reprisal for disclosing to government officials information on a substantial violation of law related to a contract. Section 846 of Public Law 110-181 and Section 842 of Public Law 110-417 amended the laws implemented by FAR Subpart 3.9 to establish protections for DOD contractor employees that differ from those specified in FAR Subpart 3.9. Therefore, DFARS Subpart 203.9 was added to address these differences.

No comments were submitted on the interim rule, so it is finalized without change. For more on the interim rule, see the February 2009 *Federal Contracts Perspective* article “Fifteen DFARS Rules for the New Year.”

■ **Competition Requirements for Purchases From Federal Prison Industries (FPI):** This finalizes, without changes, the interim rule that added DFARS Subpart 208.6, Acquisition From Federal Prison Industries, Inc., to implement Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which requires the use of competitive procedures in the acquisition of items for which FPI has a significant market share (defined as greater than 5% of the DOD market). The list of such products is available at http://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#federal_prison.

Paragraph (c) of DFARS 208.602-70, Acquisition of Items for Which FPI Has a Significant Market Share, requires contracting officers, when acquiring an item on the list, to use “(i)(A) competitive procedures (*e.g.*, the procedures in FAR 6.102 [Use of Competitive Procedures], the set-aside procedures in FAR Subpart 19.5 [Set-Asides for Small Business], or competition conducted in accordance with FAR Part 13 [Simplified Acquisition Procedures]); or (B) the fair opportunity procedures in FAR 16.505 [Ordering], if placing an order under a multiple award delivery-order contract; and (ii) include FPI in the solicitation process, consider a timely offer from FPI, and make an award in accordance with the policy at FAR 8.602(a)(4)(ii) through (v) [Policy (on Acquisition from FPI)].”

Five respondents submitted comments on the interim rule, but none of the comments were adopted, so the interim rule is finalized without change. For more on the interim rule, see the September 2008 *Federal Contracts Perspective* article “DFARS Amended to Address Competition For Purchases from Federal Prison Industries.”

■ **Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority:** This finalizes, without changes, the interim rule that implemented Section 824 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) by *shortening* the DOD pilot program for transition to follow-on contracting after use of the “other transaction” authority (from September 30, 2013, to September 30, 2010), but including within the scope of the program items developed under research projects. (DFARS 212.7001, Definitions, defines an “other transaction” as one that “(1) is other than a contract, grant, or cooperative agreement; (2) is not subject to the FAR or its supplements; and (3) is entered into in accordance with 32 CFR [Code of Federal Regulations] Part 3 [Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects].”)

The pilot program provides that certain items that do not otherwise meet the definition of “commercial item” may be treated as commercial items in the award of contracts and subcontracts that follow an “other transaction” agreement.

No comments were submitted on the interim rule, so it is finalized without change. For more on the interim rule, see the February 2009 *Federal Contracts Perspective* article “Fifteen DFARS Rules for the New Year.”

■ **Steel for Military Construction Projects:** This finalizes, without changes, the interim rule that added DFARS 236.274, Restriction on Acquisition of Steel for Use in Military Construction Projects, and DFARS 252.236-7013, Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers, to implement Section 108 of Division E of the Military Construction and Veterans Affairs Appropriations Act for Fiscal Year 2009 (Public Law 110-329), which prohibits the use of the exceptions to the Buy American Act (see FAR Subpart 25.2) or the Balance of Program requirements (see DFARS Subpart 225.75) unless American steel producers, fabricators, and manufacturers are first given the opportunity to compete for contracts and subcontracts for the acquisition of steel for use in military construction projects or activities.

No comments were submitted on the interim rule, so it is finalized without change. For more on the interim rule, see the February 2009 *Federal Contracts Perspective* article “Fifteen DFARS Rules for the New Year.”

■ **New Designated Country – Taiwan:** This interim rule adds Taiwan (“the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”) as a “designated country” to the list of World Trade Organization Government Procurement Agreement countries in paragraph (a)(3)(i) of DFARS 252.225-7021, Trade Agreements, and in the definition of “designated country” in paragraph (a) of DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements. This change is made because Taiwan became a party to the World Trade Organization Government Procurement Agreement on July 15, 2009 (for more on a similar change to the FAR, see the September 2009 *Federal Contracts Perspective* article “FAC 2005-36 Tidies Up Some Loose Ends”).

Comments on this interim rule must be submitted no later than January 22, 2010, by any of the following means: (1) <http://www.regulations.gov>; (2) e-mail: dfars@osd.mil; (3) fax: 703-602-7887; (4) mail: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; or (5) hand delivery/courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402. Cite “DFARS Case 2009-D010” in all correspondence.

■ **Government Rights in the Design of DOD Vessels:** This interim rule amends DFARS Subpart 227.71, Rights in Technical Data, and corresponding clauses at DFARS 252.227-7013, Rights in Technical Data – Noncommercial Items, and DFARS 252.227-7015, Technical Data – Commercial Items, to implement Section 825 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) and the Vessel Hull Design Protection Amendments of 2008 (Public Law 110-434). The two statutory provisions are similar in substance and language in that they both clarify the government’s technical data rights in the designs of DOD vessels, boats, craft, and components.

To implement the statutory changes, a new paragraph (c) is added to DFARS 227.7102-1, Policy [for commercial items, components, or processes], and a new paragraph (g) is added to DFARS 227.7103-1, Policy [for noncommercial items or processes]. These two new paragraphs alert contracting officers that “the government’s rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the government’s rights in technical data pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).”

In addition, the rule provides an Alternate II to DFARS 252.227-7013, and an Alternate I to DFARS 252.227-7015, for use “in contracts for the development or delivery of a vessel design or any useful article embodying a vessel design.” Each alternate adds to the basic clause a new definition for “vessel designs,” and an affirmative grant of appropriate rights in those vessel designs to the government.

Comments on this interim rule must be submitted no later than January 22, 2010, by any of the means identified above, except that “DFARS Case 2008-D039” is to be cited in all comments pertaining to this interim rule.

■ **Class Deviation to Implement Temporary Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan:** This class deviation implements Section 801 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which provides temporary authority to limit competition to, or provide a preference for products and services that are from countries along the Northern Distribution Network in support of operations in Afghanistan when it is determined that it is in the national security interest of the United States. This temporary authority may be used to acquire products and services produced in Georgia, the Kyrgyz Republic, Pakistan, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan, or Turkmenistan.

■ **Class Deviation on Small Disadvantaged Business (SDB) Certification for Subcontractors:** This class deviation directs contracting officers to use deviations from FAR 19.703, Eligibility Requirements for Participating in the Program; paragraph (c) of FAR 52.219-8, Utilization of Small Business Concerns; and paragraph (a) of FAR 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting. The Small Business Administration (SBA) decided it would no longer certify SDBs, and would allow firms to self-represent their SDB status for subcontracting purposes, as of October 3, 2008 (see the October 2008 *Federal Contracts Perspective* article “SBA Ceases Certifying SDBs”). However, the FAR has not yet been revised to reflect the SBA’s decisions, so DOD decided to issue this class deviation “to be consistent with the SBA’s current regulations and to alleviate any adverse impact to the SDB subcontracting goal for DOD prime contractors”.

■ **Personal Conflicts of Interest (PCIs) of Contractors’ Employees:** This memorandum provides the following guidance: “The risk associated with PCIs is directly related to the supply or service being acquired and the type of contract used to secure the supply or service. Attachment 1 [of the memorandum] depicts levels of risk created as a function of the relationship

between potential impacts of PCIs and the likelihood that contractors will influence government decisions. PCIs present lesser risk to the government on fixed-price, supply contracts – however, risk increases as the supply or services become more sophisticated or the relationships between government and contractor blur into inherently governmental functions. Attachment 2 provides scenarios of contractor employee PCIs and the level of risk associated with each scenario.” (See the previous article for information on the proposed FAR rule addressing PCIs.)

■ **Extension of 8(a) Partnership Agreement Between the SBA and DOD:** This memorandum announces that the 8(a) partnership agreement between the SBA and DOD has been extended from November 30, 2009, to December 31, 2009. DOD contracting officers are allowed to continue to award 8(a) contracts directly to 8(a) program participants in accordance with DFARS Subpart 219.8, Contracting with the Small Business Administration (the 8(a) Program).

For more on the extension of the 8(a) partnership agreement from September 30, 2009, to November 30, 2009, see the November 2009 *Federal Contracts Perspective* article “DOD Memos and DFARS Changes Abound.”

■ **Meeting on Weapon Systems Acquisition Reform Act Organizational Conflicts of Interest Requirements:** DOD is hosting a public meeting to establish an initial dialogue with industry and government agencies about the requirements of Section 207 of the Weapon Systems Acquisition Reform Act of 2009 (Public Law 111-23) (WSARA) relating to organizational conflicts of interest (OCI). The meeting will be held on December 8, 2009, between 1:00 pm and 4:00 pm, at the General Services Administration (GSA) Auditorium, 1800 F Street, NW, Washington, DC.

Suggested areas for comments and presentations by attendees on Section 207 are:

1. OCIs related to lead system integrator contractors on major defense acquisition programs and follow-on contracts for production;
2. Ownership of business units performing systems engineering and technical assistance functions, professional services, or management support services of major defense acquisition programs in relation to the business units that compete to perform as supplier for such programs; and
3. Award of major subsystem contracts by the prime contractor for a major defense acquisition program to affiliated business units for (1) software integration or development of proprietary software system architecture, or (2) providing technical evaluations on major defense acquisition programs.

Those planning to attend must fax the following information to 703-614-1254, or e-mail to Sandra.Ross@osd.mil by December 3, 2009:

- Company or organization name
- Names of persons attending
- Identify if desiring to speak; limit to a 10-minute presentation per company or organization
- Last four digits of the social security number for anyone who is not a federal government employee with a government badge, to create an attendee list for secure entry to the GSA building. Interested parties are encouraged to arrive at least 30 minutes early to accommodate security procedures.

Those wishing to make a presentation should contact and submit a copy of the presentation five (5) days prior to the meeting date, to CPIC/DPAP, 3060 Pentagon, Room 5E621, Attn:

Sandra Ross, Washington, DC 20301-3060. Submit electronic materials via e-mail to **Sandra.Ross@osd.mil**. Please submit presentations only and cite “WSARA OCI Public Meeting” in all correspondence related to the public meeting. The submitted presentations will be the only record of the public meeting.

SBA REVISES DEFINITION OF “HUBZONE EMPLOYEE”

The Small Business Administration (SBA) is revising the definition of “employee” as it pertains to the Historically Underutilized Business Zone (HUBZone) program to simplify it and increase employment of HUBZone residents.

Currently, 35% of a HUBZone concern’s employees must be residents of a HUBZone. SBA’s regulation at Title 13 of the Code of Federal Regulations (CFR), Section 126.103, What definitions are important in the HUBZone program?, had defined “employee” as “a person (or persons) employed by a HUBZone SBC [small business concern] on a full-time (or full-time equivalent), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week...Temporary employees, independent contractors or leased employees are not employees for these purposes.” Section 126.103 then provides four examples of how to calculate “full-time equivalent employees.”

SBA wanted to eliminate the term “full-time equivalent” because it was confusing. However, that change would not count part-time or temporary employees, so SBA proposed to change the definition of “employee” to cover “all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, professional employee organization, leasing concern, or through a union agreement...Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees. However, if an individual has an ownership interest in and works for the HUBZone SBC a minimum of 40 hours per month, that owner is considered an employee regardless of whether or not the individual receives compensation.”

Eight comments were received in response to the proposed rule, and, as a result, the final rule differs from the proposed rule with the removal of “professional employee organization” and the addition of the **words in bold**:

“Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, leasing concern, or through a union agreement **or co-employed pursuant to a professional employer organization agreement**. Volunteers (*i.e.*, individuals who receive **deferred compensation or** no compensation, including no in-kind compensation, for work performed) are not considered employees. However, if an individual has an ownership interest in and works for the HUBZone SBC a minimum of 40 hours per month, that owner is considered an employee regardless of whether or not the individual receives compensation.”

This rule goes into effect May 3, 2010.

For more on the proposed rule, see the February 2007 *Federal Contracts Perspective* article “SBA Proposes New Definition for ‘HUBZone Employee’.”

50% SDVOSB PERFORMANCE DOES NOT APPLY TO PREFERENCE

The Government Accountability Office (GAO) has ruled that the requirement for a service-disabled veteran-owned small business (SDVOSB) to perform more than 50% of the contract requirements only applies to SDVOSB set-aside awards, not when an evaluation preference will be given to SDVOSBs (GAO B-401794; B-401794.2, *Washington-Harris Group*, November 16, 2009).

The protest involved an Army request for proposals (RFP) for case management and administrative services. The RFP stated that proposals would be evaluated on the basis of six evaluation factors, SDVOSB status being one of them. The SDVOSB evaluation factor stated that the agency would give favorable consideration to SDVOSB concerns:

“The government will evaluate the offeror’s [SDVOSB] status. The federal government strongly supports the participation of SDVOSB concerns in the Federal Supply Schedule program. As such, the government has decided to evaluate whether an offeror is a [SDVOSB] as a primary evaluation factor when making the best value determination in this competition. In this regard, offerors will receive a rating as either “[SDVOSB] – Yes” or “[SDVOSB] – No.” An offeror does not have to be a SDVOSB in order to be considered for award.”

The RFP further advised offerors that they would receive credit as an SDVOSB under two conditions: (1) if the prime contractor was an SDVOSB concern; or (2) if the offeror was a joint venture where one of the joint venture partners was an SDVOSB concern that performed more than 50% of the contract requirements.

The Army received proposals from Washington-Harris Group (WHG) and Skyline Unlimited, Inc. (Skyline). Both claimed to be SDVOSBs, and both proposals were approximately \$66 million. Skyline’s proposal stated that it would act as the prime contractor for the contract, and that Sterling Medical Associates (Sterling), a non-SDVOSB, would be a subcontractor to Skyline. However, Skyline’s proposal made it clear that Sterling would perform more than 50% of the contract. Nevertheless, Skyline received the award because its proposal was rated higher than WHG’s. WHG promptly protested the award, claiming that the Army improperly credited Skyline as being an SDVOSB offeror because, even though Skyline is an SDVOSB concern on its own, it will not perform more than 50% of the contract requirements.

WHG also argued that the Army’s interpretation of the solicitation was unreasonable because the RFP stated that an SDVOSB joint venture partner must perform more than 50% percent of the contract requirements to receive SDVOSB evaluation credit. WHG contended that there was no reasonable basis to distinguish between “SDVOSB joint venture partner” and “SDVOSB prime contractor,” and that the Army should have read the solicitation “as a whole” and applied the restriction to both offerors.

The GAO did not agree with WHG’s argument. GAO pointed out that FAR 52.219-27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, contains the 50% requirement for services in paragraph (c)(1): “(a service-disabled veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for) services (except construction), at least 50% of the cost of personnel for contract performance will be spent for employees of the concern or employees of other service disabled veteran-owned small business concerns...” However, “FAR 52.219-27 was not included in the RFP, was not required to be included here, and has no application to this procurement. This RFP expressly states that this procurement was neither an SDVOSB set-aside nor an SDVOSB sole-source award.”

Regarding the 50% requirement for an SDVOSB joint venture partner, GAO decided “the solicitation explicitly stated that these two categories of business arrangements [prime contractor and joint venture partner] would be treated differently in the evaluation...To the extent that the protester believes these solicitation provisions were improper or inconsistent with the FAR requirements for SDVOSBs, it cannot now timely challenge them, as such a challenge must be raised prior to the time for submission of proposals.”

“In sum, we [GAO] think that the Army reasonably concluded that, under the terms of its proposal, Skyline was the prime contractor for this procurement, and was therefore entitled under the terms of the RFP to receive credit as an SDVOSB offeror.”

SOCIAL MEDIA TO MAKE ACQUISITION MORE EFFECTIVE

The General Services Administration (GSA), in conjunction with the National Academy of Public Administration and the American Council for Technology-Industry Advisory Council, has launched the Better Buy Project (<http://www.BetterBuyProject.com>) in an attempt to “use collaboration and social media to make the federal acquisition process more efficient and effective...The Better Buy Project is asking for your best ideas on how to make it more open and collaborative! Promising ideas will be selected by GSA to be piloted on future acquisitions.”

For now, the Better Buy Project is primarily concerned with the **pre-contract-award stages** of the process – the activities that take place before the government buys a product or service. The three stages are:

- **Market Research and Requirements Definition Phase** – Includes publicizing agency needs and requirements, and refining them based on further input and research about current capabilities.
- **Pre-Solicitation Phase** – Includes web-based research, discussions with other federal agencies, meetings and open discussion forums with the private sector to discuss potential solutions, and requests for information soliciting input and ideas. The requirements are also further refined at this stage in the process.
- **Solicitation Phase** – Includes the government notifying the private sector of the requirement through various channels such as E-Buy (<https://www.ebuy.gsa.gov>) and FedBizOpps (<http://www.fbo.gov>), holding open forums to discuss the requirement and answer questions (*e.g.*, Industry Days), a review of the solicitation by interested companies, the written exchange between government and the private sector of questions, answers and clarifications on government requirements, and proposal submissions.

GSA is looking for ideas to make federal acquisition more open, transparent, and collaborative:

- **Open** – Raise awareness of upcoming needs government is trying to fulfill, in order to assemble a pool of qualified providers who can compete on specific requirements.
- **Transparent** – Give the public and interested parties timely data on upcoming and ongoing buying activities, with the goal of promoting fair and high-quality competitions.
- **Collaborative** – Find ways for the government to engage in more open conversations with the private sector on topics such as best practices, emerging technologies and innovations, and market conditions.

Visitors are invited to register and submit their ideas for improving the acquisition process, and GSA will provide an e-mail summarizing any activity on the ideas: comments, status changes, administrative responses, etc. Also, each registered visitor is given 20 votes that can be used to indicate the ideas the visitor likes the best.

HSAR PROHIBITS FELONS FROM PROVIDING GUARD SERVICES

The Department of Homeland Security (DHS) is amending the DHS Acquisition Regulation (HSAR) to add HSAR 3009.171, Prohibition on Federal Protective Service Guard Services Contracts with Business Concerns Owned, Controlled, or Operated by an Individual Convicted of a Felony, and the corresponding clause with the same title, HSAR 3052.209-76, to establish guidelines under which DHS will prohibit awards of Federal Protective Service (FPS) contract for guard services to a business concern that is owned, controlled, or operated by an individual who has been convicted of a serious felony. The rule implements the provisions of the Federal Protective Service Guard Contracting Reform Act of 2008 (Public Law 110-356).

The Federal Protective Service Guard Contracting Reform Act required DHS to publish regulations establishing guidelines for the prohibition of awards of FPS contracts for guard services to any business concern that is owned, controlled, or operated by an individual who has been convicted of a serious felony (as determined by DHS). This final rule implements the prohibition; identifies which felonies are serious and may prohibit a business concern from being awarded a contract; requires contractors to provide information regarding any felony convictions when submitting bids or proposals; provides guidelines for the contracting officer to assess present responsibility, mitigating factors, and the risk associated with the previous conviction; and allows the contracting officer to award a contract under certain circumstances, notwithstanding the conviction of a serious felony of an individual who owns, controls, or operates the contractor.

The following is the list of felonies (in paragraph (b) of HSAR 3009.171-5, Serious Felonies Prohibiting Award) that DHS has determined are serious enough to prevent award of an FPS guard contract:

- Fraud of any type, including those arising out of a procurement contract, cooperative agreement, grant or other assistance relationship with the federal, state or local government, as well as, without limitation, embezzlement, fraudulent conversion, false claims or statements, kickbacks, misappropriations of property, unfair or deceptive trade practices, or restraint of trade;
- Bribery, graft, or a conflict of interest;
- Threatened or actual harm to a government official or family member;
- Threatened or actual harm to government property;
- A crime of violence;
- A threat to national security;
- Commercial bribery, counterfeiting, or forgery;
- Obstruction of justice, perjury or subornation of perjury, or bribery of a witness;
- An attempt to evade or defeat federal tax;
- Willful failure to collect or pay over federal tax;
- Trafficking in illegal drugs, alcohol, firearms, explosives, or other weapons;
- Immigration violations (*e.g.*, 8 U.S.C. 1324, 1324c, 1326); and

- Any other felony that involves dishonesty, fraud, deceit, misrepresentation, or deliberate violence; that reflects adversely on the individual's honesty, trustworthiness, or fitness to own, control, or operate a business concern; that casts doubt on the integrity or business ethics of the business concern; or is of a nature that is inconsistent with the mission of FPS.

HSAR 3009.171-4, Determination of Ownership, Control, or Operation, lists the types of positions that are considered constituting ownership, control, or operation of a business:

- Director or officer, including incumbents of boards and offices that perform duties ordinarily performed by a chairman or member of a board of directors, a secretary, treasurer, president, a vice president, or other chief official of a business concern, including Chief Financial Officer, Chief Operating Officer, or Chief contracting official.
- Officials of comparable function and status to those described above as exist in partnerships of all kind and other business organizations, including sole proprietorships.
- A general partner in a general or limited partnership.
- An individual with a limited partnership interest of 25% or more.
- An individual who has the: power to vote, directly or indirectly, 25% or more interest in any class of voting stock of the business concern; ability to direct in any manner the election of a majority of the business concern's directors or trustees; or ability to exercise a controlling influence over the business concern's management, policies, or decision making.

Paragraph (b) of HSAR 3009.171-3, Determination of Eligibility for Award of FPS Guard Service Contracts, requires contractors “to immediately notify the contracting officer in writing upon any felony conviction of personnel who own, control or operate a business concern...at any time during the duration of an indefinite delivery/indefinite quantity contract, blanket purchase agreements, or other contractual instrument that may result in the issuance of task orders or calls, or exercise of an option or options to extend the term of a contract. Upon notification of a felony conviction, the contracting officer shall review and make a new determination of eligibility prior to the issuance of any task order, call or exercise of an option.”

Paragraph (b) of HSAR 3009.171-7, Contract Award Approval Procedures for Contractors with Felony Convictions, authorizes a business concern owned, operated or controlled by an individual convicted of any felony to submit an award request to the contracting officer on the grounds that the felony is not a serious felony; that such individual does not or no longer owns, controls or operates the business concern; or that the commission of a serious felony no longer poses the contract risk the legislation and HSR 3009.171 are designed to guard against. If the contracting officer does not *disapprove* the award request, the request may be forwarded to the head of the contracting activity (HCA) for approval. The HCA has the sole authority to approve such award requests.

The clause at HSAR 3052.209-76 reflects the provisions of HSAR 3009.171. Paragraph (f) provides a disclosure statement in which the offeror whether it is or is not owned, controlled, or operated by an individual convicted of a felony.

Three comments were submitted in response to the proposed rule. As a result of these comments and further internal review by DHS, the final rule differs from the proposed rule in that:

- HSAR 3009.171-3(b) is amended to add “exercise of an option” as a contractual instrument subject to reporting during performance.
- HSAR 3009.171-5 is revised to provide more structured and objective guidance to contracting officers. It now more clearly defines serious felonies that will prohibit a business concern from being awarded a contract for FPS guard services. The list of serious felonies is expanded with offenses determined by DHS to be serious felonies.
- HSAR 3009.171-6 and HSAR 3009.171-7 are revised to clearly establish that a referral of an award from the contracting officer to the HCA will include the contracting officer’s determination and a recommendation for approval to promote consistency and objectivity. The HCA must document his or her decision in writing.

For more on the proposed rule, see the April 2009 *Federal Contracts Perspective* article “DHS Proposes Prohibiting Guard Services by Felons.”

DIRECT HIRE AUTHORITY FOR ACQUISITION POSITIONS EXTENDED

The Office of Personnel Management (OPM) has issued final regulations extending the direct hire authority for certain acquisition positions through September 30, 2012.

Section 853 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) extended through September 30, 2012, the direct-hire authority for acquisition positions under Section 1413 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). This statutory change permits department and agencies (other than DOD) to determine, under regulations prescribed by OPM, when certain federal acquisition positions are shortage positions for purposes of direct-hire authority.

The eligible positions, listed in Title 41 of the U.S. Code, Section 433(g)(i)(A), are as follows:

- Entry-level positions in the General Schedule Contracting series (GS-1102);
- Senior positions in the General Schedule Contracting series (GS-1102);
- All positions in the General Schedule Purchasing series (GS-1105); and
- Positions in other General Schedule series in which significant acquisition-related functions are performed.

DANIEL GORDON CONFIRMED AS NEW OFPP ADMINISTRATOR

On November 21, the Senate confirmed Daniel Gordon as the new Office of Federal Procurement Policy (OFPP) administrator. He has been a career employee of the Government Accountability Office (GAO), most recently as the deputy general counsel. Before that, he served as the managing associate general counsel, associate general counsel, and senior attorney for the GAO’s Procurement Law Division. Also, he has served as the assistant general counsel for the GAO’s Legal Services Division. He is an active member of the American Bar Association’s Section of Public Contract Law.

The position of OFPP administration has been unfilled since the resignation of Paul Denett in September 2008.

REWRITTEN HHSAR UNVEILED

The Department of Health and Human Services (HHS) is revising the entire HHS Acquisition Regulation (HHSAR) to reflect changes since the last revision was published in December 2006 (see the January 2007 *Federal Contracts Perspective* article “HHSAR Updated, Brought Into Conformance with FAR”). The decision to revise the HHSAR in its entirety is based on the number of changes and not on their collective substance.

The changes fall into one of several categories: (1) changes to make the document easier to read (the majority of the changes fall into this category); (2) changes to reflect internal procedural matters that are administrative in nature and will not have a major effect on the general public or on contractors or offerors supporting HHS acquisition programs; (3) changes that HHS previously issued on an interim basis (and posted on its publicly available website), following coordination with the HHS Operating Divisions’ (OPDIVs) Heads of Contracting Activity; (4) changes that involve implementation of statutes or governmentwide mandates enacted or issued since December 2006; (5) necessary changes to conform to the FAR, such as addition of new or revised definitions; and (6) deletion of outdated material.

The following are the significant changes made to the HHSAR:

- HHSAR Subpart 301.6, Career Development, Contracting Authority, and Responsibilities, has been rewritten to reflect the HHS implementation of the Federal Acquisition Certification programs for: (1) contracting staff (FAC-C) based on guidance provided by the Office of Federal Procurement Policy (OFPP) in April 2005; (2) contracting officer’s technical representatives (FAC-COTR) based on the governmentwide COTR certification standards established by OFPP in November 2007; and (3) program/project managers (FAC-P/PM) in response to the Services Acquisition Reform Act of 2003 (Public Law 108-136), and the requirements established by OFPP in April 2007. In addition, HHSAR Subpart 301.6 addresses the HHS-unique simplified acquisition certification program (SAC-C); HHS-specific training requirements, including those for purchase card holders; and prerequisites and authorities for issuance of contracting officer warrants.
- HHSAR Subpart 302.70, Common HHSAR Acronyms and Abbreviations, is added to identify the abbreviations and acronyms commonly used throughout the HHSAR.
- HHSAR Subpart 302.71, HHS Standard Templates and Formats, is added. It lists the areas where HHS has developed standards for documentation or approaches that provide consistency across the HHS OPDIVs. These internal business standards encompass acquisition planning, competition reporting, the organization and content of contract files, and market research notices.
- HHSAR Subpart 304.6, Contract Reporting, establishes clear lines of responsibility and accountability for the quality and timeliness of contract data.
- HHSAR Subpart 304.13, Personal Identity Verification, is added to implement Homeland Security Presidential Directive-12 (HSPD-12) in HHS. It specifies applicable solicitation provisions and contract clauses and: (1) reflects the implementing guidance established by Office of Management and Budget (OMB) Memoranda M-05-24, Implementation of HSPD-12 – Policy for a Common Identification Standard for Federal Employees and Contractors, and M-06-18, Acquisition of Products and Services for Implementation of HSPD-12; Federal

Information Processing Standard (FIPS) Publication 201, Personal Identity Verification of Federal Employees and Contractors; and FAR Subpart 4.13; and (2) provides a consistent and systematic approach to ensure the security of HHS facilities and information systems.

- HHSAR 305.205, Special Situations, includes coverage concerning the appropriate use of sources sought notices (research and development (R&D) and non-R&D).
- HHSAR Subpart 306.3, Other Than Full and Open Competition, includes content requirements for Justifications for Other Than Full and Open Competition (JOFOCs); a requirement to use a standard JOFOC format; and the contracting officer's approval authority for JOFOCs for acquisitions exceeding \$100,000.
- HHSAR Part 307, Acquisition Planning, includes updated requirements for preparing an Annual Acquisition Plan and provided a standard template for the plan's preparation; a standard format for development of an Acquisition Plan and procedures for the plan's review, coordination, and approval; and instructions for the preparation and approval of an acquisition strategy for major information technology capital investments and, as applicable, other major investments.
- HHSAR Subpart 308.4, Federal Supply Schedules, includes content requirements for Limited Source Justifications (LSJs); a requirement to use a standard LSJ format; and the contracting officer's approval authority for LSJs for acquisitions exceeding \$100,000.
- New HHSAR Subpart 315.70, Acquisition of Electronic Information Technology, includes coverage for acquisition of electronic information technology (EIT) products and services to implement the requirements of Section 508 of the Rehabilitation Act of 1973. It establishes a policy preference for commercially available products; indicates what must be addressed in solicitations, contracts, and orders; and added documentation and contract administration requirements that relate to the Section 508 accessibility standards and requirements.
- New Subpart 317.1, Multi-Year Contracting, addresses policy on multi-year contracting.
- New HHSAR Subpart 317.70, Multi-Agency and Intra-Agency Contracts, states the conditions for use of intra-agency and multi-agency contracts.
- HHSAR 319.270-1, Solicitation provision and contract clause, is amended to address the HHS mentor-protégé program.
- New HHSAR Subpart 322.8, Equal Employment Opportunity, provides a contract clause regarding contractor cooperation in equal employment opportunity investigations (HHSAR 352.222-70, Contractor Cooperation in Equal Employment Opportunity Investigations).
- HHSAR Subpart 332.7, Contract Funding, is amended to provide coverage regarding awards made during a continuing resolution.
- New HHSAR Subpart 323.71, Green Purchasing Requirements, establishes requirements for green purchasing.

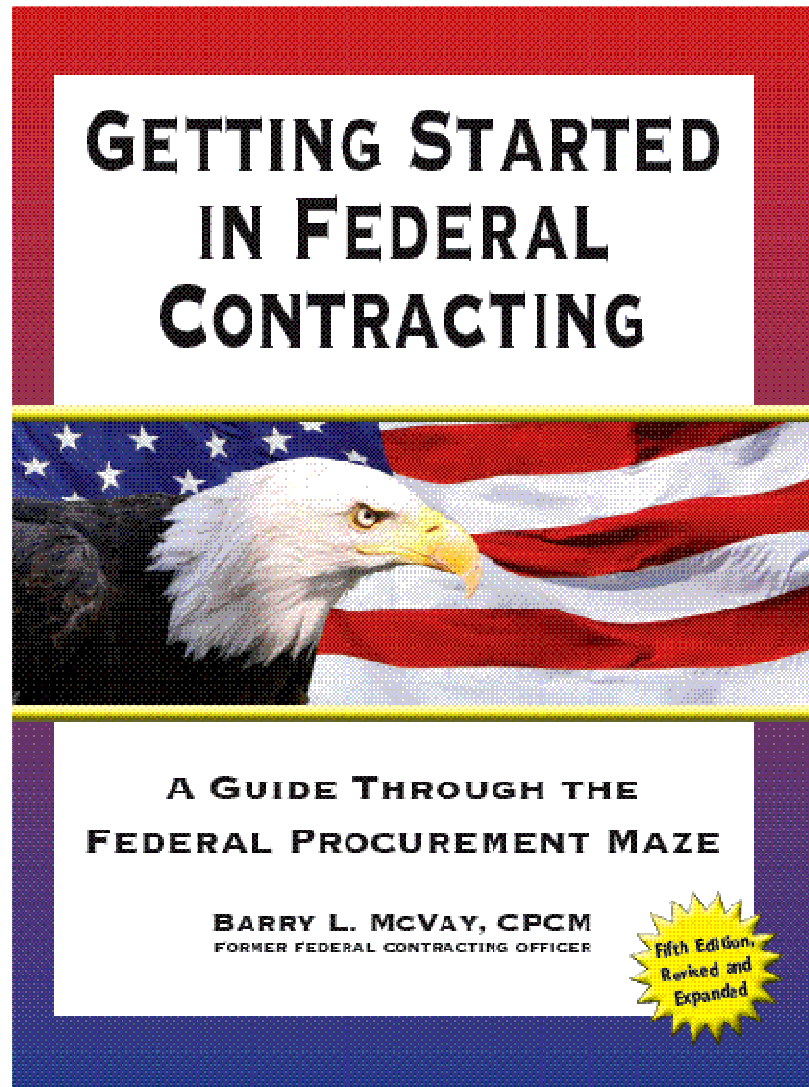
- HHSAR Part 333, Protests, Disputes, and Appeals, is revised to specify revised legal review, concurrence, and approval procedures related to protests to HHS and the Government Accountability Office (GAO) before and after award.
- New HHSAR Subpart 334.2, Earned Value Management System, implements the FAR coverage of earned value management (EVM), including: use of full and partial EVM; use of solicitation provisions and contract clauses addressing documentation offerors must provide to demonstrate compliance with EVM system requirements; and criteria for use of pre-award or post-award integrated baseline reviews.
- New HHSAR Subpart 339.1, General, provides standards for security configuration, encryption, and information security when acquiring information technology.
- New HHSAR Subpart 339.70, Use of General Services Administration Blanket Purchase Agreements for Independent Risk Analysis Services, is added.
- New HHSAR Subpart 370.6, Conference Funding and Sponsorship, provides guidance, including a contract clause, concerning conference funding, sponsorship, and disclaimers.
- New HHSAR Subpart 370.7, Acquisitions Under the Leadership Act, provide a solicitation provision and a contract clause to be used: (i) in connection with the implementation of HIV/AIDS programs under the President’s Emergency Plan for AIDS Relief; or (ii) when the contractor will receive funding under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003.

This is a “direct final rule,” which means it will go into effect on January 26, 2010, if no adverse comments are received. Comments must be submitted no later than December 28, 2009, by any of the following means: (1) <http://www.regulations.gov>; (2) fax: 202-690-8772; (3) e-mail: cheryl.howe@hhs.gov; or (4) mail: Cheryl Howe, Procurement Analyst, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Financial Resources, Office of Grants and Acquisition Policy and Accountability, Division of Acquisition, Room 336-E, Hubert Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201.

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