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DEFENSE WEAPONS SYSTEMS ACQUISITION PROCESS TO BE REFORMED BY NEW STATUTE

On May 22, at a ceremony in the Rose Garden, President Barack Obama signed Public Law 111-23, the Weapons Systems Acquisition Reform Act of 2009. “I reject the notion that we have to waste billions of taxpayer dollars to keep this nation secure. When it comes to purchasing weapons systems and developing defense projects, the choice we face is between investments that are designed to keep the American people safe and those that are simply designed to make a defense company or a contractor rich,” said the president prior to signing the legislation. “The bill I’m signing today...reforms a system where taxpayers are charged too much for weapons systems that too often arrive late – a system that suffers from spending on unproven technologies, outdated weapons, and a general lack of oversight.”

President Obama said the purpose of the law is to “limit cost overruns before they spiral out of control. It will strengthen oversight and accountability by appointing officials who will be charged with closely monitoring the weapons systems we’re purchasing to ensure that costs are controlled. If the cost of certain defense projects continue to grow year after year, those projects will be closely reviewed, and if they don’t provide the value we need, they will be terminated. This law will also enhance competition and end conflicts of interest in the weapons acquisitions process so that American taxpayers and the American military can get the best weapons at the lowest cost.”

Title I, of the act, Acquisition Organization, establishes several new positions:

- The **Director of Cost Assessment and Program Evaluation** will review all cost estimates and cost analyses conducted on major defense acquisition programs and major automated information system programs, conduct independent cost estimates and cost analyses for major defense acquisition programs and major automated information system programs, and comment on deficiencies in the methodology or execution of any cost estimate or cost analysis developed by a military department or DOD agency for a major defense acquisition program or major automated information system program.
- The **Director of Developmental Test and Evaluation** will develop policies and guidance for the conduct of developmental test and evaluation, review and approve the developmental test and evaluation plan for each major defense acquisition program, and monitor and review the test and evaluation activities of the major defense acquisition programs.
- The **Director of Systems Engineering** will develop policies and guidance for the use of systems engineering principles and best practices, review and approve the systems

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engineering master plan for each major defense acquisition program, and monitor and review the systems engineering and development planning activities of the major defense acquisition programs.

In addition, the Secretary of Defense is to designate a senior official responsible for conducting and overseeing performance assessments and “root cause analyses” for major defense acquisition programs. A “root cause analysis” is defined as “an assessment of the underlying cause or causes of shortcomings in cost, schedule, or performance of the program, including the role, if any, of (1) unrealistic performance expectations; (2) unrealistic baseline estimates for cost or schedule; (3) immature technologies or excessive manufacturing or integration risk; (4) unanticipated design, engineering, manufacturing, or technology integration issues arising during program performance; (5) changes in procurement quantities; (6) inadequate program funding or funding instability; (7) poor performance by government or contractor personnel responsible for program management; or (8) any other matters.”

Title II, Acquisition Policy, makes the following changes to DOD's acquisition processes:

- The Secretary of Defense shall ensure that mechanisms are developed and implemented to require consideration of trade-offs among cost, schedule, and performance objects as part of the process for developing requirements for DOD acquisition programs.
- The Secretary of Defense shall ensure that the acquisition strategy for each major defense acquisition program includes measures to ensure competition, or the option of competition, at both the prime contract level and the subcontract level. These measures may include the following, as appropriate: (1) competitive prototyping; (2) dual-sourcing; (3) unbundling of contracts; (4) funding of next-generation prototype systems or subsystems; (5) use of modular, open architectures to enable competition for upgrades; (6) use of build-go-print approaches to enable production through multiple sources; acquisition of complete technical data packages; (8) periodic competitions for subsystem upgrades; (9) licensing of additional suppliers; and (10) periodic system or program reviews to address long-term competitive effects of program decisions.
- If the procurement acquisition unit cost of a major defense acquisition program or designated subprogram increases by 25% over the critical cost growth threshold established for the program or subprogram, the Secretary shall terminate the program unless the Secretary submits to Congress a certification that (1) the continuation of the program is essential to the national security; (2) there are no alternatives to the program which will provide acceptable capability to meet the joint military requirement at less cost; (3) the new estimates of the program acquisition unit cost or procurement unit cost have been determined by the Director of Cost Assessment and Program Evaluation to be reasonable; (4) the program is a higher priority than programs whose funding must be reduced to accommodate the growth in cost of the program; and (5) the management structure for the program is adequate to manage and control program acquisition unit cost or procurement unit cost.

Vivina McVay, Editor-in Chief

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GSAR REWRITE PICKING UP MOMENTUM

The General Services Administration (GSA) issued five final rewritten GSA Acquisition Regulation (GSAR) parts, and proposed another in May.

■ **GSAR Part 513, Simplified Acquisition Procedures:** This final rule removes GSAR Part 513 because it did not regulatory material, but policy. Therefore, the material that constituted GSAR Part 513 has been transferred to the GSA Acquisition Manual (GSAM).

No comments were received on the proposed rule, so it is finalized without changes. For more on the proposed rule, see the September 2008 *Federal Contracts Perspective* article “GSAR Rewrite Begins to Show Results.”

■ **GSAR Part 525, Foreign Acquisition:** This final rule removes GSAR Part 525 because it is outdated.

One comment was received in response to the proposed rule, but the respondent did not comment on the proposed rule. Instead, the respondent asked for an interpretation of the FAR coverage pertaining to the Buy American Act and the Trade Agreements Act. Therefore, the proposed rule is finalized without changes. For more on the proposed rule, see the August 2008 *Federal Contracts Perspective* article “GSAR Rewrite Continues.”

■ **GSAR Part 537, Service Contracting:** This final rule deletes GSAR 537.101, Definitions, which consists of the definition for “contracts for building services,” and incorporates the text into the GSAM because it is non-regulatory language. However, GSAM 537.201, Definitions, is being removed from the GSAM and incorporated as the regulatory GSAR 537.201, Definitions [for Advisory and Assistance Services], because these definitions may have an effect beyond GSA.

In addition, various editorial revisions are made to GSAR Part 537.

One respondent submitted comments on the proposed rule, but GSA did not concur with any of them, so the proposed rule is finalized with the addition of GSAR 537.201. For more on the proposed rule, see the July 2008 *Federal Contracts Perspective* article “GSAR Undergoing Rewrite.”

■ **GSAR Part 547, Transportation:** This final rule removes GSAR Part 547, which consists of GSAR Subpart 547.3, Transportation in Supply Contracts, and the associated clauses at GSAR 552.247-70, Placarding Railcar Shipments, and GSAR 552.247-71, Diversion of Shipment Under F.O.B. Destination Contracts, because this information is specific to the Federal Acquisition Service (FAS) and its special order program and stock program, and not the Multiple Award Schedule Program.

No comments were received on the proposed rule, so it is finalized without changes. For more on the proposed rule, see the July 2008 *Federal Contracts Perspective* article “GSAR Undergoing Rewrite.”

■ **GSAR Part 549, Termination of Contracts:** This final rule deletes GSAR Subpart 549.5, Contract Termination Clauses, and the two associated clauses at GSAR 552.249-70, Termination for Convenience of the Government (Fixed Price) (Short Form), and GSAR 552.249-71, Submission of Termination Liability Schedule. These are two GSA-unique clauses were used in contracts for the acquisition and maintenance of telephone systems funded through the Information Technology (IT) Fund. Since this fund no longer exists, these clauses are obsolete.

No comments were received on the proposed rule, so it is finalized without changes. For

more on the proposed rule, see the September 2008 *Federal Contracts Perspective* article “GSAR Rewrite Begins to Show Results.”

■ **GSAR Part 541, Acquisition of Utility Services:** This proposed rule would add GSAR Subpart 541.5, Solicitation Provision and Contract Clauses, which would consist of the prescriptions for two new clauses: GSAR 552.241-XX, Availability of Funds for the Next Fiscal Year or Quarter, and GSAR 552.241-YY, Disputes (Utility Contracts). GSAR 552.241-XX would be included all GSA utility solicitations and contracts instead of FAR 52.232-19, Availability of Funds for the Next Fiscal Year. GSAR 552.241-YY would be relocated from GSAM Part 533, Protests, Disputes, and Appeals, to the regulatory GSAR to supplement FAR 52.233-1, Disputes, and revised to align with utility acquisitions.

Comments on the proposed rule must be submitted no later than July 20, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “GSAR Case 2008-G511” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with GSAR Case 2008-G511; 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.

TWO CHANGES TO FAR PROPOSED

During May, two proposed rules to amend the FAR were published:

■ **Payments Under Fixed-Price Architecture and Engineering Contracts:** This proposed rule would revise the withholding-of-payment requirements under paragraph (b) of FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, which presently requires the contracting officer to withhold 10% of the amounts due on each voucher (however, payment may be made in full during any month in which the contracting officer determines the performance to be satisfactory and the amount retained exceeds the amount adequate for the protection of the government's interests). The government retains the amount until the contracting officer determines the work has been satisfactorily completed. Paragraph (c) of the clause permits the contracting officer to release the retained amounts to the contractor when the contracting officer determines the work is substantially complete.

This rule would revise FAR 52.232-10(b) to permit the contracting officer to withhold “up to 10% of the amounts due...in order to protect the government’s interest and ensure satisfactory completion of the contract. The amount of withhold shall be determined based upon the contractor’s performance record under this contract.”

Also, paragraph (c) would be revised to clarify that “Upon satisfactory completion by the contractor and final acceptance by the contracting officer of all design work done by the contractor...the contractor will be paid the unpaid balance of any money due for design work under the statement, including all withheld amounts.”

Comments on the proposed rule must be submitted no later than July 6, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-015” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-015; 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 2008-015” in all correspondence.

■ **Clarification of Criteria for Sole Source Awards to Service-Disabled Veteran-Owned Small Business Concerns:** This proposed rule would amend paragraph (a) of FAR 19.1406, Sole Source Awards to Service-Disabled Veteran-Owned Small Business Concerns, to clarify the criteria that need to be met to conduct a sole source service-disabled veteran-owned small business (SDVOSB) concern acquisition.

Paragraph (a) currently states that a contracting officer may award a sole source contract to a SDVOSB concern provided “(1) only one service-disabled veteran-owned small business concern can satisfy the requirement...” This can be interpreted as meaning that a sole source SDVOSB acquisition is prohibited if more than one SDVOSB could conceivably perform the work. In the Government Accountability Office (GAO) protest decision B-299291, MCS Portable Restroom Service, March 28, 2007, GAO notes that the wording of FAR 19.1406 may be unintentionally inconsistent with the Veterans Benefit Act of 2003 and the Small Business Administration regulations that implement the act, which are that the contracting officer may not award a sole source SDVOSB contract unless the contracting officer does not have a reasonable expectation that two or more SDVOSBs will submit offers.

To lessen the possibility of misinterpretation, the proposed rule would revise paragraph (a)(1) to state that a contracting officer may award a sole source contract to an SDVOSB concern provided “(1) the contracting officer does not have a reasonable expectation that offers would be received from two or more service-disabled veteran-owned small business concerns...”

In addition, this proposed rule would amend paragraph (a)(1) of FAR 19.1306, HUBZone Sole Source Awards, which consists of language similar to that in FAR 19.1406(a)(1) because the intent of the language in the HUBZone program’s statutory authority (15 U.S.C. 657a(b)) is the same as that for sole source SDVOSB awards. Therefore, FAR 19.1306(a)(1) would be revised to match FAR 19.1406(a)(1). Not revising FAR 19.1306(a)(1) could lead to a presumption that the intent of the different language is to convey different meanings.

Comments on the proposed rule must be submitted no later than July 20, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-023” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-023; 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 2008-023” in all correspondence.

DOE REVISES DEAR SECURITY CLAUSE

The Department of Energy (DOE) is amending DOE Acquisition Regulation (DEAR) 952.204-2, Security (formerly “Security Requirements”) to require contractors and subcontractors to conduct a background review of any uncleared applicant or employee who will require access to DOE classified information or special nuclear material, and to test the individual for illegal drugs. The contractor or subcontractor must evaluate the individual based on its own processes and consistent with applicable law, and then send specific information to the cognizant local DOE security office.

The proposed rule would have required the contractor or subcontractor to conduct background checks that included the collection and review of items such as credit and local law enforcement checks, and contacts with personal references and certain past employers. Then it required contractors to assess the “job qualifications and suitability” of uncleared applicants and employees before assigning them to positions requiring an access authorization, and before requesting that DOE process the individual for an access authorization. A contractor or

subcontractor would have to determine the applicant's or employee's "suitability" by assessing the possible impact of "adverse information" found in the background and other checks and deciding whether it is "confident" that the individual would pass the rigorous background investigation conducted by DOE. A contractor's assessment of the information would be guided by the criteria in 10 CFR 710.8, Criteria [for Determining Eligibility for Access to Classified Matter or Special Nuclear Material].

Three organizations submitted comments: two DOE national laboratories and one aircraft manufacturer. After considering the comments, DOE decided to finalize the rule with several revisions, including to DEAR 952.204-2(h)(2) to eliminate the requirement that a contractor consider the criteria in 10 CFR 710.8 in determining whether to select an individual for a position requiring an access authorization. In particular, the requirement that a contractor determine an applicant's "suitability" for an access authorization has been removed. Rather, the contractor or subcontractor must conduct a background review of such individuals prior to selection, evaluate the individual based on its own processes and consistent with applicable law, and then send the following information to DOE: date the review was conducted; each entity that provided information concerning the individual; a certification that the review was conducted in accordance with all applicable laws, regulations, and executive orders; a certification that all information collected during the review was reviewed and evaluated in accordance with the contractor's personnel policies; and the results of the test for illegal drugs.

In addition, DEAR 904.404, Solicitation Provision and Contract Clause, which specifies the security clauses to be used in DOE contracts, is revised to add a requirement in paragraph (d)(1) that DEAR 952.204-2 is required to be included in any contract that will involve contractor employees' access to special nuclear material. This change reflects past DOE practice and is being added to make the instruction clear and complete.

For more on the proposed rule, see the March 2008 *Federal Contracts Perspective* article "DOE Proposes Revising DEAR Security Clause."

EXECUTIVE COMPENSATION BENCHMARK RAISED TO \$684,181

Leslie Field, the Office of Federal Procurement Policy (OFPP) acting administrator, has decided to increase the "benchmark compensation amount" for senior executives by \$71,985, from \$612,196 to \$684,181 – an 11.8% increase. This figure is "the median amount of the compensation provided for all senior executives of all benchmark corporations [those with annual sales in excess of \$50 million] for the most recent year..." It was determined based on commercially available surveys made available by the Securities and Exchange Commission and after consultation with the director of the Defense Contract Audit Agency.

The \$684,181 is the maximum amount of compensation (that is, wages, salary, bonuses, deferred compensation, and employer contributions to defined contribution pension plans) that is allowable under federal contracts for "the five most highly compensated employees in management positions at each home office and each segment of the contractor." However, the benchmark compensation amount is not a limit on the compensation an executive may receive – \$684,181 is the maximum allowable amount the government will reimburse contractors for their senior executives' compensation. See paragraph (p) of FAR 31.205-6, Personal Compensation.

The benchmark compensation amount applies to contract costs incurred after January 1, 2009, for contractor fiscal year 2009 and subsequent contractor fiscal years unless and until revised by the Office of Management and Budget (OMB), which is required to set the benchmark compensation amount annually. (OFPP is part of OMB.)

Questions concerning this may be addressed to Raymond Wong, OFPP, at 202-395-6805.

SEVERAL WAIVERS OF THE NONMANUFACTURER RULE GRANTED

The Small Business Administration (SBA) is waiving the nonmanufacturer rule for the following industries: conductor and cable (aluminum), North American Industry Classification System (NAICS) code 331319, product service code (PSC) 6145; conductor and control cable (copper), NAICS code 331422, PSC 6145; truck trailer manufacturing, NAICS code 336212, PSC 2330; all-terrain vehicles (ATVs), wheeled or tracked, manufacturing; snowmobiles and parts; off-road all terrain vehicles (ATVs); wheeled or tracked manufacturing, NAICS code 336999, PSC 2330; and noncurrent-carrying wiring device manufacturing – dead end tees and connectors, guy strain and link assemblies, bolts, washers, turnbuckles, twisted clips, steel angle assemblies, yoke plates, compression T connectors, press dies, anchor shackles, and clevis ball and clevis sockets, yoke plates and grounding clamps, NAICS code 335932, PSC 5975.

SBA invited the public to comment on these proposed waivers or to provide information on potential small business sources for these products. No comments were submitted in response to the proposed waivers, so the waivers are granted. For more on the proposed nonmanufacturer rule waivers for these industries, see the April 2009 *Federal Contracts Perspective* article “Several Nonmanufacturer Rule Waivers Proposed.”

EDITOR’S NOTE: Public Law 100-656, enacted November 15, 1988, requires those with federal contracts that are set-aside for small businesses or awarded through the 8(a) program to provide the product of a small business manufacturer or processor if the recipient is not the actual manufacturer or processor (see paragraph (f) of FAR 19.102, Size Standards). This is called the “nonmanufacturer rule.” However, SBA may waive this requirement if there are no small business manufacturers or processors.

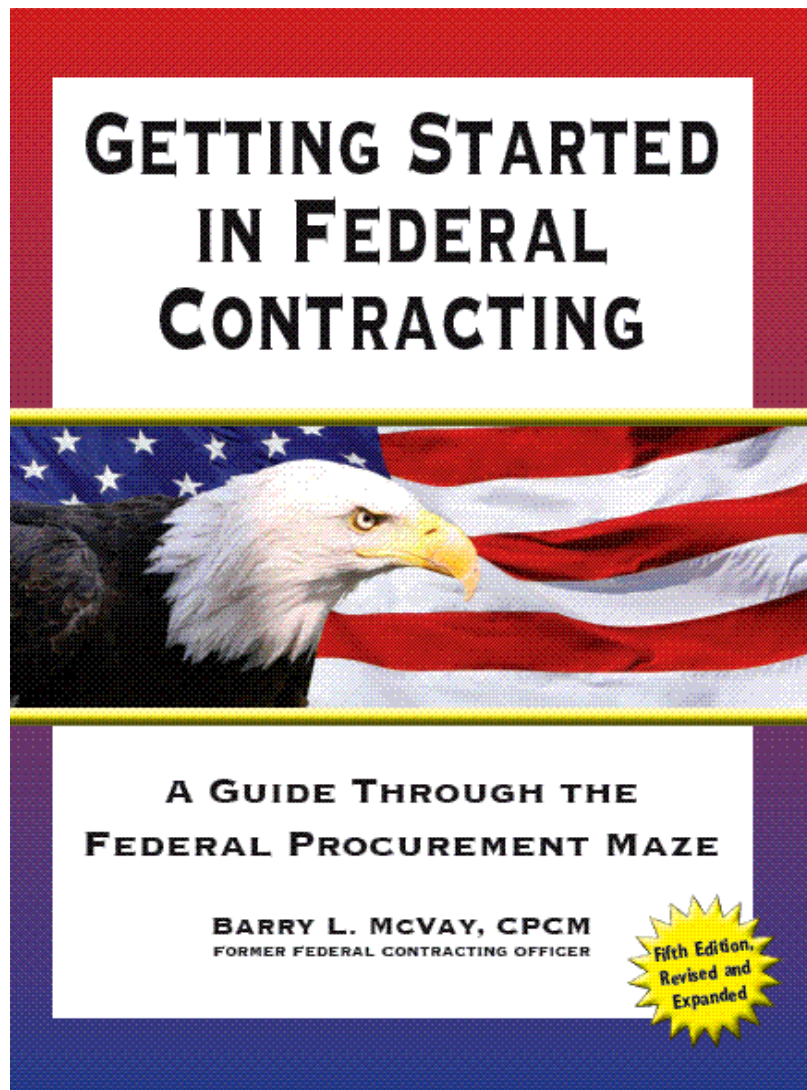
The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; Part 121, Small Business Size Standards; under paragraph (b) of 121.406, How Does a Small Business Concern Qualify to Provide Manufactured Products Under Small Business Set-Aside or MED [Minority Enterprise Development] Procurements? The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products? A complete list of products for which the nonmanufacturer rule has been waived is available at http://www.sba.gov/idc/groups/public/documents/sba_program_office/class_waiver.pdf.

FALSE CLAIMS ACT COVERAGE EXPANDED

On May 20, 2009, President signed into law the Fraud Enforcement and Recovery Act of 2009 (Public Law 111-21), to improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, and for the recovery of funds lost to these frauds.

Though the act is primarily concerned with mortgage and securities fraud, Section 4 of the act affects all government contractors in that it expands liability under the False Claims Act for making false or fraudulent claims to the federal government, and makes a person liable under the False Claims Act for presenting a false or fraudulent claim for payment or approval (liability under the False Claims Act had been limited to claims presented to an officer or employee of the federal government). Also, it requires persons who violate the False Claims Act to reimburse the federal government for the costs of a civil action to recover penalties or damages.

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