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FAC 2005-33 ADDRESSES NEW TRADE AGREEMENTS, CONTRACTORS' PROGRESS PAYMENTS REQUESTS

The ninety-day freeze on new regulations put in place by the Obama administration to give it time to assess the appropriateness of the rules that were in the pipeline at the end of the Bush administration appears to be thawing with the publication of Federal Acquisition Circular (FAC) 2005-33. FAC 2005-33 consists of two rules amending the Federal Acquisition Regulation (FAR) – one that addresses three trade agreements, and the other incorporates improvements related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments.

■ **Trade Agreements with Costa Rica, Oman, and Peru:** This interim rule amends FAR Part 25, Foreign Acquisition, and associated provisions and clauses to implement the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with respect to Costa Rica; the United States-Oman Free Trade Agreement; and the United States-Peru Trade Promotion Agreement. These trade agreements waive the applicability of the Buy American Act for some foreign supplies and construction materials from Costa Rica, Oman, and Peru, and specify procurement procedures designed to ensure fairness in the acquisition of supplies and services.

The rule amends FAR 25.003, Definitions, to add Costa Rica, Oman, and Peru to the definition of “Free Trade Agreement country,” and to delete Costa Rica from the definition of “Caribbean Basin country” because when a country becomes a signatory to the CAFTA-DR, that country ceases being a Caribbean Basin country under the Caribbean Basin Economic Recovery Act.

The table in paragraph (b) of FAR 25.401, General, is amended to include the following thresholds beyond which the Buy American Act is waived for products or services of these countries:

- **Costa Rica:** \$67,826 for supplies or services; \$7,443,000 for construction
- **Oman:** \$194,000 for supplies or services; \$8,817,449 for construction
- **Peru:** \$194,000 for supplies or services; \$7,443,000 for construction

In addition, FAR 52.225–3, Buy American Act–Free Trade Agreements–Israeli Trade Act, and FAR 52.225-4, Buy American Act–Free Trade Agreements–Israeli Trade Act Certificate, which apply to acquisitions of supplies or services involving the furnishing of supplies between \$25,000 and \$194,000, are amended to state that Omani and Peruvian supplies and services are

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not covered by the clause and provision (because both the United States-Oman Free Trade Agreement and the United States-Peru Trade Promotion Agreement provide \$194,000 as the threshold for applicability for supplies or services). Also, Alternate I of FAR 52.225-11, Buy American Act—Construction Materials Under Trade Agreements, and Alternate II of FAR 52.225-12, Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements, both of which apply to acquisitions of construction between \$7,443,000 and \$8,817,449, are amended to add that Omani construction material is not covered by the clause and provision (because the United States-Oman Free Trade Agreement provides \$8,817,449 as the threshold for applicability for construction).

Comments on the interim rule must be submitted no later than August 14, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-036” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-036; 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 “FAC 2005-33, FAR Case 2008-036” in all correspondence.

■ **Contractor’s Request for Progress Payments:** This rule finalizes, with minor changes, the proposed rule to revise FAR Part 32, Contract Financing, the associated clause FAR 52.232-16, Progress Payments, and Standard Form (SF) 1443, Contractor’s Request for Progress Payments, to address revisions to the paid cost rule, and to simplify the form and related regulations and instructions to improve clarity.

The following changes are made to FAR Part 32, FAR 52.232-16, and SF 1443:

- A definition for “liquidate” is added to FAR 32.001, Definitions, to ensure that all parties understand what is meant by this term, which is used throughout FAR Part 32.
- Paragraph (a)(1) of FAR 32.501-3, Contract Price, is revised to ensure that the term “contract price” is used consistently in FAR 32.501-3 and the SF 1443.
- FAR 32.503-1, Contractor Requests, is deleted. The language requiring the contractor to use the SF 1443 to request progress payments is moved to FAR 52.232-16, Progress Payments, as paragraph (g)(3). In addition, paragraph (g)(3) includes language allowing electronic submission of the SF 1443.
- Paragraphs (f) and (g) of FAR 32.503-6, Suspension or Reduction of Payments, and FAR 52.232-16(a)(9) and (c)(5) are revised to clarify the computation of the loss ratio.
- FAR 52.232-16(g)(2) is added to require that contractors use current estimates to complete when preparing the SF 1443.
- The SF 1443 and related instructions are revised as follows:
 - Line 4, Contract Number, is changed to require that the contractor include the Delivery or Task Order number, if applicable, so that the paying office can associate the SF 1443 with the correct order.
 - Line 14, Progress Payments Paid to Subcontractors, is revised to make the language

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on the form consistent with that of FAR 52.232-16. A related change is made to Line 20, Computation of Progress Payment Limitation.

- Line 23, Total Amount Applied To and To Be Applied To Reduce Progress Payment, is revised to clarify that the amount on this line is the dollars that have been liquidated as well as the dollars to be liquidated.

One comment was received on the proposed rule. The respondent, an association representing large defense aerospace corporations, took no issue with the proposed FAR changes, but objected to the costs that would be incurred by its member companies to make programming changes that ensue from altering the SF 1443. However, neither the Small Business Administration (SBA) nor an outside small business expert selected by the SBA discovered a substantial economic impact on a significant number of small entities, so the proposed rule was finalized with editorial corrections to the SF 1443, and the addition of a sentence to the SF 1443 instructions for Items 14a-14e to clarify that the “financing payments paid to subcontractors” do not include interim payments under a cost-reimbursement contract.

For more on the proposed rule, see the May 2008 *Federal Contracts Perspective* article “FAR Proposals For Progress Payments, Performance.”

E-VERIFY IMPLEMENTATION DELAYED FOR FOURTH TIME

The effective date of Federal Acquisition Circular (FAC) 2005-29, which requires most contractors to use the free website E-Verify (<http://www.dhs.gov/e-verify>) to determine whether their employees are authorized to work in the United States, has been postponed for a fourth time: from June 30, 2009, to September 8, 2009, to give the Obama administration more time to review the rule. Originally, E-Verify was to go into effect on January 15, 2009, but its implementation was postponed to February 20, 2009, in response to pending litigation. The second implementation postponement was to May 21, 2009, at the request of President Obama to give his new administration time to review the rule, but implementation was further postponed until June 30, 2009. Now, E-Verify implementation is postponed once again.

As of September 8, 2009, FAR 52.222-54, Employment Eligibility Verification, must be included in contracts exceeding \$100,000 that are 120 days or longer in duration. The clause requires the contractor to use E-Verify for all its employees working on the contract in the United States, and all of its newly-hired employees regardless of whether they are working on the contract or not. There are some exceptions to this: (1) contracts for “commercial off-the-shelf” (COTS) items and services, or items that would be COTS except for minor modifications (see FAR 22.1801, Definitions, for the definition of COTS – contracts for commercial items that do not meet the COTS definition are subject to E-Verify); and (2) contracts that will be performed outside the United States.

Contracting officers are not to use FAR 52.222-54 in any solicitation or contract prior to September 8, 2009.

However, on or after September 8, 2009, contracting officers “should modify, on a bilateral basis, existing indefinite-delivery/indefinite-quantity contracts . . . to include the clause for future orders if the remaining period of performance extends beyond March 8, 2010, and the amount of work or number of orders expected under the remaining performance period is substantial.”

For more on E-Verify and FAC 2005-29, see the December 2008 *Federal Contracts Perspective* article “FAC 2005-29 Requires Contractors to Verify Workers’ Eligibility for Employment”, the February 2009 *Federal Contracts Perspective* article “E-Verify Put on Hold Until May 21”, and the May 2009 *Federal Contracts Perspective* article “E-Verify Implementation Delayed for Third Time.”

PUBLIC MEETINGS ON AUTHENTIC IT PRODUCTS TO BE HELD

The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) are hosting six public meetings to continue a dialogue with industry and government agencies about ways to develop greater assurances regarding the authenticity of information technology (IT) products acquired by the government.

The dialogue began on December 11, 2008, when the two councils conducted a public meeting to seek comments from both Government and industry on whether the FAR should be revised to include a requirement that contractors selling IT products (including computer hardware and software) represent that such products are authentic. The announcement for that meeting stated, "The widespread availability of counterfeit IT products presents a multidimensional threat to our nation...While it is estimated that our nation's industries and governments lose millions of dollars each year to counterfeiters, the trade in counterfeit IT products also presents serious threats to our national security and consumer safety..."

At that meeting, the councils were interested in comments regarding contractor liability if IT products sold to the government are not authentic, and whether contractors who are resellers or distributors of computer hardware and software should represent to the government that they are authorized by the original equipment manufacturer (OEM) to sell the IT products to the government. Also, the councils sought comments on whether these measures should be extended to other items purchased by the government, and whether the rule should apply when IT is a component of a system or assembled product. (**EDITOR'S NOTE:** For more on this meeting, see the December 2008 *Federal Contracts Perspective* article "Contractors Might Represent IT Products' Authenticity.")

The six scheduled meetings will include dialogues on the impact of counterfeit IT products on matters of performance and security; contractor liability and consequential damages; competitiveness issues associated with procuring IT products from the OEM or authorized distributor; identifying viable means of authenticating IT products; and contractor supply chain risk management requirements as an evaluation factor in the procurement of IT products.

The meetings will be held between 9:00 a.m. and 3:00 p.m. EST at General Services Administration (GSA), 1800 F Street, NW, Washington, DC 20405, on the following dates:

June 23, 2009, in the GSA Auditorium
July 15, 2009, in the GSA Auditorium
July 22, 2009, in Room 5141B
July 29, 2009, in Room 5141B
August 5, 2009, in Room 5141B
August 12, 2009, in Room 5141B

Interested parties are encouraged to arrive at least 30 minutes early to accommodate security procedures. Those wishing to make a presentation on any of the topics are to submit a copy of the presentation five days prior to the meeting date, to General Services Administration, Contract Policy Division (VPC), 1800 F Street, NW, Room 4040, Attn: Ernest Woodson, Washington, DC 20405, or via e-mail to ernest.woodson@gsa.gov. Cite "Public Meeting Authentic IT Products Continued Dialogue" in all correspondence related to the public meetings.

After the July 15, 2009, meeting, all subsequent meetings are subject to be cancelled. For that reason, interested parties should contact Ernest Woodson at 202-501-3775 after July 15, 2009, to verify that subsequent meetings are being held.

FEDERAL SPENDING INCREASED 15% IN FY 2008

With a boost in defense spending and economic stimulus money at the end of the year, federal spending in Fiscal Year (FY) 2008 hit a new record of \$526 billion, an increase of 15.2% over the FY 2007 total of \$457 billion (which exceeded the FY 2006 spending of \$423 billion by 7.3%).

The following are the spending totals for the largest federal agencies, arranged in FY 2008 rank (in billions):

	<u>FY 2007</u>	<u>FY 2008</u>
Total Government	\$457.0	\$526.5
Defense	330.9	390.8
Energy	23.0	24.7
National Aeronautics and Space Administration	12.9	14.8
Veterans Affairs	11.9	14.5
Homeland Security	11.8	13.5
Health and Human Services	13.9	13.0
General Services Administration	12.4	12.2
State	5.5	5.5
Justice	6.7	5.4
Agriculture	4.3	5.0
Treasury	4.1	4.4
Transportation	3.7	4.4
Interior	4.0	3.7
U.S. Agency for International Development	1.6	3.2
Commerce	2.1	2.3
Labor	1.9	2.1
Environmental Protection Agency	1.4	1.4
Education	1.4	1.4
Office of Personnel Management	0.5	1.1
Housing and Urban Development	0.8	1.0
Social Security Administration	0.6	0.7
National Science Foundation	0.4	0.4
Nuclear Regulatory Commission	0.2	0.2
Small Business Administration	0.1	0.1
All Other Agencies	1.0	1.0

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GSAR PART 546 REWRITTEN

After all the General Services Administration (GSA) Acquisition Regulation (GSAR) parts rewritten in May, there was only one GSAR part rewritten in June: GSAR Part 546, Quality Assurance. The following are the changes to GSAR Part 546 and the associated clauses:

- GSAR 546.302-70, Source Inspection by Quality Approved Manufacturer, which is used in fixed-price contracts, is revised to include applicability to the Stock and Special Order programs, and the Wildfire program. Also, it is revised to include a reference to FAR 52.246-2, Inspection of Supplies – Fixed Price.
- GSAR 546.302-72, Destination Inspection, is added to prescribe new GSAR 552.246-78, Inspection at Destination, which provides for inspection by government personnel at destination.
- GSAR 546.470-2, Certification Testing, is deleted.
- GSAR 546.708, Warranties of Data, is revised to place emphasis on the role of the contracting officer.
- GSAR 546.710, Contract Clause, is revised to add a prescription for new GSAR 552.246-77, Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature. GSAR 552.246-77 is used when FAR 52.246-17, Warranty of Supplies of a Noncomplex Nature, is included in solicitations and contracts. GSAR 552.246-77 provides for GSA unique rights and remedies. In addition, the prescriptions for GSAR 552.246-17, Warranty of Supplies of a Noncomplex Nature; GSAR 552.246-73, Warranty – Multiple Award Schedule; GSAR 552.246-75, Guarantees; and GSAR 552.246-76, Warranty of Pesticides, are deleted because the clauses are deleted. GSAR 552.246-17 is deleted because it unnecessarily repeats, paraphrases, and restates material in the FAR; GSAR 552.246-73 is relocated to GSAR Part 538, Federal Supply Schedule Contracting; GSAR 552.246-75 is deleted because the FAR provides sufficient guidance; and GSAR 552.246-76 is deleted because it is unnecessary.
- GSAR 552.246-70, Source Inspection by Quality Approved Manufacturer, is revised to clarify existing clause language.

The proposed rule would have deleted GSAR 552.246-72, Final Inspection and Tests (and its prescription at GSAR 546.312, Construction Contracts), because GSA thought the FAR provided sufficient guidance. However, one comment on the proposed rule recommended retaining GSAR 552.246-72, and GSA agreed to retain it. Otherwise, the proposed rule is finalized without changes. For more on the proposed rule, see the September 2008 *Federal Contracts Perspective* article “GSAR Rewrite Begins to Show Results.”

ALL NONMANUFACTURER RULE WAIVERS REMAIN IN EFFECT

The Small Business Administration (SBA) has decided that all nonmanufacturer rule waivers that were in effect as of March 17, 2009, will remain in effect because, after conducting a review of all the waivers in effect on that date and asking for public comments, it has determined there are no small business manufacturing sources or processors for any of the products on the

approved waivers.

Nonmanufacturer rule waivers are granted when no small business manufacturers are supplying the classes of products to the government. When a nonmanufacturer rule waiver is granted, small businesses dealers are allowed to supply the products of any manufacturer on a federal contract set aside for small businesses, service-disabled veteran-owned small businesses or participants in SBA's 8(a) program. 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 section 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 list of products on SBA's List of Approved Class Waivers is included in the June 24, 2009, *Federal Register* notice at <http://edocket.access.gpo.gov/2009/pdf/E9-14889.pdf>.

For more on the notice of review, see the April 2009 *Federal Contracts Perspective* article "Approved Nonmanufacturer Rule Waivers to be Reviewed."

ONE NONMANUFACTURER WAIVER APPROVED, ONE PROPOSED

The SBA is waiving the nonmanufacturer rule for liquid propellants – petroleum base manufacturing, North American Industry Classification System (NAICS) code 324110, product service code (PSC) 9130.

SBA invited the public to comment on the proposed waiver or to provide information on potential small business sources for this product. No comments were submitted in response to the proposed waiver, so the waiver is granted. For more on the proposed nonmanufacturer rule waiver for this industry, see the May 2009 *Federal Contracts Perspective* article "Nonmanufacturing Rule Waiver Proposed for Propellants."

In addition, SBA is proposing to waive the nonmanufacturer rule for 13 watt compact fluorescent lamps (CFLs), 26 watt CFLs, and occupancy sensors dual technology, NAICS code 335110, PSC 6240. SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources for these products by June 23, 2009, to Edith G. Butler, Program Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street, SW, Suite 8800, Washington, DC 20416.

DOD LISTS FPI'S ITEMS TO BE COMPETED

The Department of Defense (DOD) has published a list of product categories (by Federal Supply Classification codes (FSCs)) for which the Federal Prison Industries' (FPI's) share of the DOD market is greater than 5%. This list is required by Section 827 of the National Defense Authorization Act for FY 2008 (Public Law 110-181), and products on the list must be procured using competitive (or fair opportunity) procedures (see Defense FAR Supplement (DFARS) 208.602-70, Acquisition of Items for Which FPI Has a Significant Market Share). In conducting such a competition, contracting officers must consider a timely offer from FPI for any of the products on the list. In addition, FPI must be included in the process even if the procurement otherwise would have been set aside in accordance with FAR Part 19, Small Business Programs. When the FPI item is determined to provide the best value as a result of FPI's response to a

competitive solicitation, contracting officers are to follow the ordering procedures at http://www.unicor.gov/help/help_tabs/help_ordering.cfm.

The following is the list of products:

<u>FSC</u>	<u>Description</u>
5440	Scaffolding Equipment & Concrete Forms
5975	Electrical Hardware and Supplies
5995	Cable, Cord, Wire Assemblies; Communications Equipment
6007	Filters
6150	Miscellaneous Electric Power & Distribution Equipment
6160	Miscellaneous Battery Retaining Fixtures & Liners
7110	Office Furniture
7230	Draperies, Awnings, and Shades
8405	Outerwear, Men's
8415	Clothing, Special Purpose
8420	Underwear and Nightwear, Men's
AP46	Recreation (Management/Support)

NASA UPDATES MENTOR-PROTÉGÉ PROGRAM

The National Aeronautics and Space Administration (NASA) is amending NASA FAR Supplement (NFS) Subpart 1819.72, NASA Mentor-Protégé Program, and the associated clauses in NFS 1852.219 to: (1) streamline the program; (2) align the mentoring to technical skills; (3) expand the program to veteran-owned small businesses, service-disabled veteran-owned small businesses, historically underutilized business zone (HUBZone) small businesses, NASA Small Business Innovation Research (SBIR) Phase II small businesses, and non-profit agencies employing people who are blind or severely disabled; and (4) include award fee incentives.

Under the NASA mentor-protégé program, a large prime contractor may become a “mentor” to one or more eligible small business “protégés” to enhance each protégé’s capabilities to satisfy NASA and other contract and subcontract requirements; increase the overall participation of each protégé as a subcontractor and supplier under NASA contracts, other federal agency contracts, and commercial contracts; and foster the establishment of long-term business relationship with each protégé.

Eight respondents submitted comments on the proposed rule. In response to the comments, the following changes have been made to the final rule:

- Paragraph (b)(1) of NFS 1819.7201, Eligibility, is amended to add non-profit agencies employing people who are blind or severely disabled as being eligible to be protégés.
- The reciprocity with the DOD mentor-protégé program is eliminated. That reciprocity had been in NFS 1819.7204, Transportability of Features from the Department of Defense (DOD) Mentor-Protégé Program to NASA Contractors, but that section is not included in the final rule.

For more on the proposed rule, see the October 2008 *Federal Contracts Perspective* article “NASA to Update Its Mentor-Protégé Program.”

USAID CONSIDERING PARTNER VETTING SYSTEM

The United States Agency for International Development (USAID) is seeking comments on a proposed rule that would add USAID Acquisition Regulation (AIDAR) Subpart 704.70, Partner Vetting, which would apply to all USAID assistance and acquisition awards and help ensure that USAID funds and other resources do not inadvertently benefit individuals or entities that are terrorists, supporters of terrorists or affiliated with terrorists.

In July 2007, USAID announced its decision to establish a new system of records called the “Partner Vetting System” (PVS) to support the vetting of key individuals of non-governmental organizations (NGOs) who apply for USAID contracts, grants, cooperative agreements, or other funding and of NGOs who apply for registrations with USAID as Private and Voluntary Organizations. In January 2009, at the end of the Bush administration, USAID published a final rule adding PVS to its Privacy Act regulation and exempting portions of this system of records from one or more provisions of the Privacy Act. However, the effective date for the PVS Privacy Act final rule has been extended three times and, at this time, USAID has not yet made a final decision whether to implement PVS. If USAID decides to implement PVS, USAID intends to apply PVS to both assistance and acquisitions. Therefore, USAID is publishing a proposed AIDAR Subpart 704.70 that would be finalized if PVS is implemented, and seeking comments.

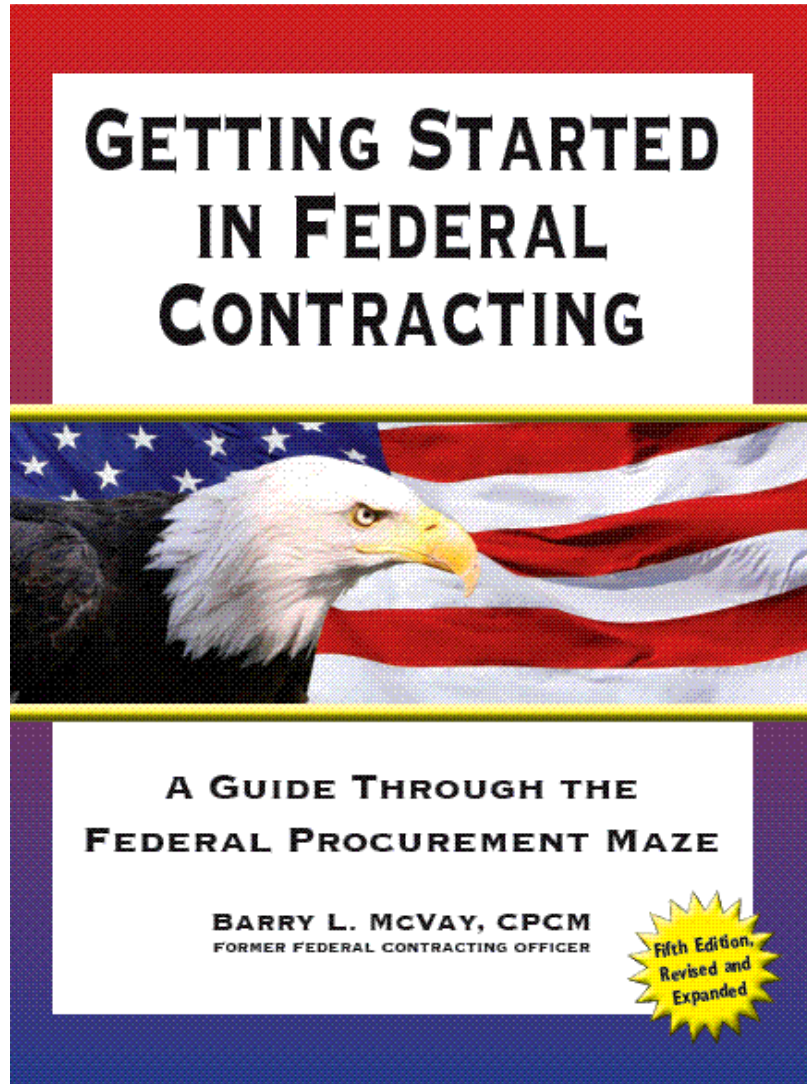
PVS will facilitate the management and collection of information from individuals, officers, employees, or other officials of organizations that seek USAID funding. The information will be used to conduct national security screening of such individuals and organizations. To properly conduct this screening, it is necessary to collect information on the principal officers and other key employees and personnel of USAID contractors.

USAID intends to apply PVS to acquisitions in a manner that protects the integrity of the source selection process but ensures that USAID’s Office of Security is able to obtain information necessary to vet key individuals and protect that information from unnecessary disclosure. To accomplish this, no individual involved in the source selection process, including the contracting officer, will have access to the information offerors submit for partner vetting, other than to confirm the key individuals the offerors have submitted.

When an acquisition is subject to vetting, AIDAR 752.204-70, Partner Vetting Pre-Award Requirements, will notify offerors of the vetting requirements and procedures. The contracting officer will instruct offerors when to submit the completed USAID Partner Information Form, USAID Form 500-13, to the vetting official identified in the solicitation. The vetting official will be a U.S. citizen employee of USAID who is not involved in the source selection process. In addition to receiving the completed Form 500-13s, the vetting official will be responsible for responding to questions from offerors about information to be included on the form, coordinating with the Office of Security, and conveying the vetting determination to each vetted offeror and the contracting officer.

Comments on the proposed rule must be submitted no later than August 25, 2009, by any of the following methods: (1) Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: AIDARPartnerVetting@usaid.gov (include “RIN number 0412-AA63” in the subject line of the message); (3) fax: 202-216-3395; or (4) mail: U.S. Agency for International Development, Office of Acquisition & Assistance, Policy Division, 1300 Pennsylvania Avenue, NW, Room 7.9-8, Washington, DC 20523-0001. Because security screening precautions have slowed the delivery and dependability of surface mail delivery to USAID/Washington, USAID recommends sending all comments to the Federal eRulemaking Portal. The above e-mail address and fax number are provided in the event that submission to the Federal eRulemaking Portal is not convenient. Those choosing to submit comments by e-mail must not use any special characters and any form of encryption.

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