

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XI, No. 2

February 2010

PROPOSED DFARS CHANGES ADDRESS BUSINESS SYSTEMS AND INCREASED ACQUISITION THRESHOLDS

Keeping up its torrid pace of the last few months, the Department of Defense (DOD) proposed two important changes to the Defense Federal Acquisition Regulation Supplement (DFARS): one would improve the oversight of six contractor business systems, and the other would adjust many DOD-specific acquisition-related thresholds. Another proposed rule would waive the provisions of the Trade Agreements Act and the Balance of Payments Program for states in central and southern Asia supporting operations in Afghanistan. In addition, two interim rules were finalized, one Federal Acquisition Regulation (FAR) class deviation was issued, two memoranda issuing acquisition policy were issued, and comments are sought on industry's experience in participating in the Czech Republic's public defense procurements as it considers entering into a reciprocal defense procurement agreement with the Czech Republic.

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■ **Business Systems – Definition and Administration:** This proposed rule would improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems by authorizing contracting officers to withhold 10% of each payment under a contract until the system deficiencies are corrected.

New clause DFARS 252.242-7XXX, Business Systems, would define the covered business systems as “(1) **accounting system**, if this contract includes the clause at [DFARS] 252.242-7YYY, Accounting System Administration; (2) **earned value management system**, if this contract includes the clause at [DFARS] 252.234-7002, Earned Value Management System; (3) **estimating system**, if this contract includes the clause at [DFARS] 252.215-7002, Cost Estimating System Requirements; (4) **material management and accounting system**, if this contract includes the clause at [DFARS] 252.242-7004, Material Management and Accounting System; (5) **property management system**, if this contract includes the clause at [FAR] 52.245-1, Government Property; and (6) **purchasing system**, if this contract includes the clause at [FAR] 52.244-2, Subcontracts.”

If DCAA or DCMA identifies deficiencies in any of these systems, the administrative contracting officer (ACO) would be notified, and he or she would notify the contractor. The contractor would have 30 days to respond, and the ACO would determine whether the system or systems are deficient. If the ACO determines a system is deficient, “the ACO will immediately withhold 10% of each of the contractor’s payments under this contract. The contractor shall,

within 45 days of receipt of the notice, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies...If the contractor submits an acceptable corrective action plan within 45 days of receipt of a notice of the ACO's intent to withhold, but has not completely corrected the identified deficiencies, the ACO will reduce the amount withheld to an amount equal to 5% of each payment until the ACO determines that the contractor has corrected the deficiencies in the business system. However, if at any time the ACO determines that the contractor fails to follow the accepted corrective action, the ACO will increase the amount of payment withheld to 10% of each payment under this contract until the ACO determines that the contractor has completely corrected the deficiencies in the business system."

If the ACO finds more than one business system is deficient, the ACO will withhold 10% of each payment *for each deficient system* – for example, if two business systems are found to be deficient, the ACO would withhold 20% of each payment. However, the withholding cannot exceed 50%, which would occur if five business systems are determined to be deficient.

Withholding would apply to any of the following payments authorized under the contract: (1) interim payments under cost-reimbursement contracts, incentive type contracts, time-and-materials contracts, and labor-hour contracts; (2) progress payments; and (3) performance-based payments.

Comments on the proposed rule must be submitted no later than March 16, 2010, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: dfars@osd.mil; (3) fax: 703-602-0350; (4) mail: Defense Acquisition Regulations System, Attn: Mark Gomersall, 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 2009-D038."

■ **Inflation Adjustment of Acquisition-Related Thresholds:** This proposed rule would implement Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375), which requires the adjustment of statutory acquisition-related thresholds, except for the Davis-Bacon Act, the Service Contract Act, and trade agreements thresholds, every five years (specifically, in years divisible by 5). In addition, this proposed rule would adjust some nonstatutory acquisition-related thresholds.

The following thresholds would be adjusted (these thresholds pertain to DOD only – a similar proposed rule revising governmentwide acquisition thresholds in the FAR is being prepared):

- The threshold in DFARS 205.303, Announcement of Contract Awards, for public announcement of contract awards, would be **\$6.5 million** (from \$5.5 million).
- The threshold in DFARS 207.170-3, Policies and Procedures, for prohibiting the consolidation of contract requirements, would be **\$6 million** (from \$5.5 million).
- The threshold in DFARS 208.405-70, Additional Ordering Procedures, for competition of orders against Federal Supply Schedule contracts, would be **\$150,000** (from \$100,000).

Vivina McVay, Editor-in Chief

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The *Federal Contracts Perspective* is published monthly by Panoptic Enterprises, P.O. Box 11220, Burke, VA 22009-1220.

- The threshold in DFARS 209.104-1, General Standards, prohibiting contracting officers from awarding contracts to a firm owned or control by the government of a terrorist country, would be **\$150,000** (from \$100,000). Also, the threshold in DFARS 209.104-70, Solicitation Provisions, for inclusion of DFARS 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, would likewise be increased to **\$150,000** (from \$100,000), as would the threshold in DFARS 209.409 Solicitation Provision and Contract Clause, for the inclusion of DFARS 252.209-7004, Subcontracting with Firms That Are Owned or Controlled by the Government of a Terrorist Country.
- The threshold in DFARS 211.503, Contract Clauses, for the inclusion of FAR 52.211-12, Liquidated Damages – Construction, would be **\$650,000** (from \$550,000).
- The minimum contract size in DFARS 215.407-2, Make-or-Buy Programs, would be **\$1.5 million** (from \$1 million).
- The threshold in DFARS 216.505-70, Orders Under Multiple Award Contracts, for competitively awarding orders under multiple award contracts, would be **\$150,000** (from \$100,000).
- The thresholds in DFARS 217.170, General, and DFARS 217.171, Multiyear Contracts for Services, requiring Congressional notification before entering into multiyear contracts for services, would be **\$637.5 million** (from \$572.5 million).
- The limit in DFARS 219.502-1, Requirements for Setting Aside Acquisitions, on setting aside acquisitions for architect-engineer services for military construction or family housing projects, would be **\$350,000** (from \$300,000).
- The upper limits in DFARS 219.502-2, Total Set-Asides, for small business set-asides for dredging, would be **\$1.5 million** (from \$1 million), and for architect-engineer services for military construction or family housing projects, would be **\$350,000** (from \$300,000).
- The limit in DFARS 219.1005, Applicability, for setting aside Architect-engineering services in support of military construction projects or military family housing projects, would be **\$350,000** (from \$300,000).
- The dividing line in DFARS 225.103, Exceptions, between approvals by the head of the contracting activity and the agency head for public interest exceptions to the Buy American Act and nonavailability determinations, would be **\$1.5 million** (from \$1 million).
- The threshold in DFARS 225.7204, Solicitation Provision and Contract Clauses, for including DFARS 252.225-7003, Report of Intended Performance Outside the United States and Canada – Submission with Offer, and DFARS 252.225-7004, Report of Intended Performance Outside the United States and Canada – Submission after Award, would be **\$13 million** (from \$11.5 million); and the threshold for including DFARS 252.225-7006, Quarterly Reporting of Actual Contract Performance Outside the United States, would be **\$650,000** (from \$550,000). The thresholds in the clauses themselves would be revised as well.
- The dividing line in DFARS 225.7703-2, Determination Requirements, between determinations made by the head of the contracting activity and the Director, Defense Procurement, Acquisition Policy, and Strategic Sourcing (and the acquisition executives of the services) regarding the acquisition of products or services other than small arms from Iraq or Afghanistan, would be **\$87 million** (from \$78.5 million).
- The threshold in DFARS 228.102-1, General, requiring bonds for fixed-price construction contracts under cost-type contracts, would be **\$150,000** (from \$100,000).
- The threshold in DFARS 232.502-1, Use of Customary Progress Payments, for progress payments to a small disadvantaged business, would be **\$65,000** (from \$55,000).

- The dividing line in DFARS 237.170-2, Approval Requirements, between approvals by the designated official and the senior procurement executive of contracts and task orders for services, would be **\$87 million** (from \$78.5 million).
- The threshold in DFARS 246.402, Government Contract Quality Assurance at Source, for contract quality assurance at source, would be **\$300,000** (from \$250,000).
- The dividing line in DFARS 250.102-1, Delegation of Authority, and DFARS 250.102-1-70, Delegations, between approvals by the head of the contracting activity and the Undersecretary of Defense (Acquisition, Technology, and Logistics) to exercise “residual powers” under Public Law 85-804, would be **\$65,000** (from \$55,000).
- The threshold in DFARS 252.211-7000, Acquisition Streamlining, for contractors to include the clause in subcontracts, would be **\$1.5 million** (from \$1 million).
- The threshold in DFARS 252.249-7002, Notification of Anticipated Contract Termination or Reduction, for contractors to notify their subcontractors of an anticipated termination or reduction, would be **\$650,000** (from \$550,000); and the threshold for first-tier subcontractors to notify their second-tier subcontractors and require those second-tier subcontractors to include the clause in their third-tier subcontracts, would be **\$150,000** (from \$100,000).

Comments on the proposed rule must be submitted no later than March 22, 2010, by any of the means mentioned above, except mail should be addressed to the attention of Amy Williams. Identify comments as “DFARS Case 2009-D003.”

■ **Foreign Participation in Acquisitions in Support of Operations in Afghanistan:** This proposed rule would add a new DFARS 225.7704, Acquisitions of Products and Services from South Caucasus/Central and South Asian (SC/CASA) State in Support of Operations in Afghanistan, to allow acquisition from the nine SC/CASA states (Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan) by waiving the Trade Agreements Act prohibition on acquisitions of products or services from non-designated countries, and waiving the provisions of the Balance of Payments Program for offers of products (other than arms, ammunition, or war materials) and construction materials from these SC/CASA states acquired in direct support of operations in Afghanistan.

The proposed rule would make the following changes to implement the Trade Agreements Act waiver:

- Add cross-references to DFARS 225.7704-1, Applicability of Trade Agreements, in DFARS 225.401, Exceptions [to trade agreements], and DFARS 225.403, World Trade Organization Government Procurement Agreement and Free Trade Agreements.
- Add Alternate I to DFARS 252.225-7020, Trade Agreements Certificate, and DFARS 252.225-7021, Trade Agreements, with conforming changes to the prescriptions paragraphs (5) and (6) of DFARS 225.1101, Acquisition of Supplies.
- Add a requirement to DFARS 252.225-7021 and DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements, for the contractor to “inform its government of its participation in this acquisition and that it generally will not have such opportunity in the future unless its government provides reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.”

The proposed rule would make the following changes to implement the Balance of Payments Program waiver:

- Amend DFARS 225.502, Application [of DFARS Subpart 225.5, Evaluating Foreign Offers – Supply Contracts], to provide that whenever the acquisition is in support of operations in Afghanistan, offers of end products (other than arms, ammunition, and war materials) from SC/CASA states shall be treated the same as qualifying country offers.
- Modify paragraphs (b)(1)(iii) and (b)(2) of DFARS 225.7501, Applicability [of Balance of Payments Program], to provide the exception for SC/CASA states, and to cross-reference DFARS 225.7704-2, Applicability of Balance of Payments Program.
- Add alternates to 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 252.225-7035, 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; and DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements. Conforming changes would be made to the prescriptions at DFARS 225.1101(1), (2), (6), (10), and (11), and paragraphs (a)(2) and (b) of DFARS 225.7503, Contract Clauses.

Comments on the proposed rule must be submitted no later than March 9, 2010, by any of the means mentioned in the previous proposed rule. Identify comments as “DFARS Case 2009-D012.”

■ **Lead System Integrators:** This finalizes, without changes, an interim rule that modified an earlier interim rule.

The first interim rule implemented Section 807 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) by adding DFARS Subpart 209.5, Organizational and Consultant Conflicts of Interest, and the corresponding provision and clause at DFARS 252.209-7006, Limitations on Contractors Acting as Lead System Integrators, and DFARS 252.209-7007, Prohibited Financial Interests for Lead System Integrators. Section 807 placed limitations on contractors acting as lead system integrators in the acquisition of major DOD systems.

The second interim rule amended the first interim rule to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 802 placed additional limitations on DOD’s use of lead system integrators.

One comment was submitted in response to the first interim rule, and several of the comments were adopted in the second interim rule. There were no comments on the second interim rule, so it is finalized without changes.

For more on the first interim rule, see the February 2008 *Federal Contracts Perspective* article “Lots of DFARS Rules Saved for the New Year.”

For more on the second interim rule, see the August 2009 *Federal Contracts Perspective* article “Tidal Wave of DFARS Changes in July.”

For more on the acquisition-related provisions of Public Law 109-364, see the November 2006 *Federal Contracts Perspective* article “2007 Defense Authorization Addresses Training, Award Fees, Specialty Metals, Small Claims.”

For more on the 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.”

■ **Trade Agreements with Costa Rica and Peru:** This finalizes, without changes, the interim rule that amended 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, the interim rule amended 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.

For more on the interim rule, see the August 2009 *Federal Contracts Perspective* article “Tidal Wave of DFARS Changes in July.”

■ **Class Deviation to Implement New Procurement Thresholds for Trade Agreements:**

This deviation to the table in paragraph (b) of FAR 25.402, General, implements for DOD the revised procurement thresholds for trade agreements that were established by the U.S. Trade Representative (see the January 2010 *Federal Contracts Perspective* article “Thresholds for Trade Agreements Adjusted”). This deviation will remain in effect until incorporated in the FAR or the DFARS, or is rescinded.

■ **Contractor Acquired Property (CAP) Under Cost Reimbursement Contracts and Line Items:**

This memorandum clarifies DOD business rules for CAP. FAR 45.101, Definitions [for government property], defines “CAP” as “property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the government has title.” The memorandum includes a five-page attachment outlining the CAP business rules, which are applicable to cost-reimbursement contracts, cost-reimbursement line items under mixed type contracts, and cost-reimbursement delivery orders under indefinite-delivery contracts or basic ordering agreements. Essentially, the business rules state that although title passes to DOD when the property is obtained by the contractor, the property will not be recorded on DOD financial statements (as other than construction in process) or in accountability systems until the property is delivered to DOD. This will prevent duplicate accountability records.

■ **Government Furnished Property:** This memorandum describes the requirements for strengthening the accountability and management of personal property owned by DOD when the property is used on contracts. To reinforce internal controls over the accountability for DOD personal property provided to a contractor by a DOD component, or requisitioned from DOD component supply sources by a contractor, the following goals are established:

- Electronic transactions will be used to transfer government property to a contractor and/or return property to DOD. Contractors and DOD components shall confirm receipt by contract number for property received electronically.
- All transactions used to transfer property to contractor custody or return property to DOD custody shall cite a contract number under which the property is or was accountable for stewardship.

- For contractor requisitions of government furnished property (GFP), DOD components shall capture or link to the contract number under which requisition authority to contractors is granted, and shall reject any contractor requisitions that are not authorized.
- Consistent with FAR 45.201, Solicitation, GFP requirements shall be fully described and listed in an attachment in any solicitation and contract to notify the contractor of those items of GFP that are due-in from the DOD or that are authorized for requisition from a DOD component supply source.
- GFP transfer transactions and receipts of property that does not have a Unique Item Identifier (UII) shall be routed to a GFP hub co-located in the DOD Item Unique Identification (IUID) Registry as a prototype effort until DFARS guidance is final.

■ **Negotiation of a Reciprocal Defense Procurement Memorandum of Understanding With the Czech Republic:** DOD is requesting comments on a contemplated Reciprocal Defense Procurement (RDP) Memorandum of Understanding (MOU) with the Czech Republic. DOD is requesting industry feedback regarding its experience in public defense procurements conducted by or on behalf of the Czech Republic Ministry of Defense or Armed Forces.

If DOD signs an RDP MOU with the Czech Republic, the Czech Republic would be listed as one of the “qualifying countries” identified in DFARS 225.003, Definitions, and offers of products of the Czech Republic or that contain components from the Czech Republic would be afforded the benefits available to all qualifying countries. This also means that U.S. products would be exempt from any analogous “Buy Czech Republic” and “Buy European Union” laws or policies applicable to procurements by the Czech Republic Ministry of Defense or Armed Forces.

While DOD is evaluating the Czech Republic’s laws and regulations in this area, DOD is requesting comments from U.S. industry on its experience in participating in the Czech Republic’s public defense procurements. DOD is asking U.S. firms that have participated or attempted to participate in procurements by or on behalf of the Czech Republic’s Ministry of Defense or Armed Forces to let it know if the procurements were conducted in accordance with published procedures with transparency, integrity, fairness, and due process, and if not, the nature of the problems encountered.

Also, DOD is interested in comments relating to the degree of reciprocity that exists between the U.S. and the Czech Republic when it comes to the openness of defense procurements to offers of products from the other country.

Comments must be submitted no later than February 18, 2010, to the Director, Defense Procurement and Acquisition Policy, 3060 Defense Pentagon, Room 3B855, Attn: Ms. Susan Hildner, Washington, DC 20301-3060; or by e-mail to emily.clarke@osd.mil.

MILEAGE REIMBURSEMENT REDUCED TO 50¢/MILE FOR AUTOS

The Federal Travel Regulation (FTR) is amended to *decrease* the mileage reimbursement rate for use of a privately owned automobile on official travel from 55¢ per mile to 50¢ per mile, and the rate for use of a motorcycle on official travel from 52¢ per mile to 47¢ per mile. Also, GSA is increasing the reimbursement rate for use of a privately owned aircraft from \$1.24 per mile to \$1.29 per mile. These revised rates are effective for travel performed on or after January 1, 2010. Travel performed before January 1, 2010, will be reimbursed at the earlier rates.

By law, the automobile reimbursement rate cannot exceed the single standard mileage rate established by the Internal Revenue Service (IRS). The IRS announced a new mileage rate for automobiles of 50¢ per mile effective January 1, 2010, so GSA took action to decrease the automobile reimbursement rate as of January 1, 2010.

PRESIDENT ISSUES MEMO ON TAX DELINQUENT CONTRACTORS

One year to the day after his inauguration, President Obama issued a memorandum titled “Addressing Tax Delinquency by Government Contractors” to all department and agency heads. The president was concerned about the integrity of the federal acquisition process because “reports by the Government Accountability Office (GAO) state that federal contracts are awarded to tens of thousands of companies with serious tax delinquencies. The total amount in unpaid taxes owed by these contracting companies is estimated to be more than \$5 billion.”

Because of this concern, the president is directing the Internal Revenue Service (IRS) to conduct a review of tax certifications in FAR 52.209-5, Certification Regarding Responsibility Matters (the offeror is required to certify that is has or has not “within a three-year period preceding this offer, been notified of any delinquent federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied”). The commissioner of the IRS is to report the overall accuracy of the contractors’ certifications to the president within 90 days.

In addition, the president is directing the Office of Management and Budget (OMB), working with the Secretary of the Treasury and other agency heads, “to evaluate practices of contracting officers and debarring officials in response to contractors’ certifications of serious tax delinquencies and to provide me, within 90 days, recommendations on process improvements to ensure these contractors are not awarded new contracts, including a plan to make contractor certifications available in a government-wide database, as is already being done with other information on contractors.

NONMANUFACTURER RULE WAIVER PROPOSED FOR LIQUIFIED GASES

The Small Business Administration (SBA) is proposing to waive the nonmanufacturer rule for compressed and liquefied gases, North American Industry Classification System (NAICS) code 325120, Product Service Code (PSC) 6830. SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources for these products by January 27, 2010, to Amy Garcia, Program Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street, SW, Suite 8800, Washington, DC 20416.

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

SECOND HALF OF DEAR PROPOSED FOR REWRITE

The Department of Energy (DOE) is proposing to amend Parts 928 through 952 of the DOE Acquisition Regulation (DEAR) to conform it to the FAR, to remove out-of-date coverage, and to update references. However, not all the second-half DEAR parts will be amended – no changes are proposed for DEAR Parts 927, 929, 930, 934, 938, 939, 940, 943, 944, 945, 946, 947, and 948. DOE will propose separate rules for changes to DEAR Parts 927 and 945, respectively.

The following are the significant proposed changes:

- Paragraph (a)(3) of DEAR 932.501-2, Unusual Progress Payments, would be amended to reflect current procedures. It would state that all requests for unusual progress payments shall be sent to the DOE or the National Nuclear Security Administration (NNSA) Senior Procurement Executive to approve or deny.
- Paragraph (c) of DEAR 935.010, would be revised to reflect the new Internet homepage for the DOE Energy Link System (E-Link) – <http://www.osti.gov/mlink>. Contractors are required to submit all scientific and technical reports through E-link.
- New DEAR Subpart 937.2, Advisory and Assistance Services, would be added. It would consist of DEAR 937.204, Guidelines for Determining Availability of Personnel, which would provide the DOE guidelines for determining availability of sufficient personnel with the requisite training and capabilities to perform the evaluation or analysis of proposals. Also, it would clarify the DOE officials responsible for making the determinations prescribed in paragraphs (a), (b), (d), and (e) of FAR 37.204.
- DEAR 941.201-70, DOE Directives, currently states, “Utility services (defined at FAR 41.101 [Definitions]) shall be acquired in accordance with FAR Part 41 [Acquisition of Utility Services] and DOE Directives in subseries 4540 (Public Services).” It would be amended to state, “Utility services (defined at 48 CFR 41.101) shall be acquired in accordance with 48 CFR Part 41 and the Department of Energy (DOE) Order 430.2B, Departmental Energy, Renewable Energy and Transportation Management, or its successor.”
- DEAR Subpart 949.5, Contract Termination Clauses, would be removed because it merely consists of a suggestion that DEAR 952.249-70 be used in cost-plus-fixed-fee architect-engineer contracts. DEAR 952.249-70, Termination Clause for Cost-Reimbursement Architect-Engineer Contracts, was removed in 2002 because FAR 52.249-6, Termination (Cost-Reimbursement), was considered to be sufficient.

Comments on the proposed changes must be submitted no later than February 8, 2010, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: DEARRulemaking@hq.doe.gov; or (3) mail: U.S. Department of Energy, Office of Procurement and Assistance Management, MA-611, 1000 Independence Avenue, SW, Washington, DC 20585. Identify comments as “DEAR: Subchapters E, F and G and RIN 1991-AB88.”

POSTAL SERVICE REVISING DISAGREEMENT RESOLUTION

The U.S. Postal Service (USPS) is revising its regulations governing the supplier disagreement resolution (SDR) process to clarify and explain the purposes of that process, and to remove extraneous and duplicative language.

The USPS' acquisition regulations are in Title 39 of the Code of Federal Regulations (CFR), Part 601, Purchasing of Property and Services. The USPS is revising 39 CFR 601.107, Initial Disagreement Resolution, and 39 CFR 601.108, SDR [Supplier Disagreement Resolution] Official Disagreement Resolution, which govern the SDR process, to clarify certain SDR procedures.

The following are the proposed changes:

■ Section 601.107

- Paragraph (a) is revised to state that the Supplier Disagreement Resolution Official (SDR Official) is a contracting officer designated by the USPS to perform the functions established under Section 601.108.
- Paragraph (b) is revised to clarify the timelines for filing initial disagreements concerning solicitations (“the disagreement shall be lodged within 10 days of the date the supplier received notification of award or 10 days from the date the supplier received a debriefing, *whichever is later*”).
- Paragraph (c) is revised to inform parties that the alternative dispute resolution (ADR) process may be used to resolve disagreements and that if an agreement cannot be reached under ADR, the supplier has 10 days to lodge its disagreement with the SDR Official.

■ Section 601.108

- Paragraph (a) is revised to remove language that was extraneous or duplicative of statements made in other paragraphs.
- Paragraph (b) further explains the purposes of the disagreement resolution process.
- Paragraph (c) clarifies the acceptable modes for submitting a disagreement under Section 601.107 or contest of decision under paragraph (d) of Section 601.105, Business Relationships [facsimile, e-mail, hand delivery, or U.S. Mail], and updates the dedicated fax number [202-268-0075].
- Paragraph (d) clarifies that it covers both disagreements under Section 601.107 and contests of decisions under Section 601.105.
- Paragraph (e) is supplemented to provide examples of remedies that the SDR Official is authorized to grant.
- Paragraph (g) explains when a challenged award becomes final, a status that varies depending on how the SDR Official resolves the disagreement. The grounds upon which appeals may be taken to federal court, previously addressed in paragraph (g), are now addressed in a new paragraph (h).
- Paragraph (h) clarifies the grounds upon which the USPS' final contract award, as described in paragraph (g), may be appealed. Also, paragraph (h) clarifies that the party lodging the disagreement may seek review of the USPS' final contract award only after the mandatory administrative remedies provided under Section 601.107 and Section 601.108 have been exhausted.

- Paragraph (i) is identical to the old paragraph (h) except that it clarifies that the resolution timeframe applies not only to disagreements under Section 601.107 but also to contests of decisions under Section 601.105.

NUMBER OF BID PROTESTS INCREASED 20% IN FY 2009

The Government Accountability Office (GAO) submitted its annual report to Congress for Fiscal Year (FY) 2009, stating that the number of protests filed with it increased by 20% between FY 2008 and 2009, up from 1,652 cases to 1,989 cases. This is the highest number of protests filed with GAO since 1997, when 1,707 protests were filed. However, of these 1,989 cases, 168 are attributable to GAO's recently expanded bid protest jurisdiction over task orders exceeding \$10 million (139 filings), Office of Management and Budget (OMB) Circular A-76 protests (16 filings), and Transportation Security Administration protests (13 filings). These 168 filings represent 50% of the total increase in filings from FY 2008 to FY 2009 (337 filings). **(EDITOR'S NOTE:** For more on GAO's expanded bid protest jurisdiction, see the February 2008 *Federal Contracts Perspective* article "Defense Authorization Act Restricts A-76 Competitions, Extends FAR Subpart 13.5," and the FAR implementation in the October 2008 *Federal Contracts Perspective* article "FAC 2005-27 Requires 'Enhanced Competition' for Task and Delivery Orders.")

In addition, the "effectiveness rate" (the number of protestors obtaining some form of relief) increased from 42% in FY 2008 to 45% in FY 2009. However, the number of protests sustained on their merits actually decreased from 60 to 57, resulting in a reduced sustain rate of 18% as opposed to 20% in FY08.

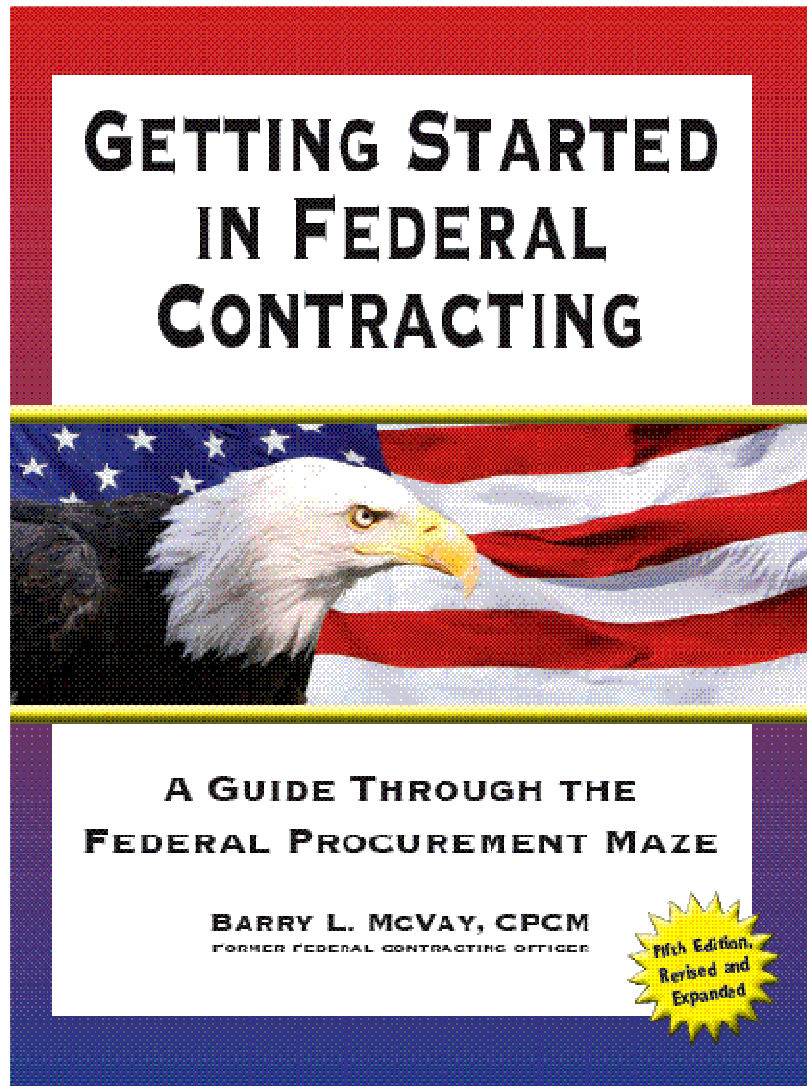
Most of the increase in protests can be attributed to the harsh economic times and the increased amount of money the government is spending for economic stimulus.

In addition, GAO is required to report to Congress each instance in which a federal agency did not fully implement one of its recommendations in connection with a bid protest decided the prior fiscal year. There was one such occurrence in FY 2009 – its recommendation in *B-401057, Mission Critical Solutions, Inc.*, May 4, 2009. In the protest, GAO decided that the HUBZone program's enabling legislation clearly states that the HUBZone program has priority over the service-disabled veteran-owned small business (SDVOSB) and 8(a) programs. However, OMB directed agencies to ignore GAO's decision, and the Department of Justice reaffirmed that the Small Business Administration's (SBA's) regulations calling for parity among the programs 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.

For more on GAO's FY 2008 protest statistics, see the January 2009 *Federal Contracts Perspective* article "GAO Protests Increase 17% in Fiscal Year 2008." For more on the *Mission Critical Solutions, Inc.* protest decision, see the August 2009 *Federal Contracts Perspective* article "OMB Issues Five Memos Providing Contracting Guidance," and the September 2009 *Federal Contracts Perspective* article "Department of Justice Reaffirms SBA's Small Business Program Parity Regulations."

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