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DEPARTMENT OF JUSTICE REAFFIRMS SBA'S SMALL BUSINESS PROGRAM PARITY REGULATIONS

The Department of Justice (DOJ) has reaffirmed that the Small Business Administration's (SBA's) regulations are correct in not giving the Historically Underutilized Business Zone (HUBZone) program priority over its 8(a) Business Development and Service-Disabled Veteran-Owned Small Business (SDVOSB) programs. The Government Accountability Office (GAO), in deciding two protests, decided that the wording of the statute that established the HUBZone program did, in fact, require contracting officers to give priority to making awards under the HUBZone program before making awards under the 8(a) and SDVOSB programs.

In the two protest decisions (*B-400278, B-400308, International Program Group, Inc.*, September 19, 2008, and *B-401057, Mission Critical Solutions, Inc.*, May 4, 2009), GAO cited language in the HUBZone program's enabling legislation, 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). In contrast, the enabling legislation for the 8(a) and the SDVOSB programs is discretionary: "A contracting officer *may* award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans," and "[a contracting] officer shall be authorized *in his discretion* to let such [8(a)] procurement contract to the [SBA]..." (emphasis added).

The GAO's decisions called into question the validity of SBA's regulations on the matter (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)), which 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."

The Office of Management and Budget (OMB) issued a memorandum directing agencies to ignore GAO's decisions pending the conduct of "an executive branch review of the legal basis underlying the GAO's decisions" (for more on OMB's memorandum, see the August 2009 *Federal Contracts Perspective* article "OMB Issues Five Memos Providing Contracting Guidance"). The DOJ memorandum is the "executive branch review" mentioned by OMB.

In its memorandum, DOJ states, "Having carefully reviewed the relevant legal materials, including SBA's own views, we conclude that the [Small Business] Act does not compel SBA to

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prioritize the HUBZone program in the manner GAO determined to be required. In our view, SBA's regulations permissibly authorize contracting officers to exercise their discretion to choose among the three programs in setting aside contracts to be awarded to qualified small business concerns."

DOJ does clarify the misconception that the SBA's regulations require "parity" among the three programs: "The SBA's regulations do not expressly provide for parity of treatment among the 8(a), HUBZone, or SDVOSB programs. Rather, by their plain terms, the regulations [*i.e.*, 13 CFR 126.607(b)] require that the contracting officers prioritize these programs *collectively* by giving consideration to the group of them before a contracting officer may set aside an opportunity for small businesses generally and before the contracting officer may make the contract otherwise available... The regulations do not, therefore, single out one program for the kind of prioritization over the other two that the GAO decisions conclude is mandated under the HUBZone statute."

FAC 2005-36 TIDIES UP SOME LOOSE ENDS

Federal Acquisition Circular (FAC) 2005-36 tidies up the Federal Acquisition Regulation (FAR) with six small rules, the most significant of which is the inclusion of two clauses in time-and-material (T&M) and labor-hour (LH) contracts for services.

■ **Fair Labor Standards Act and Service Contract Act Price Adjustment Clauses:** This adopts as final, without change, the proposed rule that would amend FAR Subpart 22.10, Service Contract Act of 1965, as Amended, to require the inclusion of FAR 52.222-43, Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multiple Year and Option Contracts), and FAR 52.222-44, Fair Labor Standards Act and Service Contract Act –Price Adjustment, in T&M and LH service contracts that are subject to the Service Contract Act.

Though these two clauses were not required to be included in T&M and LH contracts, many contracting officers included them in their T&M and LH contracts to establish a consistent manner for making adjustments under wage determinations issued by the Department of Labor. Revising the clause prescriptions in paragraphs (c)(1) and (c)(2) of FAR 22.1006, Solicitation Provisions and Contract Clauses, to require their inclusion in T&M and LH contracts will achieve consistency throughout the government acquisition community and resolve potential inequities where the clauses have not been applied previously.

No comments were received in response to the proposed rule, so the proposed rule is adopted as final without change. For more on the proposed rule, see the February 2009 *Federal Contracts Perspective* article "Labor Clauses Proposed for Inclusion in T&M Contracts."

■ **Cost Accounting Standards (CAS) Administration and Associated FAR Clauses:** This adopts as final, without change, the interim rule in FAC 2005-27 that revised FAR 52.230 series of clauses related to CAS administration to maintain consistency between the FAR and CAS, primarily to reflect the increase in the CAS applicability threshold from \$500,000 to \$650,000.

Vivina McVay, Editor-in Chief

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No comments were received in response to the interim rule, so it was adopted as final without change. For more on the interim rule, see the October 2008 *Federal Contracts Perspective* article “FAC 2005-27 Requires ‘Enhanced Competition’ for Task and Delivery Orders.”

■ **Federal Technical Data Solution (FedTeDS):** This final rule removes all references to the Federal Technical Data Solution (FedTeDS) System, and instead refers to the enhanced capabilities of the Governmentwide Point of Entry (GPE) system – FedBizOpps (<http://www.fbo.gov>). The FedTeDS system was used to post on-line technical data packages and other items associated with solicitations that required some level of access control. It interfaced directly with FedBizOpps. However, in April 2008, the newest version of FedBizOpps was launched, and it incorporated the capabilities of FedTeDS, thus allowing the FedTeDS system to be retired.

The following will be amended to remove all references to FedTeDS and refer to the enhanced controls of the GPE (FedBizOpps): paragraphs (a)(4) and (a)(5) of FAR 5.102, Availability of Solicitations; paragraph (c)(18) of FAR 5.207, Preparation and Transmittal of Synopses; and paragraph (b)(15) of FAR 7.105, Contents of Written Acquisition Plans.

■ **New Designated Country – Taiwan:** On July 15, 2009, Taiwan became a designated country based on its accession to the World Trade Organization Agreement on Government Procurement. This interim rule adds Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”) to the list of World Trade Organization Government Procurement Agreement countries in paragraph (b)(4) of FAR 22.1503, Procedures for Acquiring End Products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor; in paragraph (1) of the definition of “designated country” in FAR 25.003, Definitions; paragraph (a)(4) of FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies; paragraph (a)(1) of FAR 52.225-5, Trade Agreements; paragraph (1) of the definition of “designated country” in paragraph (a) of FAR 52.225-11, Buy American Act – Construction Materials under Trade Agreements; and paragraph (1) of the definition of “Recovery Act designated country” in paragraph (a) of FAR 52.225-23, Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements.

This change allows contracting officers to purchase goods and services made in Taiwan without application of the Buy American Act if the acquisition is covered by the World Trade Organization Agreement on Government Procurement.

Comments on this interim rule must be submitted no later than October 13, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2009-014” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2009-014; 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 2009-014” in all correspondence.

■ **Prohibition on Restricted Business Operations in Sudan and Imports from Burma:** This finalizes, with changes, the interim rule in FAC 2005-26 that implemented Section 6 of the Sudan Accountability and Divestment Act of 2007 (Public Law 110-174). Section 6 requires certification in each contract entered into by an executive agency that the contractor does not conduct certain business operations in Sudan. In addition, the FAR Council added Burma to the list of countries from which most imports are prohibited, in accordance with Executive Order

13310, Blocking Property of the Government of Burma and Prohibiting Certain Transactions, July 28, 2003, and Executive Order 13448, Blocking Property and Prohibiting Certain Transactions Related to Burma, October 18, 2007.

The changes made by the interim rule in FAC 2005-26 were in paragraph (b) of FAR 25.701, Restrictions on Acquisitions of Supplies or Services from Prohibited Sources (Burma); FAR 25.702, Prohibition on Contracting with Entities that Conduct Restricted Business Operations in Sudan; and FAR 52.225-20, Prohibition on Conducting Restricted Business Operations in Sudan – Certification. Five respondents submitted comments on the interim rule. In response to those comments, the definition of “person” is removed, the definition of “restricted business operation” is revised to more closely reflect that in Public Law 110-174, and several other editorial changes are made in the final rule.

For more on FAC 2005-26, see the July 2008 *Federal Contracts Perspective* article “Contractors Banned from Conducting Business in Sudan.”

■ **List of Approved Attorneys, Abstractors, and Title Companies:** This adopts as final, with changes, the proposed rule that would amend FAR 28.203-3, Acceptance of Real Property, and FAR 52.228-11, Pledge of Assets, to update the procedures for the acceptance of a bond with a security interest in real property.

FAR Subpart 28.2, Sureties and Other Security for Bonds, requires agencies to obtain adequate security for bonds when bonds are used with a contract. A corporate or individual surety is an acceptable form of security for a bond. FAR 28.203, Acceptability of Individual Sureties, provides that when an individual surety secures a bond with an interest in real estate, the surety must provide evidence of title in the form of a certificate of title prepared by a qualified title attorney or abstractor, or a title insurance policy issued by title insurance company that has been approved by the Department of Justice (DOJ). DOJ used to provide a “List of Approved Attorneys, Abstractors, and Title Companies” for this purpose. However, DOJ has discontinued maintenance of the list, instead publishing “Title Standards,” which is available at http://www.usdoj.gov/enrd/2001_Title_Standards.html. The “Title Standards” evidence requirements for acceptance of title to real property for individual sureties includes mortgagee title insurance or other evidence of title that is consistent with Section 2 of Title Standards 2001. This final rule modifies FAR 28.203-3(a)(1) and FAR 52.228-11(b)(2)(i) to reflect this change.

One respondent submitted comments in response to the proposed rule. In response to the comments, the proposed FAR 28.203-3(a)(1), which would have stated “depending on the value of the property, contracting officers should consider requesting assistance from agency designated legal counsel to determine if the evidence of title is adequate” is revised to “agency contracting officers should request the assistance of their designated agency legal counsel in determining if the title evidence is consistent with the Department of Justice standards” (that is, “depending on the value of the property” is deleted, and “should consider” is changed to “should”).

For more on the proposed rule, see the April 2007 *Federal Contracts Perspective* article “Numbered Synopsis Notes Proposed for Deletion.”

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THREE FAR CHANGES PROPOSED

Three rules were proposed in August that would revise the FAR regarding Buy American Act nonavailable articles, contract closeout procedures, and government property language.

■ **Nonavailable Articles:** The Buy American Act does not apply to articles, materials, or supplies that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. This proposed rule would amend paragraph (a) of FAR 25.104, Nonavailable Articles, to add the following to the list of “nonavailable articles”: (1) active dry yeast and instant active dry yeasts; and (2) pineapple, solid pack, canned. Inclusion of an article on this list does not necessarily mean there is no domestic source for the listed items, but that domestic sources can only meet 50% or less of total U.S. government and nongovernment demand.

Also, the article titled “modacrylic fur ruff” would be corrected to “modacrylic fiber.”

In addition, FAR 25.104(b) requires publication of the list of nonavailable articles for public comment in the *Federal Register* no less frequently than once every five years. The list was last published for comment on May 18, 2004 (see the June 2004 *Federal Contracts Perspective* article “Comments Sought on BAA Nonavailable Items”). Therefore, comments are being sought on whether some articles on the list should be removed because they are now mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. “Specific information with regard to domestic production capacity in relation to U.S. government and nongovernment demand and the quality of domestically produced items would be most helpful in determining whether articles should remain on or be removed from the list.”

Comments on the proposed rule and articles on the list of nonavailable items must be submitted no later than October 6, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2009-013” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2009-014; 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 2009-013” in all correspondence.

■ **Contract Closeout:** This proposed rule would revise procedures for clearing final patent reports and the quick-closeout procedure, and would describe an adequate final indirect cost rate proposal and supporting data.

The proposed FAR changes would be as follows:

- Paragraph (a)(2) of FAR 4.804-5, Procedures for Closing Out Contract Files, would require that a final patent report be cleared within 60 days after receipt. Also, it would allow the contracting officer to proceed with contract closeout when a required final patent report is not received.
- Paragraph (b) of FAR 42.705-1, Contracting Officer Determination Procedure, would be revised to add that the cognizant auditor will determine adequacy of the contractor's proposal for audit.
- Paragraph (a) of FAR 42.708, Quick-Closeout Procedure, would be revised to increase the threshold for using the quick-closeout procedure from (1) \$1,000,000 in total unsettled indirect costs and not exceeding 15% of the estimated, total unsettled indirect

costs allocable to cost-type contracts by the contractor for that fiscal year, to (2) \$4,000,000 in total unsettled indirect and direct costs and not exceeding 20% of the total contract, task order, or delivery order amount.

- Paragraph (d) of FAR 52.216-7, Allowable Cost and Payment, would be revised to: (1) identify the required data that must be submitted in an adequate final indirect cost rate proposal (the introduction to the proposed rule states, “Contractors may refer to the Model Incurred Cost Proposal in Chapter 6 of the Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors, available at <http://www.dcaa.mil>”); (2) identify supplemental data that is required for audit and may be submitted with the proposal; and (3) require the contractor to update cumulative costs claimed and billed within 60 days of rate settlement.
- Paragraph (b) of FAR 52.216-8, Fixed Fee, paragraph (c) of FAR 52.216-9, Fixed Fee – Construction, and paragraph (c) of FAR 52.216-10, Incentive Fee, would be revised to permit the contracting officer to withhold up to 15% of the total fixed fee or \$100,000, whichever is less, to protect the government’s interest and encourage the timely submission of an adequate final indirect cost rate proposal. The current language provides “after payment of 85% of the fixed fee, the contracting officer may withhold further payment of fee until a reserve is set aside in an amount that the contracting officer considers necessary to protect the government’s interest. This reserve shall not exceed 15% of the total fixed fee or \$100,000, whichever is less.”

Comments on the proposed rule must be submitted no later than October 19, 2009, by any of the means mentioned above, except comments should be identified as “FAR Case 2008-020.”

■ **Government Property:** This proposed rule would revise coverage regarding government property and its associated clauses to add clarity and correct FAC 2005-17, which rewrote FAR Part 45, Government Property (see the June 2007 *Federal Contracts Perspective* article “FAR Coverage on Government Property Simplified, Clarified, Trimmed”).

After the issuance of FAC 2005-17, the Department of Defense (DOD) received comments on the revisions made by the FAC. A team comprised of members from DOD, the General Services Administration (GSA), and the Defense Contract Management Agency (DCMA) was formed to review comments from industry, academia, and government sources. This proposed rule is a result of the team’s recommendations.

The proposed rule would make the following changes to the FAR:

- FAR 4.705-3, Acquisition and Supply Records, would be amended to add “property records” as record that must be retained for four years.
- Paragraph (a)(3) of FAR 15.404-4, Profit, would be amended to add “Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.”
- Paragraph (a)(30)(iii) of FAR 42.302, Contract Administration Functions, would be revised to change “approve use of government property” to “evaluate the use of government property”; and paragraph (a)(30)(v), which requires administrative contracting officers to “ensure reporting of items no longer needed for government production” when contractors request government property, would be revised to require administrative contracting officers to “modify contracts to reflect addition of government furnished property and ensure appropriate consideration.”

- In FAR 45.101, Definitions, the definitions of “cannibalize,” “equipment,” “government-furnished property,” “government property,” “material,” and “real property” would be clarified; a definition of “property records” would be added; and the definition of “plant equipment” would be deleted.
- In paragraph (a)(4) of FAR 45.201, Solicitation, the term “unique-item identifier” would be changed to “item unique identifier”, and paragraph (d) would be revised to delete “when use of property on more than one contract is anticipated.”
- In FAR 45.502, Subcontractor Locations (which would be retitled “Subcontractor and Alternate Prime Contractor Locations”), paragraph (a) would be revised to make clear the need for prime contractor approval when support property administration as subcontractor locations is necessary; paragraph (b) would be revised to state that the prime property administrator shall “advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system”; and paragraph (c) would be added (“Prime contractor consent is not required for support delegations involving prime contractor alternate locations”).
- In FAR 45.606-1, Contractor with an Approved Scrap Procedure, paragraph (b) would be reformatted to separate categories of property requiring preparation of an inventory disposal schedule into a new paragraph (c). In addition, language would be added to new paragraph (c) for “all aircraft regardless of condition” and “flight safety critical aircraft parts.” Finally, “scrap” would be revised to include “precious metals that are economically beneficial to recover.”
- In FAR 52.245-1, Government Property:
 - Definitions in paragraph (a) would be changed to be consistent with those in FAR 45.101.
 - Paragraph (c) would be reformatted and information regarding modifications or alterations of Government property would be added to clarify that modifications or alterations must be reasonable and necessary due to the scope of work under this contract or its terms and conditions, required for normal maintenance, or otherwise authorized by the contracting officer. Also, language would be added to clarify when cannibalization occurs.
 - Paragraph (g), Systems Analysis, would be revised to reflect the coverage in FAR 45.502 that provides for support property administration for subcontractors and prime contractor alternate locations.
 - Paragraph (j)(1)(i)(B) would be reformatted into paragraphs (B) and (C) to reflect the changes made to FAR 45.606-1.
 - Paragraph (j)(3)(iv) would be revised to add a list of items for which additional descriptive information is required during disposition.
 - Paragraph (j)(3)(vi) would be added to state, “Scrap should be reported by ‘lot’ along with metal content, estimated weight and estimated value.”
- FAR 52.245-9, Use and Charges, which may only used when FAR 52.245-1 is included in the contract, would be revised to delete definitions contained in FAR 52.245-1 and reference the definitions in FAR 52.245-1 instead.

Comments on the proposed rule must be submitted no later than October 5, 2009, by any of the means mentioned above, except comments should be identified as “FAR Case 2008-011.”

GSA ESTABLISHES MENTOR-PROTÉGÉ PROGRAM

The General Services Administration (GSA) is implementing a mentor-protégé program to encourage GSA prime contractors to assist small business, including veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business, in enhancing their capabilities to perform contracts and subcontracts for GSA and other federal agencies.

GSA is adding GSA Acquisition Regulation (GSAR) Subpart 519.70, GSA Mentor-Protégé Program, which provides the following:

- To encourage prime contractors to provide subcontracting opportunities for small businesses, contracting officers may give mentors evaluation credit during the source selection process for subcontracts awarded under their subcontracting plans pursuant to their mentor-protégé agreements. Also, contracting officers may evaluate subcontracting plans containing mentor-protégé agreements more favorably than subcontracting plans without such agreements (paragraphs (b) and (c) of GSAR 519.7004, Incentives for Prime Contractors). These incentives are limited to negotiated procurements, including GSA Multiple Award Schedule contracts (also known as Federal Supply Schedule contracts) and the GSA Governmentwide Acquisition Contracts (GWACs). These incentives do not include orders under any GSA contracts (GSAR 519.7004(a)).
- While costs incurred by a mentor to provide developmental assistance to its protégé are not reimbursable as direct costs, GSA will consider the costs when determining indirect cost rates if GSA is the mentor's responsible audit agency. If GSA is not the mentor's responsible audit agency, GSA recommends that the mentor "enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates" (paragraph (a) of GSAR 519.7004(a)).
- A mentor must be either a large business prime contractor that is currently performing under an approved subcontracting plan as required by FAR Subpart 19.7, The Small Business Subcontracting Program, or a small business prime contractor that can provide developmental assistance to enhance the capabilities of protégés to perform as contractors, subcontractors, and suppliers (paragraph (a) of GSAR 519.7006, Mentor Firms).
- A protégés must be a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business, and small for the North American Industrial Classification System (NAICS) code the mentor assigns to the subcontract (paragraph (a) of GSAR 519.7007, Protégé Firms).
- Mentor firms are solely responsible for selecting protégés, and the selection of protégés is not protestable. Also, mentors may have more than one protégé (GSAR 519.7008, Selection of Protégé Firms).
- Mentors can provide to a protégé: (a) management guidance relating to financial management, organizational management, overall business management/planning, and business development; (b) engineering and other technical assistance; (c) loans; (d) rent-free use of facilities and/or equipment; (e) temporary assignment of personnel to the protégé for purpose of

training; and (f) any other types of developmental assistance approved by the GSA Mentor-Protégé program manager (GSAR 519.7012, Developmental Assistance).

- Each year, the mentor and the protégé will formally brief the GSA Mentor-Protégé program manager, the technical program manager, and the contracting officer regarding their accomplishments (GSAR 519.7016, Program Review).

- GSAR 552.219-75, GSA Mentor-Protégé Program, describes the program and encourages potential mentors and protégés to participate. It is to be included in all unrestricted solicitations (not set aside) and contracts that exceed the simplified acquisition threshold that offer subcontracting opportunities.

- GSAR 552.219-76, Mentor Requirements and Evaluation, which is to be included in contracts anticipated to exceed the simplified acquisition threshold where the prime contractor has signed a mentor-protégé agreement with GSA, describes the administrative processes: what GSA will do, what the mentor must do, and GSA's authority.

Twelve respondents submitted comments in response to the proposed rule. In response to those comments, the following are the changes made to the proposed rule when it became final:

- Proposed GSAR 519.7006(a) had stated, "A large business prime contractor that is currently, or has performed under at least one approved subcontracting plan awarded under a negotiated contract within the last five years, as required by FAR Subpart 19.7." The words "or has performed under at least one approved subcontracting plan awarded under a negotiated contract within the last five years" have been deleted.

- GSAR Subpart 519.70 is clarified to indicate that the mentor-protégé program applies to GSA schedules as well as contracts.

For more on the proposed rule, see the July 2008 *Federal Contracts Perspective* article "GSAR Undergoing Rewrite."

RETRACTION OF TWO NONMANUFACTURER WAIVERS PROPOSED

The Small Business Administration (SBA) is proposing to retract two nonmanufacturer rule waivers: (1) radio telephones, (radio and television broadcasting and wireless communications equipment manufacturing), Product Service Code (PSC) 5805, under North American Industry Classification System (NAICS) code 334220, because of the discovery of a small business manufacturer; and (2) liquid propellants – petroleum base, PSC 9130, under NAICS code 324110, because the Defense Energy Support Center (DESC) was unaware of SBA's intent to grant the nonmanufacturer rule waiver, and DESC has awarded prime contracts to, or received offers from, multiple small business refiners within the past 24 months (see the July 2009 *Federal Contracts Perspective* article "One Nonmanufacturer Waiver Approved, One Proposed").

Comments and source information on either of these proposed retractions must be submitted no later than August 19, 2009, to the Small Business Administration, Office of Government Contracting, 409 3rd Street, SW., Suite 8800, Washington, DC 20416.

LABOR PROPOSES EMPLOYEE RIGHTS NOTIFICATION

The Department of Labor (DOL) is proposing rules to implement President Obama's Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, which directs that a clause be included in all contracts exceeding the simplified acquisition threshold (\$100,000), and all subcontracts of such contracts, that requires the contractor (or subcontractor) "to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract..." (for more on Executive Order 13496, see the March 2009 *Federal Contracts Perspective* article "Obama Issues Four Labor-Related Executive Orders").

The proposed rule would establish the new regulations in Title 29 of the Code of Federal Regulations as Part 471, Obligations of Federal Contractors and Subcontractors; Notification of Employee Rights Under Federal Labor Laws (29 CFR Part 471).

The rule would prescribe the text of the required contract clause (which is specified in Section 2 of Executive Order 13496, and would be incorporated into the new regulations as Appendix A of 29 CFR Part 471), and the size, form, and content of the notice that must be posted by a contractor (which will be available at <http://www.olms.dol.gov>). The contract clause would be required to be included in every government contract, except for collective bargaining agreements and contracts for purchases under the simplified acquisition threshold, and except in those cases in which the Secretary of Labor exempts a contracting department or agency with respect to particular contracts or subcontracts or class of contracts or subcontracts. In addition, the new regulations would address sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under Executive Order 13496 and the implementing regulations at 29 CFR Part 471.

Comments on the proposed rule must be submitted no later than September 2, 2009, by either of the following methods: (1) Federal eRulemaking portal at <http://www.regulations.gov>; or (2) by mail to: Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5609, Washington, DC 20210. Identify all comments by referring to "1215-AB70."

GSAR DEFINITIONS REVISED

GSA is updating the definitions that are used in more than one place in the GSAR by revising GSAR 502.101, Definitions of Words and Terms, to reflect the merger of the Federal Technology Service and Federal Supply Service; creation of the Federal Acquisition Service; and deletion of the title Deputy Associate Administrator of Acquisition Policy, and introduction of Deputy Chief Acquisition Officer. No additional definitions were added.

DHS PLACES RESTRICTIONS ON TEXTILE ACQUISITIONS

The Department of Homeland Security (DHS) is adding Homeland Security Acquisition Regulation (HSAR) Part 3025, Foreign Acquisition, and HSAR 3052.225-70, Requirement for Use of Certain Domestic Commodities, to implement Section 604 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5), which limits DHS' acquisition of certain clothing and other textile items directly related to the national security interests of the United States if such items are not domestically grown, reprocessed, reused, or produced in the United States.

To implement Section 604, DHS is adding HSAR Part 3025, consisting of HSAR Subpart 3025.70, American Recovery and Reinvestment Act Restrictions on Foreign Acquisition. HSAR 3025.7002, Restrictions on Clothing, Fabrics, and Related Items, prohibits contracting officers from acquiring, either as end products or components, any of the following items if the item is directly related to the national security interests of the United States and the item has not been grown, reprocessed, reused, or produced in the United States:

- The following commercial or non-commercial items:
 - Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof)
 - Tents, tarpaulins, covers, textile belts, bags, protective equipment (such as body armor), sleep systems (sleeping bags), load carrying equipment (such as fieldpacks), textile marine equipment, parachutes or bandages
- The following non-commercial items (including any item of individual equipment manufactured from or containing any of the fibers, yarns, fabrics, or materials):
 - Cotton and other natural fiber products
 - Woven silk or woven silk blends
 - Spun silk yarn for cartridge cloth
 - Synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics)
 - Canvas products
 - Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) (HSAR 3025.7002-1, Restrictions)

HSAR 3025.7002-2, Exceptions, lists the following exceptions to the Section 604 prohibitions:

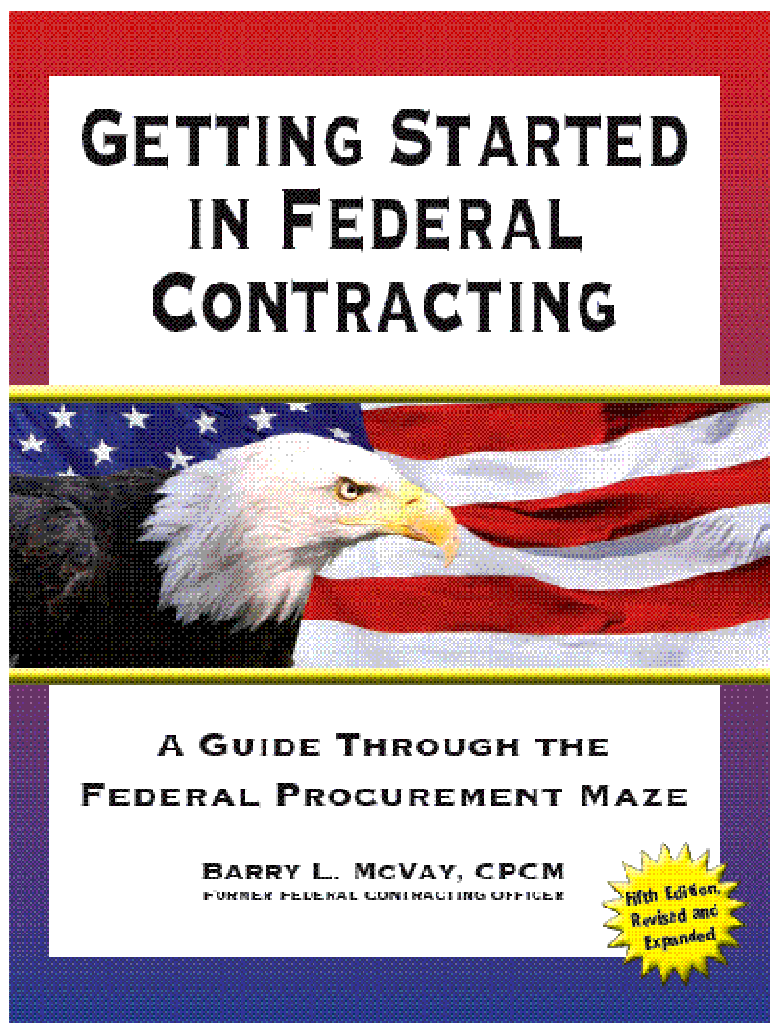
- Acquisitions at or below the simplified acquisition threshold (\$100,000)
- Acquisition of items not directly related to national security interests of the United States
- Acquisitions of any of the items otherwise covered by HSAR 3025.7002-1, if the Chief Procurement Officer determines that the item grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at United States market prices.
- Acquisitions of items listed in FAR 25.104, Nonavailable Items (that is, articles, materials, or supplies of the class or kind to be acquired, either as end items or components, that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality)
- Emergency acquisitions by activities located outside the United States
- Acquisitions by vessels in foreign waters
- Acquisitions of incidental amounts of cotton, other natural fibers, wool or other items covered by HSAR 3025.7002-1 incorporated in an end product, for which the estimated value of the item so covered is not more than 10% of the total price of the end product
- Acquisitions of items covered by HSAR 3025.7002-1 for which restricting a procurement of the items to those that have been grown, reprocessed, reused, or produced in the United States would be inconsistent with United States obligations under international agreements. Acquisitions of products that are eligible products in accordance with FAR Subpart 25.4, Trade Agreements, are not covered by these restrictions (see HSAR 3025.7003-2, Specific Application of Trade Agreements, for details on how to apply

these restrictions to trade agreements, and special rules for the Transportation Security Administration (TSA))

HSAR 3052.225-70 incorporates restrictions and exceptions for inclusion in solicitations, exercises of an option, contract modifications that add new items (or that make a cardinal change), and contracts with a value exceeding the simplified acquisition threshold when procuring any item covered under HSAR 3025.7002-1.

Comments on this interim rule must be submitted no later than September 16, 2009, by either of the following methods: (1) Federal eRulemaking portal at <http://www.regulations.gov>; or (2) by mail to: Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation Branch, ATTN: Jeremy Olson, 245 Murray Drive, Bldg. 410 (RDS), Washington, DC 20528. Identify all comments by referring to “DHS Docket Number DHS-2009-0081.”

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