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OMB ISSUES FIVE MEMOS PROVIDING CONTRACTING GUIDANCE

The Office of Management and Budget (OMB) issued five memoranda on various aspects of federal contracting, several of which are follow-ups to President Obama’s March 4 memorandum on “Government Contracting.” The five memoranda provide guidance on the relationship among the 8(a) business development program, the Historically Underutilized Business Zone (HUBZone) program, and the service-disabled veteran-owned small business (SDVOSB) programs; contractor performance information; communicating with lobbyists; achieving contract savings; and managing a workforce consisting of federal employees and private contractors.

■ **Recent Government Accountability Office (GAO) Decisions Concerning Small Business Programs:** In a highly unusual memorandum, OMB directed agencies to disregard two recent GAO protest decisions stating that the HUBZone program takes precedence over the SDVOSB and 8(a) programs (*B-400278*, *B-400308*, *International Program Group, Inc.*, September 19, 2008, and *B-401057*, *Mission Critical Solutions, Inc.*, May 4, 2009, respectively).

GAO, the investigative arm of Congress, cites language in the HUBZone program’s enabling legislation (Title 15 of the U.S. Code, Section 657a, paragraph (b)(2)(b)) which states, “Notwithstanding any other provision of law...a contract opportunity *shall* be awarded pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price” (emphasis added). This is in contrast to the language in Title 15 of the U.S. Code, Section 657f, paragraph (b): “A contracting officer *may* award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price” (emphasis added). The statutory language pertaining to the 8(a) program in Title 15 of the U.S. Code, Section 637, paragraph (a)(1)(A) is as follows: “In any case in which the [Small Business] Administration [SBA] certifies to any officer of the government having procurement powers that the [SBA] is competent and responsible to perform any specific government procurement contract to be let by any such officer, such officer shall be authorized *in his discretion* to let such procurement contract to the [SBA] upon such terms and conditions as may be agreed upon between the [SBA]

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and the procurement officer” (emphasis added). GAO’s interpretation is the use of the word “shall” in the HUBZone statute takes precedent over the word “may” in the SDVOSB statute and “in his discretion” in the 8(a) statute.

However, the SBA’s regulations give the three programs parity. For example, Title 13 of the Code of Federal Regulations (CFR), Section 126.607, When must a contracting officer set aside a requirement for qualified HUBZone SBCs?, paragraph (b) states, “The contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVOSB contracting before setting aside the requirement as a small business set-aside.”

In its memorandum, OMB states, “If agencies were to follow the GAO decisions, the federal government’s efforts to procure goods and services from 8(a) small businesses and from SDVOSB through the other statutory programs may be negatively impacted. In particular, the analysis the GAO offered in *Mission Critical Solutions* and *International Program Group* would, if followed, significantly limit the discretion contracting officers have historically possessed in deciding whether an agency will use 8(a), SDVOSB, or HUBZone small business programs to satisfy an agency’s acquisition requirement. Under the GAO’s reading of the statutes governing these programs, a federal agency must use a HUBZone small business for an acquisition if the agency’s contracting officer has a reasonable expectation that at least two qualified HUBZone small businesses will submit offers and that the award can be made at a fair market price. That is, an agency adhering to the GAO’s approach would, in such circumstances, be required to procure from a HUBZone small business even in a case where an 8(a) small business is currently providing the goods or services to the agency or where SBA has accepted the requirement for award through the 8(a) program.”

Noting that the separation of powers doctrine in the Constitution means that GAO’s decisions are not binding on federal agencies as part of the executive branch and “are contrary to regulations promulgated by the Small Business Administration (SBA) that provide for ‘parity’ among the three small business programs,” OMB announced that “an executive branch review of the legal basis underlying the GAO’s decisions has been initiated, and the results of that review are expected this month. Pending the results of the review, the applicable SBA ‘parity’ regulations remain binding and in effect as validly-promulgated implementations of the governing statutes.”

EDITOR’S NOTE: Subsequent to OMB’s memorandum, GAO turned down a request by the SBA to reconsider its *Mission Critical Solutions* decision on the grounds that the decision erred in its interpretation of the phrase “notwithstanding any other provision of law” found in the HUBZone statute (*B-401057.2, Small Business Administration – Reconsideration*, July 6, 2009). GAO characterized SBA’s argument as being that the phrase should “not be interpreted literally... because to do so would conflict with – and by implication repeal, in the SBA’s view – the goals set under the Small Business Act for contracting with various categories of small businesses. GAO dismissed SBA’s argument out-of-hand, noting that “SBA had not provided information to support its position” and that “SBA’s argument ignores the plain language of the HUBZone statute, which distinguishes that program from others, such as the 8(a) program, which have non-mandatory set-aside requirements.” *It will be interesting to see what happens once the executive branch review is issued!*

Vivina McVay, Editor-in Chief

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■ **Improving the Use of Contractor Performance Information:** The Office of Federal Procurement Policy (OFPP), which is part of OMB, issued a memorandum alerting chief acquisition officers (CAOs) and senior procurement executives (SPEs) of the final rule in Federal Acquisition Circular (FAC) 2005-34 that amends the Federal Acquisition Regulation (FAR) to strengthen the use of contractor performance information (see next article). “To reinforce the FAR requirements and to ensure quality evaluations are included in PPIRS [Past Performance Information Retrieval System], agency CAOs and SPEs shall make certain that internal procedures for evaluating and reporting contractor performance are clear and include evaluation factors, rating scales, and appropriate management controls such as: (1) identifying within-agency roles and responsibilities for using, reporting, and managing information in Past Performance Information Retrieval System (PPIRS), (2) establishing a process for conducting regular compliance assessments, and (3) developing a process for evaluating and validating the quality and timeliness of contractor performance evaluations, which shall include corrective action plans for addressing any delinquent and/or incomplete reports and performance metrics to measure compliance and quality regularly.” OFPP will begin conducting compliance assessments and quality reviews on February 1, 2010, to make certain that agencies are submitting to PPIRS timely performance evaluations and that these evaluations provide clear, comprehensive, and constructive information that is useful for making future contract award decisions. OFPP plans to publicly release statistics on agency compliance with these reporting requirements starting in FY 2010.

■ **Updated Guidance Regarding Communications with Registered Lobbyists About Recovery Act Funds:** On March 20, President Obama issued “Ensuring Responsible Spending of Recovery Act Funds.” Section 3 of the memorandum mandated specific protocols for oral communications between agency officials and federally-registered lobbyists. In OMB’s implementing memorandum dated July 24, 2009, OMB clarifies the prohibition on oral communications between federal agency officials and federally-registered lobbyists. The restriction applies in the period beginning after the submission of formal applications for, and up through awards of, competitive grants or other competitive forms of federal financial assistance under the Recovery Act. Also, the restriction has been expanded to cover, in general, all persons outside the federal government (not just federally-registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act.

■ **Improving Government Acquisition:** This memorandum requires agencies to: (1) review their existing contracts and acquisition practices and develop an acquisition savings plan to save 7% of baseline contract spending by the end of FY 2011 (3.5% in FY 2010 and an additional 3.5% in FY 2011); and (2) reduce by 10% the share of dollars obligated in FY 2010 under new contract actions that are awarded with the following high-risk contracting authorities: contracts awarded noncompetitively and/or that receive only one bid in response to a solicitation or a request for quote; cost-reimbursement contracts; and time-and-materials (T&M) and labor-hour (LH) contracts.

■ **Managing the Multi-Sector Workforce:** This memorandum requires agencies to begin the process of developing and implementing policies, practices, and tools for managing the multi-sector workforce (that is, a workforce consisting of both federal and contractor employees). The memorandum requires program, human capital, acquisition, and budget and finance offices to collaborate on the following actions: (1) adopt a framework for planning and managing the multi-sector workforce; (2) conduct a multi-sector workforce planning pilot; and (3) when considering in-sourcing, use criteria developed by OMB to facilitate consistent and sound application of statutory requirements.

FAC 2005-34 ADDRESSES PAST PERFORMANCE INFORMATION

Federal Acquisition Circular (FAC) 2004-34 consists of three rules revising the Federal Acquisition Regulation (FAR), the most significant being the one that revises the contractor performance information process.

■ **Contractor Performance Information:** This final rule emphasizes the use of the Past Performance Information Retrieval System (PPIRS) (<http://www.ppirs.gov>). This change aligns the FAR with President Obama's March 4, 2009, memorandum "Government Contracting," particularly the mandate for agencies to manage the government's risk associated with the goods and services being procured and ensuring projects are completed effectively and efficiently (for more on the Government Contracting memorandum, see the April 2009 *Federal Contracts Perspective* article "Obama Directs More Fixed-Price Contracts and Fewer Sole Source Contracts").

The final rule: (1) clearly reflects the requirement to use of the PPIRS; (2) requires the evaluation of past performance for orders exceeding the simplified acquisition threshold (*i.e.*, \$100,000) placed against Federal Supply Schedule contracts, or under a task order or delivery order against a contract awarded by another federal agency (*i.e.*, a governmentwide acquisition contract (GWAC) or multi-agency contract); (3) recommends past performance information for orders under single agency contracts; (4) consolidates the collection of past performance guidance in FAR Part 42, Contract Administration and Audit Services; and (5) clarifies that agencies are to identify those responsible for preparing interim and final evaluations.

The primary changes are in FAR Subpart 42.15, Contractor Performance Information:

- FAR 42.1502, Policy, is revised to: (1) require evaluations of contractor performance for each contract that exceeds the simplified acquisition threshold (paragraph (b)); (2) require evaluations of contractor performance for each task or deliver order that exceeds the simplified acquisition threshold placed against a Federal Supply Schedule contract, a GWACs, or multi-agency contract (paragraph (c)); permit the contracting officer to require performance evaluations for each task or delivery order against a single-agency contract in excess of the simplified acquisition threshold when such evaluations would produce more useful past performance information for source selection officials than that contained in the overall contract evaluation (paragraph (d)); (4) require past performance evaluations for each construction contract of \$550,000 or more, or for each construction contract terminated for default regardless of dollar amount (paragraph (e)); (5) require past performance evaluations for each architect-engineer services contract of \$30,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value (paragraph (f)); and (6) require an assessment of contractor performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes FAR 52.219-9, Small Business Subcontracting Plan (paragraph (g)).
- FAR 42.1503, Procedures, is revised to: (1) require agencies to identify those responsible for preparing interim and final evaluations (paragraph (a)); (2) require agencies to submit past performance reports electronically to PPIRS (paragraph (c)); and (3) require agencies to use the past performance information in PPIRS that is within three years of the completion of performance of the evaluated contract or order (six years for construction and architect-engineer contracts) (paragraph (e)).

Ten respondents submitted forty comments on the proposed rule. In response to these comments, several editorial and clarifying changes were made to the final rule (for example, revising FAR 2.101, Definitions, by adding the word “physically” to the definition of “past performance” to clarify that the term means “an offeror’s or contractor’s performance on active and *physically* completed contracts”). For more on the proposed rule, see the May 2008 *Federal Contracts Perspective* article “FAR Proposals For Progress Payments, Performance.”

■ **Prohibition on Contracting with Inverted Domestic Corporations:** This interim rule adds FAR 9.108, Prohibition on Contracting with Inverted Domestic Corporations, and a corresponding provision to implement Section 743 of the Omnibus Appropriations Act of 2009 (Public Law 111-8), which prohibits the award of contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of one. The reason a corporation would do this is to avoid United States taxes on business income generated in foreign countries. Bermuda, Barbados, and the Cayman Islands are well known tax havens, though they are not the only ones. A term in wide use for these corporations is “corporate expatriate.”

The following are the significant provisions of this interim rule:

- FAR 9.108-1, Definition, defines an “inverted domestic corporation” as “a foreign incorporated entity which is treated as an inverted domestic corporation...*i.e.*, a corporation that used to be incorporated in the United States, or used to be a partnership in the United States, but now is incorporated in a foreign country, or is a subsidiary whose parent corporation is incorporated in a foreign country...”
- FAR 9.108-2, Relationship with the Internal Revenue Code and Treasury Regulations, states that a foreign corporation is covered by the prohibition if it is considered an inverted domestic corporation for federal income tax purposes (*i.e.*, (1) at least 80% of the stock is now held by former shareholders of the domestic corporation or partners of the domestic partnership; and (2) the foreign entity plus companies connected to it by 50% percent or more ownership do not have substantial business activities in the foreign country).
- FAR 9.108-3, Prohibition, states that the prohibition applies to actions using FY 2009 appropriated funds *and* FY 2006 through 2008 funds because the same prohibition was contained in FY 2006-2008 appropriations acts.
- FAR 9.108-4, Waiver, permits an agency head to waive this prohibition if in the interest of national security and it is reported to Congress.

In addition, FAR 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations – Representation, is required to be included in each solicitation issued after July 1, 2009, for the acquisition of products or services unless waived in accordance with FAR 9.108-4. FAR 52.209-2 states that any offeror submitting an offer represents that it is not an inverted domestic corporation.

Comments on the interim rule must be submitted no later than August 31, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-009” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-009; 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 2005-34, FAR Case 2008-009” in all correspondence.

For more on the acquisition-related provisions of Public Law 111-8, see the April 2009 *Federal Contracts Perspective* article “Omnibus Appropriations Act Addresses Insourcing.”

EDITORS NOTE: The Department of Homeland Security (DHS) has had its own rule prohibiting contracting with inverted domestic corporations since December 2003 (see Homeland Security Acquisition Regulation (HSAR) 3009.104-70, Prohibition on Contracts with Corporate Expatriates). The DHS rule implements section 835 of the Homeland Security Act of 2002 (Public Law 107-296).

■ **Role of Interagency Committee on Debarment and Suspension:** This final rule amends FAR 9.402, Policy, to implement Section 873, paragraphs (a)(1) and (2) of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417). Paragraphs (a)(1) and (2) clarify the role of the Interagency Committee on Debarment and Suspension when more than one agency has an interest in the debarment or suspension of a contractor.

New paragraph (d) of FAR 9.402 (current paragraph (d) is redesignated as paragraph (e)) states, “When more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Committee on Debarment and Suspension...shall resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency.”

PROHIBITION ON PROJECT LABOR AGREEMENTS RESCINDED

FAC 2005-35 implements Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects, by deleting references to the revoked Executive Order 13202. Executive Order 13202 prohibited executive departments and agencies from requiring or prohibiting federal contractors and subcontractors’ entrance into project labor agreements.

The removed references were in paragraph (c) of FAR 17.603, Limitations; paragraph (b) of FAR 22.101-1, General; and paragraph (d) of FAR 36.202, Specifications.

Executive Order 13502 encourages executive agencies to consider requiring the use of project labor agreements in connection with large scale construction projects to promote economy and efficiency in federal procurement. The term “project labor agreement” means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.”

Concurrently with the issuance of FAC 2005-35 was the publication of a proposed rule that would add FAR Subpart 22.5, Use of Project Labor Agreements for Federal Construction Projects, to encourage federal departments and agencies to consider requiring the use of project labor agreements for federal construction projects where the total cost to the government is more than \$25 million. In addition, a new provision FAR 52.222-XX, Notice of Requirement for Project Labor Agreement, and a new clause FAR 52.222-YY, Project Labor Agreements, would be required to be included in all solicitations and contracts associated with a project if the agency determines that a project labor agreement will be required.

Comments on the proposed rule must be submitted no later than August 13, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2009-005” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2009-005; 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 2009-005” in all correspondence.

For more on Executive Order 13502, see the March 2009 *Federal Contracts Perspective* article “Obama Issues Four Labor-Related Executive Orders.” For more on Executive Order 13202, see the March 2001 *Federal Contracts Perspective* article “Bush Issues Three Acquisition-Related Orders Involving Labor Issues in FAR Part 22.”

TIDAL WAVE OF DFARS CHANGES IN JULY

A dam must have broken in July, because the Department of Defense (DOD) released 18 different rule changes to the Defense Federal Acquisition Regulation Supplement (DFARS) in July – nine final rules, five interim rules, two sets of technical amendments, and two proposed rules.

■ **Lease of Combat Vehicles:** This final rule amends DFARS 207.470, Statutory Requirements, to permit the award of a contract for the long-term lease or charter of a combat vehicle only if the contract will provide for a substantial termination liability, and if the secretary of the military department fulfills certain other requirements. This restriction had previously applied to vessels and aircraft. Section 815 of Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006, added combat vehicles to the restricted items.

Five respondents submitted comments in response to the proposed rule. In response to the comments, the final rule clarifies that the rule applies only to *long-term* leases or charters. Also, the proposed rule would have applied to “a lease, charter, *or similar agreement*”. The term “similar agreement” has been deleted.

For more on the proposed rule, see the June 2007 *Federal Contracts Perspective* article “DFARS Would Restrict Combat Vehicles Leasing.”

For more on other acquisition-related provisions of Public Law 109-163, see the February 2006 *Federal Contracts Perspective* article “2006 Defense Authorization Addresses A-76, Consolidates Civilian Boards of Contract Appeals.”

■ **Use of Commercial Software:** This final rule amends DFARS 212.212, Computer Software, to require the DOD to identify and evaluate, at all stages of the acquisition process, opportunities for the use of commercial computer software and other non-developmental software in accordance with Section 803 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417). In addition, a cross-reference to DFARS Subpart 208.74, Enterprise Software Agreements, is added to DFARS 212.212 (DFARS Subpart 208.74 prescribes policy and procedures for acquisition of commercial software and software maintenance), and a cross-reference to DFARS 227.7202, Commercial Computer Software and Commercial Computer Software Documentation, is added to DFARS 212.212 and DFARS 239.101, Policy [on information technology acquisition] (DFARS 227.7202 provides policy on the acquisition of commercial computer software and commercial computer software documentation).

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

■ **Restriction on Acquisition of Specialty Metals:** This final rule amends DFARS 225.7003, Restrictions on Acquisition of Specialty Metals, to address restrictions on the acquisition of

specialty metals not melted or produced in the United States. The rule implements Section 842 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181).

Section 842 of Public Law 109-364 added new provisions as Title 10 of the U.S. Code, Section 2533b (10 U.S.C. 2533b) to address requirements for the purchase of specialty metals from domestic sources. Section 804 of Public Law 110-181 made amendments to 10 U.S.C. 2533b with regard to its applicability to commercial items, electronic components, items containing minimal amounts of specialty metals, items necessary in the interest of national security, and items not available domestically in the required form. In addition, Section 884 of Public Law 110-181 added a requirement for DOD to publish a notice on the Federal Business Opportunities (FedBizOpps) website (<http://www.fbo.gov>) before making a domestic nonavailability determination that would apply to more than one contract.

This rule removes: (1) “specialty metals” from the title of DFARS 225.7002, Restrictions on Food, Clothing, Fabrics, Specialty Metals, and Hand or Measuring Tools (now titled “Restrictions on Food, Clothing, Fabrics, and Hand or Measuring Tools”); (2) paragraph (b) of DFARS 225.7002-1, Restrictions, which addressed restrictions on specialty metals; and (3) the paragraphs that address specialty metals in DFARS 225.7002-2, Exceptions – (b)(4), (m), (n), and (q). In addition, DFARS 252.225-7014, Preference for Domestic Specialty Metals, is deleted.

New DFARS 225.7003, Restrictions on Acquisitions of Specialty Metals, contains the following provisions (current DFARS 225.7003, Waiver of Restrictions of 10 U.S.C. 2534, is redesignated as DFARS 225.7008):

- DFARS 225.7003-2, Restrictions, prohibits the acquisition of “a specialty metal (*e.g.*, raw stock, including bar, billet, slab, wire, plate, and sheet; castings; and forgings) as an end item, unless the specialty metal is melted or produced in the United States. This restriction applies to specialty metal acquired by a contractor for delivery to DOD as an end item, in addition to specialty metal acquired by DOD directly from the entity that melted or produced the specialty metal.”
- Paragraph (a) of DFARS 225.7003-3, Exceptions, adds the following acquisitions as exceptions to the restrictions in DFARS 225.7003-2:
 - At or below the simplified acquisition threshold
 - Made outside the United States in support of combat operations
 - In support of contingency operations
 - For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency
 - Items specifically for commissary resale
 - Items for test and evaluation under the foreign comparative testing program (this exception does not apply to any acquisitions under follow-on production contracts)
- DFARS 225.7003-3(b) adds the following as exceptions to the restrictions in DFARS 225.7003-2:
 - Electronic components.
 - Commercially available off-the-shelf (COTS) items containing specialty metals, except the restrictions do apply to contracts or subcontracts for the acquisition of (1)

- specialty metal mill products, such as bar, billet, slab, wire, plate, and sheet, that have not been incorporated into end items, subsystems, assemblies, or components; (2) forgings or castings of specialty metals, unless the forgings or castings are incorporated into COTS end items, subsystems, or assemblies; (3) commercially available high performance magnets that contain specialty metal, unless such high performance magnets are incorporated into COTS end items or subsystems; and (4) COTS fasteners, unless the fasteners are incorporated into COTS end items, subsystems, or assemblies.
- Fasteners that are commercial items and are acquired under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted or produced specialty metal, in the required form, for use in the production of fasteners for sale to DOD and other customers, that is not less than 50% of the total amount of the specialty metal that the manufacturer will purchase to carry out the production of such fasteners for all customers.
 - Items listed in DFARS 225.7003-2 (above) that are manufactured in a qualifying country or containing specialty metals melted or produced in a qualifying country.
 - Specialty metal in any of the items listed in DFARS 225.7003-2 if the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) determines that specialty metal melted or produced in the United States cannot be acquired as and when needed at a fair and reasonable price in a satisfactory quality, a sufficient quantity, and the required form (*i.e.*, a domestic nonavailability determination).
 - End items containing a minimal amount of otherwise noncompliant specialty metals (*i.e.*, specialty metals not melted or produced in the United States that are not covered by another of these exceptions) if the total weight of noncompliant specialty metal does not exceed 2% of the total weight of all specialty metal in the end item (this exception does not apply to high performance magnets containing specialty metals).
- DFARS 225.7003-3(c) provides an alternative compliance method for commercial derivative military articles (defined in DFARS 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, as “an item acquired by the DOD that is or will be produced using the same production facilities, a common supply chain, and the same or similar production processes that are used for the production of articles predominantly used by the general public or by nongovernmental entities for purposes other than governmental purposes”). This compliance method can be used if DOD determines that an item to be acquired is a commercial derivative military article, and the contractor certifies that the contractor and its subcontractors will individually or collectively enter into a contractual agreement or agreements to purchase a specified amount of domestically melted specialty metal for use, during the period of contract performance, in the production of the commercial derivative military article and the related commercial article.
 - DFARS 225.7003-3(d) authorizes the USD(AT&L) to waive the restrictions if the USD(AT&L) determines in writing that acceptance of the item is necessary to the national security interests of the United States.
 - DFARS 225.7003-4, One-Time Waiver, establishes a one-time waiver authority for contracts under which specialty metals were incorporated into items produced,

manufactured, or assembled in the United States prior to October 17, 2006, and where final acceptance by the government takes place before September 30, 2010, provided the noncompliance was not knowing or willful.

DFARS 252.225-7014, Preference for Domestic Specialty Metals, is deleted and replaced by the following:

- Clause DFARS 252.225-7008, Restriction on Acquisition of Specialty Metals, which is to be included in solicitations and contracts that exceed the simplified acquisition threshold and require the delivery of specialty metals as end items.
- Clause DFARS 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, which is to be included in solicitations and contracts that exceed the simplified acquisition threshold and require delivery of any of the following items, or components of the following items, if such items or components contain specialty metal: aircraft, missile or space systems, ships, tank or automotive items, weapon systems, or ammunition.
- Provision DFARS 252.225-7010, Commercial Derivative Military Article – Specialty Metals Compliance Certificate, which is to be in solicitations that contain DFARS 252.225-7009 and for which the contracting officer anticipates that one or more offers of commercial derivative military articles may be received.
- Clause DFARS 252.225-7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, would be included in solicitations and contracts that contain DFARS 252.225-7009, are for the acquisition of noncommercial end item, and are awarded in fiscal year 2009.

Sixteen respondents submitted comments on the proposed rule – approximately half of the comments addressed various definitions (*e.g.*, electronic component, high performance magnets, produce) and exceptions. As a result of the comments, several of the definitions have been refined, and several exceptions have been clarified.

For more on the proposed rule, see the August 2008 *Federal Contracts Perspective* article “Restrictions on Specialty Metals Proposed.”

■ **Requirements Applicable to Undefined Contract Actions:** This final rule amends DFARS Subpart 217.74, Undefined Contract Actions (particularly with the addition of DFARS 217.7405, Plans and Reports), to address requirements for DOD management and oversight of undefined contract actions, consistent with the provisions of Section 809 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). DFARS 217.7405 requires semi-annual reporting of undefined contract actions exceeding \$5,000,000 to the Office of the Director, Defense Procurement and Acquisition Policy. Also, the rule emphasizes the limitations on the obligation of funds and profit considerations that apply to undefined contract actions in new paragraph (b) of DFARS 217.7404-4, Limitations on Obligations.

For more on other acquisition-related provisions of Public Law 110-181, see the February 2008 *Federal Contracts Perspective* article “Defense Authorization Act Restricts A-76 Competitions, Extends FAR Subpart 13.5.”

■ **Peer Reviews of Contracts:** This final rule adds DFARS 201.170, Peer Reviews, to ensure consistent policy implementation, to improve the quality of contracting processes, and to facilitate cross-sharing of best practices and lessons learned throughout DOD.

DFARS 201.170 specifies that the Office of the Director, Defense Procurement and Acquisition Policy, will organize teams of reviewers and will facilitate peer reviews for all solicitations valued at \$1 billion or more and for all contracts for services valued at \$1 billion or more. In addition, it requires the military departments, defense agencies, and DOD field activities to establish procedures for pre-award Peer Review of solicitations valued at less than \$1 billion, and post-award Peer Review of contracts for services valued at less than \$1 billion.

■ **Government Property:** This final rule updates and reorganizes four subparts of DFARS Part 245, Government Property – DFARS Subpart 245.1, General; Subpart 245.3, Providing Government Property to Contractors; Subpart 245.4, Use and Rental of Government Property; and Subpart 245.5, Management of Government Property in the Possession of Contractors – to delete obsolete terms and sections, update sections, and relocate sections to correspond to the FAR by FAC 2005-17 that addressed management of government property in the possession of contractors (see the June 2007 *Federal Contracts Perspective* article “FAR Coverage on Government Property Simplified, Clarified, Trimmed”).

Three respondents submitted comments on the proposed rule, and the following changes are made to the final rule:

- Proposed paragraph (2) of DFARS 245.301, Use and Rental, required assistant secretary or agency head approval for certain non-government use of government-owned equipment. However, FAR 45.301 assigns this responsibility to the head of the contracting activity, so DFARS 245.301 is removed from the final rule.
- Paragraph (1)(i) of DFARS 245.302, Contracts with Foreign Governments or International Organizations, stated that contracting officers “shall” authorize contractor use of government property on work for foreign governments or international organizations “only if” certain conditions were met. The respondent recommended that “only if” be changed to “provided”. This recommendation was adopted. In addition, the word “may” has been replaced with the word “shall” to preserve contracting officer flexibility.

For more on the proposed rule, see the October 2008 *Federal Contracts Perspective* article “DFARS Implements 2008 Defense Authorization Act.”

■ **Contract Reporting:** This final rule revises DFARS Subpart 204.6, Contract Reporting, to address DOD requirements for reporting of contract actions in the Federal Procurement Data System (FPDS), a comprehensive web-based tool for federal agencies to report contract actions (it can be accessed at <https://www.fpds.gov>). Also, the rule removes references to the obsolete DD Form 350, Individual Contracting Action Report, in paragraph (b) of DFARS 204.902, General; paragraph (c) of DFARS 204.7203, Responsibilities of Contracting Officers; paragraph (2)(iv) of the definition for “small business disadvantaged firm” in DFARS 219.001, Definitions; DFARS 219.202-5, Data Collection and Reporting Requirements; and DFARS 253.204-70, DD Form 350, Individual Contracting Action Report.

The changes to DFARS Subpart 204.6 are:

- New DFARS 204.602, General, references Procedures, Guidance, and Information (PGI) 204.602 as a source for additional information on the FPDS and procedures for resolving technical or policy issues relating to FPDS.
- New DFARS 204.604, Responsibilities, states that the process for reporting contract actions to FPDS should be automated, where possible, by incorporating it into contract

writing systems. Also, it provides instructions for contract file documentation requirements, and requires that the chief acquisition officer for each DOD component report to the Director, Defense Procurement and Acquisition Policy, the annual certification and data validation results for the preceding fiscal year.

- New DFARS 204.606, Reporting Data, requires that the procedures for reporting data to FPDS in PGI 204.606 be followed in addition to those in FAR 4.606.
- DFARS 204.670, Contract Action Reporting Requirements, is deleted.

■ **Clarification of Central Contractor Registration and Procurement Instrument**

Identification Data Requirements: This final rule amends DFARS 204.1103, Procedures, to address requirements for ensuring the accuracy of contractor information in the Central Contractor Registration (CCR) database (<http://www.ccr.gov>) and in contract documents. The revised DFARS 204.1103 requires contracting officers to verify the accuracy of the contractor's CCR information before exercising options or at any other time before issuing a modification. If the contractor's Data Universal Numbering System (DUNS) number, Commercial and Government Entity (CAGE) code, contractor name, or physical address on a contract do not match the information on the contractor's record in the CCR database, the contracting officer must process a novation or change-of-name agreement, or an address change, as appropriate. Also, DFARS 217.207, Exercise of Options, is added to reiterate this requirement.

In addition, DFARS Subpart 204.70, Uniform Procurement Instrument Identification Numbers, is amended by revising DFARS 204.7003, Basic PII [Procurement Instrument Identification] Number, to clarify: (1) in paragraph (a)(2) and the PII number illustration in DFARS 204.7003(b) that positions 7 and 8 of the PII number are to consist of "the last two digits of the fiscal year in which the PII number was assigned"; and (2) in paragraph (a)(3) that position 9, Type of Instrument, is not to use code C (contracts) or code H (agreements) for contracts or agreements with provisions for orders or calls.

Three respondents submitted comments on the proposed rule. In response to the comments, the following changes were made to the final rule:

- DFARS 204.7003(a)(ii) had stated that positions 7 and 8 of the PII number consist of the last two digits of the fiscal year in which the *PII number is assigned*. The proposed DFARS 204.7003(a)(ii) would have stated that positions 7 and 8 of the PII number are to consist of the last two digits of the fiscal year in which the *contract instrument is awarded*. One respondent stated that the proposed change "does not recognize that PII numbers are used for preaward solicitation actions as well as contract awards." Therefore, DOD almost went back to the original language – "PII number *was* assigned" as opposed to the original "PII number is assigned".
- One respondent recommended that DFARS 204.1103 specifically state that contract documents include the contractor's physical address as the official address. This recommended change was made to DFARS 204.1103(1).

For more on the proposed rule, see the November 2008 *Federal Contracts Perspective* article "DFARS Addresses Selected Reserve, Human Subjects."

■ **Protection of Human Subjects in Research Projects:** This final rule adds DFARS 252.235-7004, Protection of Human Subjects, to address requirements for the protection of

human subjects involved in research projects. The clause informs contractors of their responsibilities for compliance with Title 32 of the Code of Federal Regulations (CFR), Part 219, Protection of Human Subjects; DOD Directive 3216.02, Protection of Human Subjects and Adherence to Ethical Standards in DOD Supported Research; applicable DoD component policies; Title 10 of United States Code (USC), Chapter 49, Miscellaneous Prohibitions and Penalties, Section 980, Limitation on Use of Humans as Experimental Subjects; and, when applicable, Food and Drug Administration policies and regulations.

In addition, DFARS 207.172, Human Research, is added to require DOD components sponsoring research involving human subjects to have a Human Resource Protection Official, and DFARS 235.072, Additional Contract Clauses, is revised to require the inclusion of DFARS 252.235-7004 in solicitations and contracts that include or may include research involving human subjects. DFARS 235.072 clarifies that the clause does not apply to the use of cadaver materials alone.

For more on the proposed rule, see the November 2008 *Federal Contracts Perspective* article “DFARS Addresses Selected Reserve, Human Subjects.”

■ **Acquisition of Commercial Items:** This interim rule implements Sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 805 specifies the conditions under which a time-and-materials (T&M) or labor-hour (LH) contract may be used for the acquisition of commercial items. Section 815 addresses the situations under which major weapon systems, subsystems of major weapon systems, and components and spare parts for major weapon systems may be acquired using procedures established for the acquisition of commercial items. In addition, Section 815 requires DOD to modify its regulations to clarify that the terms “general public” and “non-governmental entities” do not include the federal government or a state, local, or foreign government with regard to sales of commercial items.

This rule makes the following changes:

- To DFARS 202.101, Definitions, is added an explanation that the terms “general public” and non-governmental entities,” as used in the “commercial item” definition in FAR 2.101, “do not include the federal government or a state, local, or foreign government.”
- DFARS 212.207, Contract Type, is added. It specifies that T&M and LH contracts may be used to acquire commercial items on for the following: (1) services acquired in support of a commercial item; (2) emergency repair services; and (3) any other commercial services if the head of the agency approves a determination of the contracting officer that such services are commonly sold to the general public through use of T&M or LH contracts, and the use of a T&M or LH contract type is in the best interest of the government.
- DFARS 234.7002, Policy, is amended to clarify that: (1) a subsystem of a major system may be treated as a commercial item if the subsystem is intended for a major system that is being acquired as a commercial item, or the contracting officer determines the subsystem is a commercial item; and (2) a component or spare part for a major weapon system or a subsystem of a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item if the component or spare part is intended for a major system or a subsystem that is being acquired as a commercial item.

Comments on the interim rule must be submitted no later than September 14, 2009, by any of the following means: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-

mail: dfars@osd.mil (include “DFARS Case 2008-D011” in the subject line of the message); (3) fax: 703-602-7887; (4) mail: Defense Acquisition Regulations System, Attn: Ms. Angie Sawyer, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062; or (5) hand delivery/courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402. Identify comments as “DFARS Case 2008-D011.”

For more on other acquisition-related provisions of Public Law 110-181, see the February 2008 *Federal Contracts Perspective* article “Defense Authorization Act Restricts A-76 Competitions, Extends FAR Subpart 13.5.”

■ **Limitation on Procurements on Behalf of DOD:** This interim rule amends DFARS Subpart 217.78, Contracts or Delivery Orders Issued by a Non-DOD Agency, to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which places limitations on acquisitions made by non-DOD agencies on behalf of DOD. DFARS 217.7802, Policy, is amended to provide that such acquisitions exceeding the simplified acquisition threshold may be made only if the head of the non-DOD agency has certified that the non-DOD agency will comply with defense procurement requirements for the fiscal year. However, this limitation will not apply to the acquisition of supplies and services during any fiscal year when there is in effect a written determination of the Under Secretary of Defense for Acquisition, Technology, and Logistics, that it is necessary in the interest of DOD to acquire supplies and services through the non-DOD agency during the fiscal year. Non-DOD agency certifications and additional information are available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

Comments on the interim rule must be submitted no later than September 14, 2009, by any of the means mentioned above, except mail should be sent to the attention of Cassandra Freeman, and comments should be identified as “DFARS Case 2008-D005.”

For more on other acquisition-related provisions of Public Law 110-181, see the February 2008 *Federal Contracts Perspective* article “Defense Authorization Act Restricts A-76 Competitions, Extends FAR Subpart 13.5.”

■ **Lead System Integrators:** This interim rule amends DFARS 209.570, Limitations on Contractors Acting as Lead System Integrators, and adds DFARS 237.102-72, Contracts for Management Services, to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which places limitations on the award of new contracts for lead system integrator functions in the acquisition of major DOD systems.

An interim rule was published on January 10, 2008, to implement Section 807 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) with regard to limitations on the performance of lead system integrator functions by DOD contractors. Section 802 of Public Law 110-181 placed additional limitations on DOD use of lead system integrators. This second interim rule amends the initial interim rule to implement Section 802.

This second interim rule makes the following changes:

- Paragraphs (c) and (d) are added to DFARS 209.570-2, Policy. Paragraph (c) permits award of a new contract for lead system integrator functions in the acquisition of a major system only if: (1) the major system has not yet proceeded beyond low-rate initial production; or (2) the Secretary of Defense determines in writing that it would not be practicable to carry out the acquisition without continuing to use a contractor to perform lead system integrator functions and that doing so is in the best interest of DOD. Paragraph (d) states, “Effective October 1, 2010, DOD is prohibited from awarding a new

contract for lead system integrator functions in the acquisition of a major system to any entity that was not performing lead system integrator functions in the acquisition of the major system prior to January 28, 2008.”

- A new paragraph (b) is added to DFARS 209.570-3, Procedures, to address the Secretary of Defense’s determination. The determination “(1) shall specify the reasons why it would not be practicable to carry out the acquisition without continuing to use a contractor to perform lead system integrator functions, including a discussion of alternatives, such as use of the DoD workforce or a system engineering and technical assistance contractor; (2) shall include a plan for phasing out the use of contracted lead system integrator functions over the shortest period of time consistent with the interest of the national defense; and (3) shall be provided to the Committees on Armed Services of the Senate and the House of Representatives at least 45 days before the award of a contract pursuant to the determination.
- DFARS 237.102-72 is added to provide that “DOD may award a contract for the acquisition of services the primary purpose of which is to perform acquisition support functions with respect to the development or production of a major system, only if: (a) the contract prohibits the contractor from performing inherently governmental functions; (b) the DOD organization responsible for the development or production of the major system ensures that Federal employees are responsible for determining (1) courses of action to be taken in the best interest of the government; and (2) best technical performance for the warfighter; and (c) the contract requires that the prime contractor for the contract may not advise or recommend the award of a contract or subcontract for the development or production of the major system to an entity owned in whole or in part by the prime contractor.”

Comments on the second interim rule must be submitted no later than September 14, 2009, by any of the means mentioned above, except mail should be sent to the attention of Cassandra Freeman, and comments should be identified as “DFARS Case 200-D051.”

■ **Motor Carrier Fuel Surcharge:** This interim rule adds DFARS 252.247-7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, to implement Section 884 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417). Section 884 requires DOD to take appropriate actions to ensure that, to the maximum extent practicable, in all carriage contracts that provide for a fuel-related adjustment, any such adjustment is passed through to the person who bears the cost of the fuel to which the adjustment relates. DFARS 252.247-7003 requires the contractor to include the substance of the clause in all subcontracts with motor carriers, brokers, or freight forwarders.

Comments on the interim rule must be submitted no later than September 28, 2009, by any of the means mentioned above, except mail should be sent to the attention of Mark Gomersall, and comments should be identified as “DFARS Case 2008-D040.”

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

■ **Trade Agreements – Costa Rica and Peru:** This interim rule amends DFARS 252.225-7021, Trade Agreements, DFARS 252.225-7036, Buy American Act – Free Trade Agreements – Balance of Payments Program, and DFARS 252.225-7045 Balance of Payments Program –

Construction Material Under Trade Agreements, to implement the Dominican Republic-Central America-United States Free Trade Agreement with respect to Costa Rica, and the United States-Peru Trade Promotion Agreement. These trade agreements waive the applicability of the Buy American Act for DOD acquisition of foreign supplies and construction materials from Costa Rica and Peru.

In addition, this rule amends DFARS 225.003, Definitions, to exclude Oman from the “Free Trade Agreement country” definition for DOD acquisitions. Oman was added to the “Free Trade Agreement country” definition to implement the United States-Oman Free Trade Agreement. However, the procurement obligations in the United States-Oman Free Trade Agreement do not apply to DOD.

Comments on the interim rule must be submitted no later than September 28, 2009, by any of the means mentioned above, except mail should be sent to the attention of Amy Williams, and comments should be identified as “DFARS Case 2008-D046.”

■ **Technical Amendment #1:** This technical amendment: (i) updates cross-references in DFARS 204.7202-2, DUNS Numbers; paragraphs (b)(2) and (c)(1) of DFARS 219.708, Contract Clauses; paragraph (c) of DFARS 219.1204, Solicitation Provisions and Contract Clauses; and paragraph (11)(i) of DFARS 225.1101, Acquisition of Supplies; (ii) adds a reference to <http://www.acq.osd.mil/log/PS/spot.html> as another source of information on the Synchronized Predeployment and Operational Tracker (SPOT) system; and (iii) revises paragraph (n)(2) of DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, to update a reference to DOD Directive 3002.01E, Personnel Recovery in the Department of Defense.

■ **Technical Amendment #2:** This technical amendment updates the list of Air Force contracting activities in the “contracting activity” definition in DFARS 202.101, Definitions. Also, a paragraph designation in Alternate I of DFARS 252.225-7036, Buy American Act – Free Trade Agreements – Balance of Payments Program, is updated for consistency with the corresponding paragraph in the basic clause.

■ **Management of Unpriced Change Orders:** This proposed rule would add DFARS 243.204-70, Definitization of Change Orders, to address requirements for DOD management and oversight of unpriced change orders in a manner consistent with the requirements that apply to other undefinitized contract actions. The new DFARS 243.204-70 would consist of language essentially the same as that in DFARS Subpart 217.74, Undefinitized Contract Actions, modified accordingly, and would apply to unpriced change orders with an estimated value exceeding \$5,000,000. For example, proposed DFARS 243.204-70-2, Price Ceiling, is practically identical to DFARS 217.7404-2, Price Ceiling; proposed DFARS 243.204-70-3, Definitization Schedule, is practically identical to DFARS 217.7404-3, Definitization Schedule.

Comments on the proposed rule must be submitted no later than September 28, 2009, by any of the means mentioned above, except mail should be sent to the attention of Cassandra Freeman, and comments should be identified as “DFARS Case 2008-D034.”

■ **Letter Contract Definitization Schedule:** This proposed rule would add DFARS 216.603-2, Application, to specify that DOD letter contracts will be definitized using the DFARS procedures applicable to all other undefinitized contract actions.

FAR 16.603, Letter Contracts, permits the use of a letter contract as a preliminary, undefinitized contractual instrument when the negotiation of a definitive contract would not be possible in sufficient time to meet the government’s requirements. Paragraph (c)(3) of FAR

16.603-2, Application, requires the definitization of a letter contract within 180 days after the date of the letter contract or before completion of 40% of the work to be performed, whichever occurs first.

DFARS Subpart 217.74, Undefined Contract Actions, contains requirements applicable to DOD undefinitized contract actions. Paragraph (a) of DFARS 217.7404-3, Definitization Schedule, requires definitization of such actions by 180 days after issuance of the action or the date on which the amount of funds obligated exceeds 50% of the not-to-exceed price, whichever is earlier. If the contractor submits a qualifying proposal before 50% of the not-to-exceed price has been obligated by the government, the limitation on obligations before definitization may be increased to no more than 75%.

The differences between the FAR and DFARS definitization requirements has caused confusion. Therefore, this proposed rule would add DFARS 216.603-2 to direct contracting officers to “establish definitization schedules for letter contracts following the requirements at [DFARS] 217.7404-3(a) instead of the requirements at FAR 16.603-2(c)(3).”

Comments on the proposed rule must be submitted no later than September 28, 2009, by any of the means mentioned above, except mail should be sent to the attention of Cassandra Freeman, and comments should be identified as “DFARS Case 2007-D011.”

DOD ISSUES FOUR MEMOS ON CONTRACTING TOPICS

Besides issuing 18 DFARS rule changes, DOD issued four memoranda to provide direction and guidance on various contracting issues and to provide deviations to the FAR and DFARS.

■ **Block Change to Eliminate Obsolete Government Property Clauses:** FAC 2005-17 implemented a complete rewrite of FAR Part 45, Government Property, and the associated clauses – reducing the number from nineteen to three. In response, DOD has revised the DFARS to align with FAC 2005-17 (see article above). While the new requirements apply to contracts awarded after the effective date of the FAR change (June 14, 2007), contracts that were awarded before the effective date still contain the now obsolete FAR requirements. As a result, contractors are maintaining dual property systems, and the Defense Contract Management Agency (DCMA) and the military departments responsible for oversight of the government property must conduct surveillance over the dual property systems. Maintaining dual property systems is inefficient and results in increased contractors’ costs and DOD training and oversight costs with no corresponding benefit. Therefore, the DCMA Director has been granted authority to modify all contracts administered by DCMA to delete, wherever they occur:

FAR 52.245-1, Property Records

FAR 52.245-2, Government Property (Fixed-Price Contracts)

FAR 52.245-3, Identification of Government-Furnished Property

FAR 52.245-4, Government-Furnished Property (Short Form)

FAR 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts)

FAR 52.245-6, Liability for Government Property (Demolition Services Contracts)

FAR 52.245-7, Government Property (Consolidated Facilities)

FAR 52.245-8, Liability for Facilities

FAR 52.245-10, Government Property (Facilities Acquisition)

FAR 52.245-11, Government Property (Facilities Use)

FAR 52.245-12, Contract Purpose

FAR 52.245-13, Accountable Facilities
FAR 52.245-14, Use of Government Facilities
FAR 52.245-15, Transfer of Title to the Facilities
FAR 52.245-16, Facilities Equipment Modernization
FAR 52.245-17, Special Tooling
FAR 52.245-19, Government Furnished Property “As Is”
DFARS 252.245-7001, Reports of Government Property
DFARS 252.211-7007, Item Unique Identification of Government Property

DCMA is to replace these clauses with:

FAR 52.245-1, Government Property (Jun 2007)
FAR 52.245-1 (Alt I), Government Property (June 2007), as appropriate
FAR 52.245-1 (Alt II), Government Property (June 2007), as appropriate
FAR 52.245-9, Use and Charges (Jun 2007)
DFARS 252.211-7007, Reporting of Government-Furnished Equipment in the DOD Item Unique Identification (IUID) Registry (Nov 2008)

These modifications are to be made at no cost under the appropriate “Changes” clause (FAR 52.243-1 through 52.243-5), and DOD is to take title to any special tooling acquired under the old FAR 52.245-17 consistent with FAR 45.401, Title to Government-Furnished Property.

For more on FAC 2005-17, see the June 2007 *Federal Contracts Perspective* article “FAR Coverage on Government Property Simplified, Clarified, Trimmed.”

■ **Use of the Purchase Card – American Recovery and Reinvestment Act:** This memorandum supplements the guidance in Section 1.14 of Office of Management and Budget (OMB) Memorandum M-09-15, Updating Implementing Guidance for the American Recovery and Reinvestment Act of 2009 (ARRA), regarding use of the purchase card for purchases made with funds provided by the ARRA.

The memorandum sets out the following requirements:

- Separate, dedicated ARRA-only purchase cards and convenience checks shall be established if the card is used for payments against ARRA supported contracts, or if it is anticipated that ARRA-related card or convenience check purchases will constitute 25% or more of the purchases.
- Purchase logs shall be annotated to separately identify ARRA-related purchases.
- To the extent possible, ARRA-related purchases at or below the micropurchase threshold (*i.e.*, \$3,000) should have a unique line-of-accounting that is distinct from those used on contracts.
- Card and convenience check holders must be prepared to manually comply with the ARRA-related reporting requirements in the OMB guidance if automated measures are not in place.
- Cardholders are responsible for ensuring the presolicitation/award notices are posted to FedBizOpps (<http://www.fbo.gov>) and contract action reports are provided to the Federal Procurement Data System (<https://www.fpds.gov>) for all purchases made above the micropurchase threshold where the card is used for contract payments (including those payments made using electronic catalogs or malls).

■ **Class Deviation from FAR 52.204-11, ARRA Reporting Requirements:** This authorizes DOD components to deviate from FAR 52.204-11 for the purpose of reporting information using

the online reporting tool available at <http://www.FederalReporting.gov> no later than July 10, 2009. OMB has posted an announcement on [FederalReporting.gov](http://www.FederalReporting.gov) notifying contractors that the online recipient reporting tool is still under development and is expected to be available for the quarterly report due October 10, 2009. Contractors are not required to report information on July 10, 2009, as required by FAR 52.204-11(c). However, contractor that submit an invoice prior to June 30, 2009, for ARRA funded contracts should maintain the data until October 10, 2009.

■ **Class Deviation Regarding Foreign Participation in DOD Acquisitions in Support of Operations in Afghanistan:** This directs contracting officers to use deviations to three DFARS provisions and five DFARS clauses to implement determinations made by the Deputy Secretary of Defense regarding foreign participation in future DOD acquisitions in support of Afghanistan. The Deputy Secretary has waived the World Trade Organization Procurement Agreement prohibition on acquisitions from the nine non-designated countries constituting the South Caucasus/Central and South Asian (SC/CASA) states (see the definition of “designated countries” in FAR 25.003, Definitions). The nine states are: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan. In addition, the Deputy Secretary has waived the Balance of Payments Program to eliminate the 50% evaluation factor that would otherwise be applied to offers of products from the SC/CASA states to support operations in Afghanistan.

The deviations are to the following three provisions and five clauses:

- DFARS 252.225-7000, Buy American Act – Balance of Payments Program Certificate
- DFARS 252.225-7001, Buy American Act and Balance of Payments Program
- DFARS 252.225-7020, Trade Agreements Certificate
- DFARS 252.225-7021, Trade Agreements
- DFARS 252.225-7035, Buy American Act – Free Trade Agreements – Balance of Payments Program Certificate
- DFARS 252.225-7036, Buy American Act – Free Trade Agreements – Balance of Payments Program
- DFARS 252.225-7044, Balance of Payments Program – Construction Material
- DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements

DOD ESTABLISHES POLICY ON PRIVATE SECURITY CONTRACTORS

DOD is adding a new 32 CFR Part 159, Private Security Contractors [PSCs] Operating in Contingency Operations, that establishes policy, assigns responsibilities and provides procedures for the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract during contingency operations. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel. New 32 CFR Part 159 supplements DOD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces (<http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>), which provides guidance for all DOD contractors operating in contingency operations.

DOD is publishing 32 CFR Part 159 because there is insufficient policy and guidance regulating the actions of DOD and other governmental PSCs and their movements in the

operational area. It will procedurally close existing gaps in the oversight of PSCs, ensure compliance with laws and regulations pertaining to inherently governmental functions, and ensure proper performance by armed contractors. The expansion of troops in Afghanistan will result in a corresponding increase in the number of PSCs performing in that area of operations.

This part is being published as an interim final rule because of its importance. Comments on the interim final rule must be submitted no later than August 31, 2009, by either of the following means: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160. Include "DOD-2008-OS-0125/RIN 0790-AI38" on all comments.

DOD SEEKS INPUT ON COMMERCIAL ITEM HANDBOOK

DOD is in the process of updating its Commercial Item Handbook. The purpose of the Handbook is to help acquisition personnel develop sound business strategies for procuring commercial items. DOD is seeking industry input on the contents of the draft handbook, a copy of which is available at http://www.acq.osd.mil/dpap/cpic/cp/docs/draftcihandbook_06172009.doc.

Comments on the draft must be submitted no later than July 31, 2009, by either of the following means: (1) mail: Office of the Director, Defense Procurement and Acquisition Policy, Attn: OUSD(AT&L)DPAP(CPIC), 3060 Defense Pentagon, Washington, DC 20301-3060; or (2) e-mail: CI_Handbook@osd.mil.

VA TO ENCOURAGE ELECTRONIC SUBMISSION OF INVOICES

The Department of Veterans Affairs (VA) has issued a class deviation to FAR 32.905, Payment Documentation and Process, to require the inclusion of an interim VA Acquisition Regulation (VAAR) clause in all contracts managed by VA's Financial Services Center in Austin, TX, that allows vendors to submit invoices electronically.

FAR 32.905 states that "payment will be based on receipt of a proper invoice and satisfactory contract performance." The phrase "receipt of a proper invoice" has generally been interpreted to mean a paper invoice. However, paper invoices are prone to errors, and the handling of paper invoices is much slower than electronic invoices. Therefore, VA has invoked the authority of the E-Government Act of 2002 to give contractors a choice of submitting invoices electronically using one of three transmission methods: (1) Electronic Invoice Presentment and Payment System; (2) American National Standards Institute (ANSI) X.12 electronic data interchange (EDI) formats; and (3) other electronic form as specified by the contract administration office and the designated agency office.

The text of the interim VAAR 852.273-76, Electronic Invoice Submission, is as follows:

"(a) To improve the timeliness of payments and lower overall administrative costs, VA strongly encourages contractors to submit invoices using its electronic invoicing system. At present, electronic submission is voluntary and any nominal registration fees will be the responsibility of the contractor. VA intends to mandate electronic invoice submission, subject to completion of the federal rulemaking process. At present, VA is using a 3rd party agent to contact contractors regarding this service. During the voluntary period, contractors interested in registering for the electronic system should contact the VA's Financial Services Center at <http://www.fsc.va.gov/einvoice.asp>."

PROMPT PAYMENT INTEREST RATE SET AT 4 7/8%

The Treasury Department has established 4 7/8% (4.87%) as the interest rate for the computation of payments made between July 1 and December 31, 2009, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations. The interest rate for the prior six-month period (January 1, 2009, through June 30, 2009, was 5 5/8% (5.625%). The interest rate for July 1, 2008, through December 31, 2008, was 5 1/8% (5.125%).

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

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

SAFAVIAN CONVICTION UPHeld

David Safavian, the former Office of Federal Procurement Policy (OFPP) administrator and former General Services Administration (GSA) chief of staff, was denied a new trial by the U.S. District Court for the District of Columbia (USDC 05-0370, July 21, 2009) on his December 2008 conviction for obstructing a GSA internal investigation and making false statements regarding his relationship with Washington lobbyist Jack Abramoff. Abramoff had provided Safavian with free transportation on a chartered jet.

The charges against Safavian involved a 2002 golf trip to Scotland on which Abramoff provided Safavian with free transportation on a chartered jet. He had asked a GSA ethics officer for an opinion on the propriety of accepting the free transportation. When asked whether Abramoff had any “business before GSA,” he said that Abramoff did not, even though Abramoff had asked Safavian for information and advice on obtaining two GSA-controlled properties. However, Safavian said this statement was true because he had interpreted “business before GSA” as pertaining to contracts.

He was convicted in 2006 and sentenced to 18 months in prison, but that conviction was overturned in June 2008, and he was retried and reconvicted in December 2008. Safavian subsequently moved that either he be acquitted or granted a new trial, but both motions were denied by the U.S. District Court. “The Court finds that there was no miscarriage of justice, that no substantial error was committed and that the defendant’s substantial rights were not affected by the admission of evidence concerning the cost of the charter flight.”

For more on Safavian and his case, see the December 2004 *Federal Contracts Perspective* article "Safavian Confirmed to Head OFPP"; the October 2005 *Federal Contracts Perspective* article "OFPP Chief Arrested for Making False Statements"; the November 2005 *Federal Contracts Perspective* article "Former OFPP Chief Indicted for Obstruction, False Statements"; the February 2006 *Federal Contracts Perspective* article "Abramoff Pleads Guilty to Fraud, Tax Evasion"; the July 2006 *Federal Contracts Perspective* article "Former OFPP Chief Safavian Convicted, Faces Up to 20 Years in Prison"; the November 2006 *Federal Contracts Perspective* article "Safavian Sentenced to 18 Months in Prison"; the December 2006 *Federal Contracts Perspective* article "Safavian Out on Bond Pending Appeal"; the July 2008 *Federal Contracts Perspective* article "Safavian Conviction Overturned"; and the January 2009 *Federal Contracts Perspective* article "Safavian Convicted for Second Time."

HHS PROPOSES MENTOR-PROTÉGÉ PROGRAM

The Department of Health and Human Services (HHS) Office of Small and Disadvantaged Business Utilization (OSDBU) is proposing to institute a mentor-protégé program to assist for small businesses, small disadvantaged businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, Historically Underutilized Business Zone (HUBZone) small businesses, and woman-owned small businesses to obtain HHS contracts. The program would be similar to those established by other federal agencies, such as the Department of Homeland Security and Department of Treasury.

The mentor-protégé program would motivate and encourage large business prime contractor firms to provide mutually beneficial developmental assistance with covered small businesses. Mentors would have to be large businesses, and would be required to provide appropriate developmental assistance to their protégés. In return, mentors would be eligible for the following:

- Additional evaluation points toward the award of contracts during the evaluation of competitive offers;
- Credit toward attaining subcontracting goals contained in the HHS subcontracting plan(s) for mentor-protégé participation on a dollar-by-dollar basis by counting protégé developmental assistance costs in their various small business subcontracting categories, as appropriate, in addition to traditional subcontracts; and
- An annual non-monetary award presented to the mentor firm providing the most effective developmental support to a protégé at the conclusion of the 36-month agreement between the mentor and the protégé. The OSDBU, in consultation with senior HHS management, would solicit nominations from participating mentors and determine the award winner.

Mentors would be permitted to provide the following forms developmental assistance to its protégé:

- Management guidance related to: (1) financial management; (2) organizational management; (3) overall business management/planning; and (4) business development;
- Technical assistance;
- Rent-free use of facilities and/or equipment;
- Temporary assignment of personnel to the protégé firm for the purpose of training;
- Property;
- Loans; and
- Any other types of mutually beneficial assistance.

Comments on the proposed mentor-protégé program, identified as “HHS Mentor-Protégé Program”, must be received no later than 5:00 pm on August 24, 2009, by any of the following methods: (1) fax: 202-260-4872; (2) e-mail to: sbmail@hhs.gov; (3) express or overnight mail to: Department of Health and Human Services, Office of Small and Disadvantaged Business Utilization, 200 Independence Ave., SW., Hubert H. Humphrey Building, Room 360G, Washington, DC 20201; or (4) regular mail to: Department of Health and Human Services, Office of Small and Disadvantaged Business Utilization, 200 Independence Ave. SW, Hubert H. Humphrey Building, Room 360G, Washington, DC 20201.

NONMANUFACTURER WAIVER APPROVED FOR 13 WATT LAMPS

The SBA is waiving the nonmanufacturer rule for 13 watt compact fluorescent lamps (CFLs), 26 watt CFLs, and occupancy sensors dual technology, NAICS code 335110, PSC 6240. 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 waiver, so the waiver is granted. For more on the proposed waiver, see the July 2009 *Federal Contracts Perspective* article “One Nonmanufacturer Waiver Approved, One Proposed.”

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

TECHNICAL AMENDMENTS MADE TO DEAR

The Department of Energy (DOE) is amending the DOE Acquisition Regulation (DEAR) to make technical and administrative changes, including changes to conform to the FAR’s naming and numbering conventions, correct typographical errors, remove outdated references and citations, add missing words, spell out acronyms that need to be spelled out, correct other errors of a technical nature, and improve stylistic consistency. None of these changes alter substantive rights or obligations under current law, and none will cause any added expense for DOE or its contractors.

EPA AMENDS TECHNICAL DIRECTION CLAUSE

The Environmental Protection Agency (EPA) is amending EPA Acquisition Regulation (EPAAR) 1552.237-71, Technical Direction, and its prescription at EPAAR 1537.110, Solicitation Provisions and Contract Clauses, to incorporate and supersede several class deviations to the EPAAR and to update terminology and procedures related to issuing technical direction.

This rule amends EPAAR 1552.237-71 as follows:

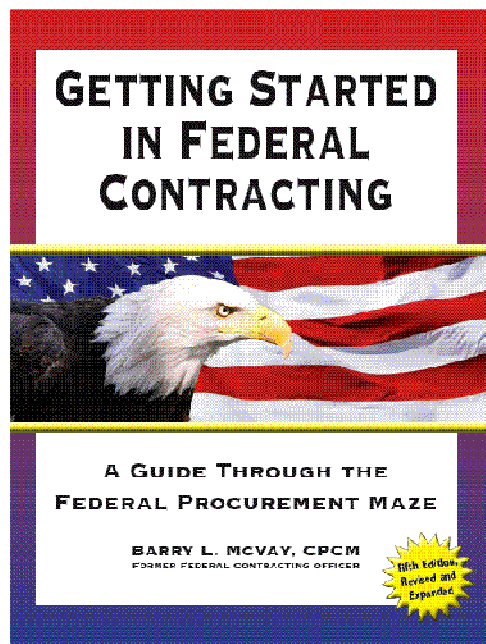
- The terms “contracting officer technical representative (COTR)” and “task order” are added and defined. These two terms will standardize titles and terminology used at EPA (such as “project officer,” “work assignment manager,” and “delivery order project officer”) with terms used in the FAR and other federal procurement policies.
- Instead of merely stating that “technical direction includes direction to the contractor which assists him in accomplishing the Statement of Work, [and] comments on and approval of reports or other deliverables”, the revised clause now states that “technical direction includes: (1) instruction to the contractor that approves approaches, solutions, designs, or refinements;

fills in details; completes the general descriptions of work shifts emphasis among work areas or tasks; and (2) evaluation and acceptance of reports or other deliverables.”

- The contractor is required to notify the contracting officer if, in the contractor’s opinion, any instruction or direction by the COTR is outside the scope of the contract. The contractor must provide this notification within three days after receiving it, and must request that the contracting officer take appropriate action. The contracting officer must advise the contractor within 30 days whether the technical direction is within the scope of the contract, and must issue either a contract modification or rescind the technical direction. A failure of the contractor and contracting officer to agree as to whether the technical direction is within the scope of the contract or failure to agree upon the contract action to be taken shall be subject to the provisions of the “Disputes” clause.
- The contractor is placed on notice that “any action taken by the contractor in response to any direction given by any person acting on behalf of the government or any government official other than the contracting officer or the contracting officer technical representative shall be at the contractor's risk.”

The clause prescription at EPAAR 1537.110 had stated that EPAAR 1552.237-71 was to be used in cost-reimbursement solicitations and contracts. The revised EPAAR 1537.110 allows contracting officers to use the clause, or a clause substantially the same, in solicitations and contracts where the contracting officer will delegate authority to issue technical direction to the COTR.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the April 2008 *Federal Contracts Perspective* article “EPA Proposes Revision to Technical Direction Clause.”



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