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FAC 2005-38 MANDATES IPv6, ADDRESSES POSTRETIREMENT BENEFITS AND TRAVEL COSTS

Federal Acquisition Circular (FAC) 2005-38 makes several important changes to the Federal Acquisition Regulation (FAR), the most significant probably being the mandate that the government use Internet Protocol Version 6 (IPv6) products. Two of the changes in FAC 2005-38 address cost principles: postretirement benefits and travel costs. The three other changes involve the removal of FAR Subpart 22.16, address governmentwide commercial purchase card restrictions for Treasury Offset Program (TOP) debts, and finalize the interim rule that implemented the Federal Food Donation Act of 2008.

■ **Internet Protocol Version 6 (IPv6):** This final rule requires that IPv6 compliant products be included in all new information technology (IT) procurements requiring Internet Protocol (IP).

The IP is one of the primary mechanisms that define how and where information moves across networks. Currently, IPv4 is the industry standard, but IPv6 will significantly increase internet address space, promote flexibility and functionality, and enhance security. Agencies can reduce costly upgrades and the complexity of transitioning to IPv6 by integrating IPv6 requirements into federal contracts.

On August 2, 2005, the Office of Management and Budget (OMB) issued Memorandum M-05-22, Transition Planning for Internet Protocol Version 6 (<http://www.whitehouse.gov/omb/memoranda/fy2005/m05-22.pdf>), to guide the government in its transition to IPv6. The memorandum outlined a transition strategy for agencies to follow and established the goal for all federal agency network backbones to support IPv6 by June 30, 2008, and requires all new IT procurements, to the maximum extent practicable, to include IPv6 compliant products and standards. Any exceptions to the use of IPv6 requires advance written approval from the agency chief information officer (CIO).

To implement OMB Memorandum M-05-22, the following changes are made to the FAR:

- New paragraph (b)(4)(iii) is added to FAR 7.105, Contents of Written Acquisition Plans, to require a discussion of IP compliance in acquisition plans for IT acquisitions.
- New paragraph (g) is added to FAR 11.002, Policy [for describing agency needs], to specify that agency requirement documents must include the appropriate IPv6 compliance requirements in accordance with the agency's Enterprise Architecture unless a waiver to the use of IPv6 has been granted by the agency's Chief Information Officer.

CONTENTS

FAC 2005-38 Mandates IPv6.....	1
Thresholds for Trade Agreements Adjusted.....	5
Prompt Payment Interest Rate Set At 3 1/4%.....	6
Slew of DOD Memos and DFARS Changes.....	7
OMB Issues More Recovery Act Guidance.....	13
Sole Source Contracts for VOSBs.....	14

- New paragraph (e) is added to both FAR 12.202, Market Research and Description of Agency Need, and FAR 39.101, Policy [for acquisition of information technology], stating that agencies must include the appropriate IP compliance requirements consistent with FAR 11.002(g) regarding IT using IP.

Six respondents submitted comments on the proposed rule, and the final rule differs from the proposed rule in that various clarification have been made, including adding a reference to OMB Memorandum M-05-22 and making editorial changes. For more on the proposed rule, see the September 2006 *Federal Contracts Perspective* article “Proposed FAR Rules Would Address ID Verification, IPv6.”

EDITOR’S NOTE: The federal standards for IPv6 are located in the National Institute of Standards and Technology (NIST) Special Publication 500-267 at <http://www.antd.nist.gov/usgv6/profile.html>.

■ **Postretirement Benefits:** This final rule amends FAR 31.205-6, Compensation for Personal Services, to permit contractors to measure accrued postretirement benefits (PRB) costs using either the criteria in Internal Revenue Code (IRC) 419 and 419A or the criteria in Financial Accounting Standard (FAS) 106.

FAR 31.205-6(o) allows contractors to choose among three different accounting methods for PRB costs; pay-as-you-go (cash basis), terminal funding, and accrual basis. When the accrual basis is used, the FAR requires that costs must be measured based on the requirements of FAS 106. However, the tax-deductible amount that is contributed to the retiree benefit trust, which is part of a welfare benefit plan, is determined using IRC 419 and 419A, which has different measurement criteria than FAS 106. The FAS 106 amount can often exceed the costs measured under IRC 419 and 419A, and contractors that choose to accrue PRB costs for government reimbursement face a dilemma: whether to fund the entire FAS 106 amount to obtain government reimbursement of the costs, regardless of tax implications, or fund only the tax deductible amount and not be reimbursed for the entire FAS 106 amount under their government contracts.

This final rule alleviates this dilemma by amending FAR 31.205-6(o) to give the contractor an option of measuring accrued PRB costs using criteria based on IRC 419 and 419A rather than FAS 106, thus permitting the contractor to fund the entire tax deductible amount without having a portion disallowed because it did not meet the FAR's current measurement criteria. Under this change, the total measured PRB costs over the life of the PRB plan are the same whether the contractor chose to apply the criteria in FAS 106 or IRC 419 and 419A.

Three respondents submitted comments on the proposed rule. In response to their comments, the final rule makes several clarifications and addresses transitions from one approved accrual method to the other. For more on the proposed rule, see the December 2007 *Federal Contracts Perspective* article “Proposed FAR Change Addresses Post-Retirement Benefits.”

■ **Travel Costs:** This final rule amends paragraph (b) of FAR 31.205-46, Travel Costs, to change “airfare costs in excess of the *lowest customary standard, coach, or equivalent airfare*

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offered during normal business hours are unallowable...” to “airfare costs in excess of the *lowest priced airfare available to the contractor during normal business hours are unallowable...*”

The original FAR 31.205-46(b) language was being interpreted inconsistently, either as lowest coach fare available to the contractor or lowest coach fare available to the general public. This change establishes “the lowest priced airfare available to the contractor” as the basis for determining the allowability of airfares.

The proposed rule would have changed the language to “airfare costs, in excess of the lowest priced *coach class, or equivalent*, airfare available to the contractor during normal business hours are unallowable...” However, nine respondents submitted comments on the proposed language, and because of the number of questions regarding interpretation of “coach class, or equivalent,” these words have been deleted from the final rule. For more on the proposed rule, see the January 2008 *Federal Contracts Perspective* article “Travel Cost Principle Proposed for Change.”

■ **Revocation of Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees:** This final rule removes FAR Subpart 22.16 and the corresponding clause FAR 52.222-39, both titled “Notification of Employee Rights Concerning Payment of Union Dues or Fees,” to comply with Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, which requires contractors to post a notice informing employees of their rights under federal labor laws. Executive Order 13496 revoked Executive Order 13201, which required contractors to post a notice to employees that “under federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs.” Executive Order 13201 was implemented in FAR Subpart 22.16 and the corresponding clause at FAR 52.222-39. Executive Order 13496 establishes a different policy, so FAR Subpart 22.16 and FAR 52.222-39 are deleted. Implementation of Executive Order 13496 will be in a separate rule.

The Department of Labor has rescinded its regulations implementing Executive Order 13201 (see the April 2009 *Federal Contracts Perspective* article “Labor Rescinds Regs on Notification of Employees”).

For more on Executive Order 13496, see the March 2009 *Federal Contracts Perspective* article “Obama Issues Four Labor-Related Executive Orders.” For more on Executive Order 13201, see the March 2001 *Federal Contracts Perspective* article “Bush Issues Three Acquisition-Related Orders Involving Labor Issues in FAR Part 22.”

■ **Governmentwide Commercial Purchase Card Restrictions for Treasury Offset Program Debts:** This final rule amends FAR 32.1108, Payment by Governmentwide Commercial Purchase Card, and the corresponding clause at FAR 52.232-36, Payment by Third Party, to restrict the use of the governmentwide commercial purchase card as a method of payment for offerors with debts subject to the Treasury Offset Program (TOP).

The Financial Management Service (FMS) of the Department of the Treasury is charged with implementing the government’s delinquent debt collection program. To collect delinquent debts owed to federal agencies and states, FMS uses the TOP (information on TOP is available at <http://fms.treas.gov/debt/index.html>). TOP uses both “offsets” and “continuous levies” to collect delinquent debts. “Offset” is a process by which federal payments are reduced to satisfy a person’s overdue federal debt, child support obligation, or state tax debt. A payee’s name and taxpayer identification number are matched against a Treasury/FMS database of delinquent debtors for automatic offset of funds. Offset funds are then used to satisfy payment of the delinquent debt to the extent allowed by law.

Under the “continuous levy” program, delinquent federal tax debts are collected by levying non-tax payments until the debt is satisfied. The continuous levy program includes levy of some vendor payments, federal employee salary payments, the Office of Personnel Management retirement payments, and Social Security benefit payments. Continuous levy is accomplished through a process almost identical to that of offset. FMS matches delinquent debtor data with payment record data for automated collection of the debt at the time of payment, after the delinquent taxpayer has been afforded due process.

FMS is unable to offset or apply a continuous levy to payments made to contractors with delinquent debts when the governmentwide commercial purchase card is used as the method of payment because the government does not make a direct payment to the contractor but rather to the banks that do business with merchants who accept charge cards. To assess the significance of the problem, FMS and the VISA credit card company matched VISA payments for governmentwide purchase card transactions for one year. FMS determined that approximately \$73.5 million of delinquent debts subject to collection under TOP were not collected because the debtors were paid using the governmentwide commercial purchase card.

To help increase the collection of delinquent debts owed to the government, this final rule amends FAR 32.1108(b) to require contracting officers to determine whether the Central Contractor Registration (CCR) (<https://www.bpn.gov/ccr/default.aspx>) indicates that the contractor has delinquent debt that is subject to collection under the TOP. If a debt flag indicator is found, the governmentwide commercial purchase card shall not be authorized as a method of payment. The contracting officer is required to check for the debt flag at the time of contract award or order placement or issuance. The rule also amends FAR 52.232-36(a) and (b) to advise contractors that the governmentwide commercial purchase card is not authorized as a method of payment if a debt indicator is included in the CCR for the contractor.

The introduction to this final rule states, “This rule will not apply to individual travel charge cards or centrally billed accounts for travel/transportation services.”

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

- The requirement to check CCR prior to option exercise was removed because, if the method of payment was changed, that would be considered a contract change outside the scope of exercising an option.
- Paragraph (g) is added to FAR 8.402, General, to clarify that this rule does not apply to Federal Supply Schedule orders placed at or below the micro-purchase threshold.
- Paragraph (h) is added to FAR 13.201, General, to clarify that this rule does not apply to simplified acquisitions at or below the micro-purchase threshold.
- Paragraph (a)(11) is added to FAR 16.505, Ordering, to clarify that this rule does not apply to orders placed at or below the micro-purchase threshold against indefinite-delivery contracts.
- FAR 32.1108(b)(2)(ii) has been modified to add language informing contracting officers that contracts to be paid by a purchase card must include either FAR 52.232-33, Payment by Electronic Funds Transfer – Central Contractor Registration, or FAR 52.232-34, Payment by Electronic Funds Transfer – Other Than Central Contractor Registration, so if payment cannot be made by purchase card, the contractor is aware of the other method of payment (electronic funds transfer) and the requirements for that method of payment.

For more on the proposed rule, see the January 2008 *Federal Contracts Perspective* article “Restrictions Proposed on Purchase Card Use.”

■ **Federal Food Donation Act of 2008:** This final rule adopts, without changes, the interim rule that implemented the Federal Food Donation Act of 2008 (Public Law 110-247) by adding FAR Subpart 26.4, Food Donations to Nonprofit Organizations, and FAR 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations, to encourage federal agencies and their contractors to donate excess food to nonprofit organizations serving the needy.

The final rule is applicable to contracts exceeding \$25,000 for the provision, service, or sale of food in the United States (that is, food supply or food service).

Three respondents submitted comments on the interim rule, but none of the comments resulted in any changes to the final rule.

For more on the interim rule, see the April 2009 *Federal Contracts Perspective* article “FAC 2005-31 Finalizes Size Rerepresentation Rule.”

THRESHOLDS FOR TRADE AGREEMENTS ADJUSTED

The United States Trade Representative (USTR) is required to set U.S. dollar thresholds for the application of various trade agreements. The USTR has decided to increase the following thresholds for trade agreements (see FAR Subpart 25.4, Trade Agreements) (previous thresholds in parentheses):

- ***World Trade Organization (WTO) Agreement on Government Procurement (GPA)***
 - Supplies: **\$203,000** (\$194,000)
 - Services: **\$203,000** (\$194,000)
 - Construction: **\$7,804,000** (\$7,443,000)

- ***U.S.-Australia Free Trade Agreement (FTA)***
 - Supplies: **\$70,079** (\$67,826)
 - Services: **\$70,079** (\$67,826)
 - Construction: **\$7,804,000** (\$7,443,000)

- ***U.S.-Bahrain FTA***
 - Supplies: **\$203,000** (\$194,000)
 - Services: **\$203,000** (\$194,000)
 - Construction: **\$9,110,318** (\$8,817,449)

- ***U.S.-Chile FTA***
 - Supplies: **\$70,079** (\$67,826)
 - Services: **\$70,079** (\$67,826)
 - Construction: **\$7,804,000** (\$7,443,000)

- ***Dominican Republic-Central American-United States FTA***
 - Supplies: **\$70,079** (\$67,826)
 - Services: **\$70,079** (\$67,826)
 - Construction: **\$7,804,000** (\$7,443,000)

- ***U.S.-Morocco FTA***
 - Supplies: **\$203,000** (\$194,000)
 - Services: **\$203,000** (\$194,000)
 - Construction: **\$7,804,000** (\$7,443,000)

- ***North American FTA (NAFTA)***
 - Canada**
 - Supplies: **\$25,000** (unchanged)
 - Services: **\$70,079** (\$67,826)
 - Construction: **\$9,110,318** (\$8,817,449)

 - Mexico**
 - Supplies: **\$70,079** (\$67,826)
 - Services: **\$70,079** (\$67,826)
 - Construction: **\$9,110,318** (\$8,817,449)

- ***U.S.-Oman FTA***
 - Supplies: **\$203,000** (\$194,000)
 - Services: **\$203,000** (\$194,000)
 - Construction: **\$9,110,318** (\$8,817,449)

- ***U.S.-Peru Trade Promotion Agreement (TPA)***
 - Supplies: **\$203,000** (\$194,000)
 - Services: **\$203,000** (\$194,000)
 - Construction: **\$7,804,000** (\$7,443,000)

- ***U.S.-Singapore FTA***
 - Supplies: **\$70,079** (\$67,826)
 - Services: **\$70,079** (\$67,826)
 - Construction: **\$7,804,000** (\$7,443,000)

PROMPT PAYMENT INTEREST RATE SET AT 3 1/4%

The Treasury Department has established 3 1/4% (3.25%) as the interest rate for the computation of payments made between January 1 and June 30, 2010, 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 (July 1, 2009, through December 31, 2009), was 4 7/8% (4.875%). The interest rate for January 1, 2009, through June 30, 2009, was 5 5/8% (5.625%).

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.

SLEW OF DOD MEMOS AND DFARS CHANGES

The Department of Defense (DOD) was busy during December, issuing four final rules, two Defense FAR Supplement (DFARS) deviations, one FAR deviation, and four memoranda providing direction or making announcements.

■ **Definitions of “Component” and “Domestic Manufacture”:** This final rule amends Defense FAR Supplement (DFARS) Part 225, Foreign Acquisitions, and associated provisions and clauses to clarify the distinction between foreign acquisition policies that apply only to top-level components of end products (that is, components that are incorporated directly into the end product) and those that apply to both top-level and lower-tier components of end products (that is, components that are incorporated into a component of the end product).

The definition of “component” in FAR 2.101, Definitions, is “any item supplied to the government as part of an end item or of another component.” Therefore, for general use, the term includes both top-level components and lower-tier components. For purposes of determining whether a product is a domestic end product under the Buy American Act or the Balance of Payments Program, the term “component” is defined in FAR 25.003, Definitions, as “an article, material, or supply incorporated directly into an end product or construction material” (that is, only top-level components). This definition is also applicable to any other situation in which evaluation of the end product is based on the value of the components, similar to that under the Buy American Act (for example, to determine a qualifying country end product or whether anchor chain is a domestic end product).

In broadly applying these concepts to DFARS Part 225, “component” has been defined to apply only to top-level components, except in DFARS Subpart 225.70, Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition, where the term “component” includes components at all tiers. However, there are some requirements of DFARS Part 225 other than those in DFARS Subpart 225.70 that are not based on, or are not similar to, the Buy American Act, and there are some requirements in DFARS Subpart 225.70 that should be treated as similar to the Buy American Act.

To clarify this, the definitions of “component” included in this final rule reflect the correct applicability of foreign acquisition policies as follows:

- New DFARS 225.900-70, Definition, consists of the following: “‘Component,’ as used in this subpart [DFARS Subpart 225.9, Customs and Duties], means any item supplied to the government as part of an end product or of another component.” This definition is used because duty-free entry is not related to evaluation of domestic products under the Buy American Act, and the basic definition in FAR 2.101 should apply to qualifying country components at any tier. The same definition is added to DFARS 252.225-7013, Duty-Free Entry.
- New paragraph (a) of DFARS 252.225-7019, Restriction on Anchor and Mooring Chain, consists of the following: “‘Component,’ as used in this clause, means an article, material, or supply incorporated directly into an end product.” The requirement that the cost of components manufactured in the United States exceed 50% of the total cost of components is similar to the Buy American Act component test, in which only top-level components are considered. Therefore, the FAR 25.003 definition restricting application to top-level components should apply (modified to remove “construction material”).

- New paragraph (a)(1) of DFARS 252.225-7025, Restriction on Acquisition of Forgings, consists of the following: “Component means any item supplied to the Government as part of an end product or of another component.” The requirement to acquire forging items that are of domestic manufacture is not related to evaluation of domestic products under the Buy American Act and should apply to components at any tier, so the FAR 2.101 definition is appropriate.

In addition, this final rule eliminates references to the DOD Industrial Preparedness Production Planning Program in DFARS 225.7005-1, Restriction [on certain chemical weapons antidote], and in the definition of “domestic manufacture” in DFARS 252.225-7025 since DOD no longer has an Industrial Preparedness Production Planning Program.

No comments were submitted on the proposed rule, so it is finalized with minor editorial changes. For more on the proposed rule, see the May 2006 *Federal Contracts Perspective* article “Coverage on Labor Laws Cleaned Up in DFARS.”

■ **Statutory Waiver for Commercially Available Off-the-Shelf Items:** This finalizes, without change, the interim rule that amended the clauses and provisions addressing the Buy American Act and Balance of Payments program to conform to the FAC 2005-30 FAR rule change that implemented 41 U.S.C. 431 with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

The Buy American Act uses a two-part test to define a “domestic end product” (that is, (1) it must be manufactured in the United States, and (2) the “component test” – that is, the cost of its components mined, produced, or manufactured in the United States exceeds 50% of the cost of all its components – see paragraph (c)(1) of FAR 25.001, General, and the definition of “domestic end products” at FAR 25.003, Definitions).

FAC 2005-30 included a rule that provided a definition of COTS and waived the component test with regard to the acquisition of COTS (see the February 2009 *Federal Contracts Perspective* article “Publication of Justifications Required For Noncompetitive Contracts”). DOD issued an interim rule conforming the DFARS to the changes made by FAC 2005-30. The DFARS interim rule incorporated the FAR COTS definition (“any item of supply (including construction material) that is (A) a commercial item (as defined in paragraph (1) of the definition of ‘commercial item’ in section 2.101 of the Federal Acquisition Regulation [Definitions]); (B) sold in substantial quantities in the commercial marketplace; and (C) offered to the government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace...”) into DFARS 252.225-7001, Buy American Act and Balance of Payments Program, DFARS 252.225-7036, Buy American Act–Free Trade Agreements – Balance of Payments Program, DFARS 252.225-7044, Balance of Payments Program – Construction Material, and DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements. Two respondents submitted comments on the interim rule, but DOD decided to finalize the interim rule without changes. For more on the interim rule, see the February 2009 *Federal Contracts Perspective* article “Fifteen DFARS Rules for the New Year.”

■ **Allowability of Costs To Lease Government Equipment for Display or Demonstration:** This rule finalizes, without change, the proposed addition of DFARS 231.205-1, Public Relations and Advertising Costs, to specify that monies paid to the government for the leasing of government equipment for display or demonstration are unallowable except in the case of foreign military sales (FMS) contracts.

DOD Instruction 7230.08, Leases and Demonstrations of DOD Equipment, contains policy on the leasing of DOD equipment to defense contractors for demonstration to foreign governments or for display or demonstration at international trade shows and exhibitions. In addition to the leasing of equipment, contractors may obtain related support services from DOD. The instruction provides that the contractor leasing the equipment may not recover the DOD charges associated with the lease, directly or indirectly through any U.S. government contract except to the extent chargeable to contracts for FMS. For consistency with the policy in DOD Instruction 7230.08, this rule adds the following text to the DFARS:

- New paragraph (e) of DFARS 225.7303-2, Cost of Doing Business with a Foreign Government or an International Organization, is revised to state, “The limitations in [DFARS] 231.205-1 [Public Relations and Advertising Costs] on allowability of costs associated with leasing Government equipment do not apply to FMS contracts.”
- Paragraph (f) of new DFARS 231.205-1, Public Relations and Advertising Costs, states the following: “Unallowable public relations and advertising costs also include monies paid to the government associated with the leasing of government equipment, including lease payments and reimbursement for support services, except for foreign military sales contracts as provided for at [DFARS] 225.7303-2.”

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the January 2008 *Federal Contracts Perspective* article “Patent Rights Clause Added to DFARS.”

■ **Technical Data and Computer Software Requirements for Major Weapon Systems:**

This finalizes, with an editorial change, the interim rule that amended DFARS 207.106, Additional Requirements for Major systems, to implement Section 802(a) of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364). Section 802(a) requires DOD program managers to assess long-term technical data needs when acquiring major weapon systems and subsystems, and to establish acquisition strategies that provide for technical data rights needed to sustain such systems and subsystems over their life cycle.

The interim rule added DFARS 207.106(S-70) to require acquisition plans for major weapon systems and subsystems to: (1) assess long-term technical data and computer software needs; and (2) establish acquisition strategies that provide for the technical data deliverables and associated license rights to sustain the systems and subsystems over their life cycle. The strategy may include the development of maintenance capabilities within DOD, or competition for contracts for sustainment of the systems or subsystems. Assessments and corresponding acquisition strategies shall: (1) be developed before issuance of a solicitation for the weapon system or subsystem; (2) address the merits of including a priced contract option for the future delivery of technical data and computer software, and associated license rights, that were not acquired upon initial contract award; (3) address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and (4) apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapon systems and subsystems that are to be supported by other sustainment approaches.

One respondent submitted comments on the interim rule, but DOD decided to finalize the interim rule with only a minor editorial change. For more on the interim rule, see the October 2007 *Federal Contracts Perspective* article “Tidying Up the DFARS.”

■ **Class Deviation on Additional Contractor Requirements and Responsibilities Relating to Alleged Crimes By or Against Contractor Personnel in Iraq and Afghanistan:** This DFARS class deviation provides a new clause, DFARS 252.225-7997, Additional Requirements and Responsibilities Relating to Alleged Crimes By or Against Contractor Personnel in Iraq and Afghanistan (Deviation), to implement Section 854 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417). As required by Section 854, the clause addresses:

- Mechanisms for ensuring that contractors are required to report offenses under the Uniform Code of Military Justice (Chapter 47 of Title 10 of the U.S. Code) or the Military Extraterritorial Jurisdiction Act (Chapter 212 of Title 18 of the U.S. Code).
- Responsibility for providing victim and witness protection and assistance to contractor personnel in connection with alleged offenses under the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act.
- A requirement that a contractor provides to all contractor personnel who will perform work on a contract in Iraq or Afghanistan, before beginning such work, information on the following:
 - How and where to report an alleged crime under the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act.
 - Where to seek the assistance required.

■ **Class Deviation on Limitations on Pass-Through Charges:** This DFARS class deviation requires DOD contracting officers to use paragraphs (n)(1), (n)(2)(i)(B), and (n)(2)(iii) of FAR 15.408, Solicitation Provisions and Contract Clauses; paragraph (i) of FAR 31.203, Indirect Costs; FAR 52.215-22, Limitations on Pass-Through Charges – Identification of Subcontract Effort; and FAR 52.215-23, Limitations on Pass-Through Charges, and its Alternate I, in place of paragraphs (3) and (4) of DFARS 215.408, Solicitation Provisions and Contract Clauses; DFARS 231.201-2, Determining Allowability; paragraph (d) of DFARS 231.203, Indirect Costs; DFARS 252.215-7003, Excessive Pass-Through Charges – Identification of Subcontract Effort; and DFARS 252.215-7004, Excessive Pass-Through Charges.

The DFARS text implemented Section 852 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), which established procedures applicable to DOD that minimize excessive pass-through charges by contractors from subcontractors that add no or negligible value. However, Section 866 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) established the same procedures for civilian agencies as Public Law 109-364 established for DOD. FAC 2005-37 included a rule that implemented both Section 852 of Public Law 109-364 and Section 866 of Public Law 110-417, so DOD is deleting its DFARS implementing rules.

For more on the FAC 2005-37 rule, see the November 2009 *Federal Contracts Perspective* article “FAC 2005-37 Provides Guidance on Use of Award Fees.”

■ **Class Deviation on Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items:** This FAR deviation implements Section 816 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84) by modifying paragraph (d) of FAR 13.500, General, to state that the authority to enter into contracts under FAR Subpart 13.5, Test Program for Certain Commercial Items, is extended from January 1, 2010, to January 1, 2012. FAR Subpart 13.5 authorizes, as a test program, use of simplified acquisition procedures for the acquisition of commercial supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5.5 million.

For more on Section 816 and other acquisition-related provisions of Public Law 111-84, see the November 2009 *Federal Contracts Perspective* article “FY10 Defense Authorization Restricts A-76 Competitions.”

■ **Waiver of 10 U.S.C. 2534 for Certain Defense Items Produced in the United Kingdom:**

The Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) is waiving the limitation of Title 10 of the U.S. Code (U.S.C.), Section 2534, Miscellaneous Limitations on the Procurement of Goods Other than United States Goods (10 U.S.C. 2534) for certain defense items produced in the United Kingdom (UK). 10 U.S.C. 2534 limits the DOD to procuring items listed in that section only if the manufacturer of the item is part of the national technology and industrial base. However, the Secretary of Defense may waive this restriction for a particular item listed in Section 2534 and for a particular foreign country if the Secretary determines that application of the limitation “would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items” and if “that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.” The Secretary of Defense has delegated this waiver authority to the USD(AT&L).

The USD(AT&L) has extended for one year, from December 28, 2009, to December 27, 2010, the waiver of the limitation on procurement of the following products from the UK:

- Air circuit breakers
- Welded shipboard anchor and mooring chain with a diameter of four inches or less
- Gyrocompasses
- Electronic navigation chart systems
- Steering controls
- Pumps
- Propulsion and machinery control systems
- Totally enclosed lifeboats

The USD(AT&L) granted this waiver because the UK does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in the UK, and the application of the limitation in 10 U.S.C. 2534 against defense items produced in the UK would impede the reciprocal procurement of defense items under the Reciprocal Defense Procurement Memorandum of Understanding (MOU) the DOD has had with the UK since 1975.

■ **Resolving Contract Audit Recommendations:** This memorandum from the Director, Defense Procurement and Acquisition Policy, establishes DOD’s policy for resolving disagreements when the contracting officer does not include significant audit report recommendations from the Defense Contract Audit Agency (DCAA) in establishing pre-negotiation objectives.

“When significant disagreements occur, the contracting officer shall discuss the basis of the disagreement with the auditor prior to negotiations. The contracting officer shall document that discussion, and the basis for disagreement in the pre-negotiation objective (or pre-business clearance) and in a written communication with the auditor prior to commencing negotiations, *e.g.*, an e-mail confirming the discussion or a copy of the applicable portion of pre-negotiation objective. Approval of the pre-negotiation objective confirms that the discussion with DCAA

and the basis for the disagreement is adequately documented and supported. Once the negotiation objective is approved, the contracting officer may proceed with negotiations.

“If after the discussion between the contracting officer and the auditor, the auditor does not agree with the contracting officer, DCAA’s management may request that the DOD component’s management review the contracting officer’s decision. DCAA’s request for the component’s higher-level review shall occur within three business days after receiving the contracting officer’s written communication.

“If the differences cannot ultimately be resolved at the component’s highest management level, the Director, DCAA, may contact me to discuss the disagreement. If the DCAA Director believes that I have not adequately addressed the matter, the disagreement may finally be elevated to the Under Secretaries for Defense, Acquisition, Technology, Logistics and Comptroller.”

■ **Guidance on Reviewing Contractor Reports Required by the American Recovery and Reinvestment Act of 2009:** This memorandum provides guidance for contracting officer conduct of reviews to ensure the contractor reports submitted in accordance with Section 1512 of the Recovery Act (Public Law 111-5) are consistent with contract award documentation – that is, to identify “significant errors” and “material omissions.”

- A “significant error” is a data field that is not reported accurately and where such erroneous reporting results in a significant risk that the public will be misled or confused by the contractor’s report. All incorrect data in a report data field constitutes a significant error.
- A “material omission” is data that is not responsive to a specific data element. When reviewing for material omissions, the reviewer should do so with the goals of transparency in mind. For instance, when required to provide a narrative description, the contractor’s input must be sufficiently clear to facilitate understanding by the general public.

Contractors are required to submit the reports required by FAR 52.204-11, American Recovery and Reinvestment Act – Reporting Requirements, by the 10th day after the end of the quarter (that is, by January 10, April 10, July 10, and October 10) to <http://www.FederalReporting.gov>. The next 11 days the contractors may make corrections to their reports. All contracting officer’s reviews must take place during the next five days (for example, January 22 through 26). The contracting officer must verify the data contained in the report, specifically, that the following key data elements are accurate:

- The obligation is accurate.
- The contract number or task order is accurate.
- The contractor information (DUNS, name, address, etc.) is accurate.
- The total reported invoiced amount does not exceed the total obligated.
- The total number of jobs reported is reasonable when compared to the amount invoiced.
- The total amount of subcontracts does not exceed the total obligated.
- Contractor entered data fields match the contract award data, as stated in the Federal Procurement Data System (<https://www.fpds.gov>).
- For contracts awarded with Recovery Act and non-Recovery Act funds, ensure the contractor limits reporting to the Recovery Act funds. Non-Recovery Act funds shall not be reported.

- The project status is reported accurately. The contracting officer must ensure the project is not reported as “Fully Complete” if the project is still in progress.
- Final reports are reported accurately. The contractor shall not provide a final report if the final invoices have not been submitted.
- The award date and reported jobs created/retained cannot occur after the end of the reporting period.

The system will default to status “Not Reviewed” on Day 26, so timely review of the reports is essential.

The memorandum provides detailed instructions on what contracting officers must do if their reviews detect significant errors and/or material omissions, and provides examples of instructions contracting officers are to provide contractors, and sample letters notifying contractors to correct their reports.

Also, see the next article for more on Recovery Act reporting requirements.

■ **New 8(a) Partnership Agreement Between the Small Business Administration (SBA) and DOD:** This memorandum announces a new partnership agreement between the SBA and DOD has been completed. The agreement, which is effective through September 30, 2012, allows DOD contracting officers to award 8(a) contracts directly to 8(a) program participants.

For more on the extensions of the previous agreement, see the December 2009 *Federal Contracts Perspective* article “DOD Ties Up Some Loose Ends.”

OMB ISSUES MORE GUIDANCE ON RECOVERY ACT REPORTING

The Office of Management and Budget (OMB) issued a memorandum addressing reporting under Section 1512 of the American Recovery and Reinvestment Act (Public Law 111-5). With the subject “Improving Compliance in Recovery Act Recipient Reporting,” this memorandum from the OMB Director states:

“While the response rate for the first quarter of required reporting demonstrates that a significant majority of recipients reported timely and complete reports, a preliminary review of **FederalReporting.gov** data indicates that a number of recipients have not filed as required by Section 1512 of the Recovery Act and OMB guidance. In order to provide the public with the transparency and accountability envisioned by the Recovery Act, we must take steps to ensure all recipients understand their reporting obligations and the consequences of non-compliance.

“Recipients who have failed to submit a Section 1512 report as required by the terms of their award are considered to be non-compliant. Non-compliant recipients, including those who are persistently late or negligent in their reporting obligations, are subject to federal action, up to and including the termination of federal funding or the ability to receive federal funds in the future...Beginning immediately, and consistent with these existing terms and policies, federal departments and agencies must take the following actions to improve compliance with Section 1512 recipient reporting:

“1. Identify non-compliant recipients...

“2. Determine an appropriate outreach method and establish contact with each recipient who failed to report by the quarterly deadline...”

“3. Assess the severity of the non-compliance and the circumstances surrounding the non-compliance. From this assessment, federal departments and agencies are to determine the need, if any, for future action regarding each non-filing recipient...

“If the non-compliance appears to be fraudulent, federal departments and agencies are to refer the matter to other appropriate agency officials such as the officer responsible for criminal investigation.”

SOLE SOURCE CONTRACTS FOR VETERAN-OWNED BUSINESSES

The Department of Veteran Affairs (VA) issued a final rule implementing portions of the Veterans Benefits, Health Care and Information Technology Act of 2006 (Public Law 109-461), and Executive Order 13360, Providing Opportunities for Service-Disabled Veteran Businesses To Increase Their Federal Contracting and Subcontracting. The act and the executive order authorize the VA to establish special methods for contracting with service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSB). Under this final rule, a VA contracting officer may restrict competition to contracting with SDVOSBs or VOSBs under certain conditions. Likewise, sole source contracts with SDVOSBs or VOSBs are permissible under certain conditions. In addition, a mentor-protégé program in which the protégés are restricted to SDVOSBs and VOSBs is established.

New VA Acquisition Regulation (VAAR) Subpart 819.70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program, consists of the following:

- VAAR 819.7004, Contracting Order of Priority, establishes the following order of precedence for VA contracting officers to consider when determining the acquisition strategy: (1) SDVOSBs; (2) VOSBs (including, but not limited to, SDVOSBs); (3) either the 8(a) program or the Historically Underutilized Business Zone (HUBZone) program; and (4) any other small business program.
- VAAR 819.7005, Service-Disabled Veteran-Owned Small Business Set-Aside Procedures, requires that the contracting officer set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that: (1) offers will be received from two or more eligible SDVOSB concerns; and (2) award will be made at a fair and reasonable price. When conducting SDVOSB set-asides, the contracting officer is required to ensure that: (1) eligibility is extended to businesses owned and operated by surviving spouses; and (2) businesses are registered and verified as eligible in the Vendor Information Pages (VIP) database (<http://www.VetBiz.gov>) prior to making an award.
- VAAR 819.7006, Veteran-Owned Small Business Set-Aside Procedures, applies the same requirements to VOSB set-asides as VAAR 819.7005 does to SDVOSB set-asides. However, “The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides.”
- VAAR 819.7007, Sole Source Awards to Service-Disabled Veteran-Owned Small Business Concerns, provides that a contracting officer may award contracts to SDVOSB concerns on a sole source basis provided: (1) the anticipated award price of the contract (including options) will not exceed \$5 million; (2) the requirement is synopsisized; (3) the SDVOSB concern has been determined to be a responsible contractor with respect to

performance; and (4) award can be made at a fair and reasonable price. When conducting a SDVOSB sole source acquisition, the contracting officer is required to ensure businesses are registered and verified as eligible in the VIP database prior to making an award. Also, “a determination that only one SDVOSB concern is available to meet the requirement is not required.”

- VAAR 819.7008, Sole Source Awards to Veteran-Owned Small Business Concerns, applies the same requirements to VOSB sole source awards as VAAR 819.7007 does to SDVOSB sole source awards.

New VAAR Subpart 819.71, VA Mentor-Protégé Program, consists of the following:

- VAAR 819.7102, Definitions, states that a mentor may be a large or small business, and a protégé must be either a SDVOSB or VOSB.
- VAAR 819.7105, Incentives for Prime Contractor Participation, states that developmental assistance provided by the mentor to the protégé is not reimbursable as a direct cost under a VA contract. However, if VA is the mentor’s responsible audit agency under FAR 42.703-1, Policy [for Indirect Rates], VA will consider these costs in determining indirect cost rates. If VA is not the responsible audit agency, mentors would be encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

In addition, contracting officers are required to give mentors evaluation credit under VAAR 852.219-72, Evaluation Factor for Participation in the VA Mentor-Protégé Program, by: (1) evaluating subcontracting plans containing mentor-protégé arrangements more favorably than subcontracting plans without mentor-protégé agreements; and (2) assessing the mentor’s compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance and determining contractor responsibility.

- VAAR 819.7110, Developmental Assistance, would authorize mentors to provide protégés the following assistance:
 - Guidance relating to: (1) financial management; (2) organizational management; (3) overall business management/planning; (4) business development; and (5) technical assistance
 - Loans
 - Rent-free use of facilities and/or equipment
 - Property
 - Temporary assignment of personnel to a protégé for training, and
 - Any other types of permissible, mutually beneficial assistance.
- VAAR 819.7115, Solicitation Provisions, requires the inclusion of VAAR 852.219-71, VA Mentor-Protégé Program, in solicitations that include FAR 52.219-9, Small Business Subcontracting Plan. Also, it requires the inclusion of VAAR 852.219-72 in solicitations that include an evaluation factor for participation in VA’s mentor-protégé program in accordance with VAAR 819.7105 and that also include FAR 52.219-9.

Ninety-seven (97) respondents submitted comments on the proposed rule. As a result, the following changes were made to the final rule:

- Proposed VAAR 808.803, Priority for Acquisition of Printing and Related Supplies, would have authorized contracting officers to acquire government printing from eligible SDVOSBs and VOSBs instead of the Government Printing Office (GPO). However, one respondent commented that Title 44 of the U.S. Code, Section 501, Government Printing, Binding, and Blank-Book Work to be Done at Government Printing Office, is a statutory mandate. VA agrees, and has removed VAAR 808.803 from the final rule. VA will negotiate a memorandum of agreement with GPO to foster greater business opportunities for and stronger outreach efforts to SDVOSBs and VOSBs.
- To ensure that other government entities comply with this rule when making awards for VA through interagency agreements, VAAR 817.502, General [for interagency agreements under the Economy Act, is added. VAAR 817.502 requires other governmental agencies, when procuring services and supplies for VA through an interagency agreement, to comply with VA's order of priority for SDVOSBs and VOSBs.
- One respondent recommended that the rule clarify the eligibility of mentors and protégés, particularly whether a participating mentor must be a prime contractor to its protégé. In particular, the proposed VAAR 819.7102 stated "a mentor is a prime contractor that elects to promote and develop SDVOSB and/or VOSB subcontractors..." However, proposed VAAR 819.7106 , Eligibility of Mentor and Protégé Firms, stated, "Protégés may participate in the [VA mentor-protégé] program in pursuit of a prime contract or as subcontractors under the mentor's prime contract with VA, but are not required to be a subcontractor to a VA prime contractor or be a VA prime contractor." VA agreed with the comment, and deleted "prime" from the "mentor" definitions in VAAR 819.7102 and VAAR 852.219-71(b)(1). Also, in VAAR 819.7102, "SDVOSB and/or VOSB subcontractors" is changed to "SDVOSBs and/or VOSBs." In addition, VAAR 819.7106(a) is revised to state that a mentor "may be either a large or small business entity and either a prime contractor or subcontractor..."

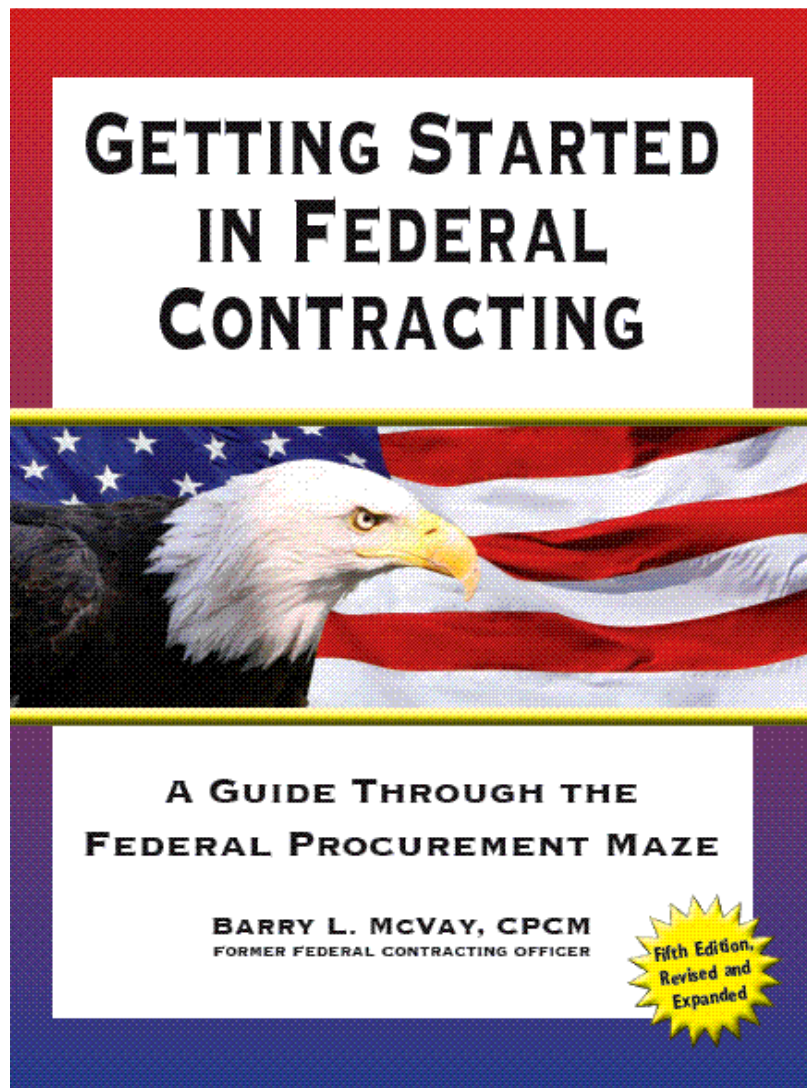
Finally, proposed VAAR 819.307, Protests, stated that VA would utilize SBA to consider and decide SDVOSB and VOSB status protests. This requires VA and SBA to execute an interagency agreement. However, negotiations of this interagency agreement have not yet been finalized, so VA has amended VAAR 819.307 (now titled "SDVOSB/VOSB Small Business Status Protests") with an interim rule to provide that VA's Executive Director, OSDDBU, will consider and decide SDVOSB and VOSB status protests until the interagency agreement is executed by the agencies.

For more on the proposed rule, see the September 2008 *Federal Contracts Perspective* article "VA Proposes Veteran-Owned Small Business Set-Asides."

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