

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

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## INFLATION ADJUSTMENTS PROPOSED FOR ACQUISITION THRESHOLDS

Every five years, statutory-based acquisition-related thresholds are required to be adjusted for inflation except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. This requirement is in Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year (FY) 2005 (Public Law 108-375), and it requires an adjustment in years evenly divisible by five using the Consumer Price Index for all urban consumers. This proposed rule would make the required adjustments to the statutory-based acquisition thresholds. In addition, this proposed rule would use the same methodology to adjust nonstatutory acquisition-related thresholds – that is, those thresholds in the Federal Acquisition Regulation (FAR) that have their origin in executive orders or regulations. However, this proposed rule does not address those thresholds that are not considered “acquisition-related,” such as those related to claims, penalties, withholding, payments, required levels of insurance, small business size standards, liquidated damages, etc. Finally, changes to cost accounting standards (CAS) thresholds will be dealt with separately.

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The following are the adjustments that would be made to the most heavily-used thresholds by this rule:

- The simplified acquisition threshold in FAR 2.101, Definitions, would be increased from \$100,000 to **\$150,000**.
- The commercial items test program ceiling in FAR 13.500, General, would be increased from \$5,500,000 to **\$6,500,000**.
- The cost and pricing data threshold in FAR 15.403-4, Requiring Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b), would be increased from \$650,000 to **\$700,000**.
- The prime contractor subcontracting plan threshold in FAR 19.702, Statutory Requirements, would be increased from \$550,000 to **\$650,000**, and the construction threshold would be increased from \$1,000,000 to **\$1,500,000**.

The \$3,000 micro-purchase base threshold in FAR 2.101 would be unchanged, and the threshold for FedBizOpps preaward and post-award notices in FAR Part 5, Publicizing Contract Actions, would remain at \$25,000 because of the trade agreements.

Some other important thresholds that would be changed are:

- In paragraph (a) of FAR 5.303, Announcement of Contract Awards, the threshold for public announcement of contract awards would be increased from \$3.5 million to **\$4.0 million**.
- In paragraph (a)(1) of FAR 19.702, Statutory Requirements, the threshold for contractors to submit small business subcontracting plans would be increased from \$550,000 to **\$650,000** (from \$1.0 million to **\$1.5 million** for construction).
- In paragraph (a)(2) of FAR 19.805-1, General [for Competitive 8(a)], the threshold for competition among 8(a) firms would be increased from \$5.5 million to **\$6.5 million** for manufacturing, and from \$3.5 million to **\$4.0 million** for all other industries. Changes to comparable thresholds would be made to the sole source limits for awards to HUBZone small businesses (paragraph (a)(2) of FAR 19.1306, HUBZone Sole Source Awards) and service-disabled veteran-owned small businesses (paragraph (a)(2) of FAR 19.1406, Sole Source Awards to Service-Disabled Veteran-Owned Small Business Concerns).
- In paragraph (a) of FAR 28.102-1, General [for performance and payment bonds], and elsewhere in FAR Subpart 28.1, Bonds and Other Financial Protections, the threshold for inclusion of the Miller Act requirements for performance and payment bonds would be increased from \$100,000 to **\$150,000**.
- In paragraph (b) of FAR 36.501, Performance of Work by the Contractor, the threshold for inclusion of FAR 52.236-1, Performance of Work by the Contractor, in solicitations and contracts would be increased from \$1.0 million to **\$1.5 million**.
- In paragraph (e) of FAR 42.1502, Policy [on contractor performance information], the threshold for past performance evaluations on construction contracts would be increased from \$650,000 to **\$700,000**.

Comparable changes would be made to corresponding provisions and clauses in FAR Part 52, Solicitation Provisions and Contract Clauses.

Comments on the proposed rule must be submitted no later than April 5, 2010, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (MVPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405. Identify comments as “FAR Case 2008-024.”

Vivina McVay, Editor-in Chief

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## VETERAN BUSINESS STATUS VERIFICATION RULE FINALIZED

The Department of Veterans Affairs (VA) has finalized, with changes, its interim final rule that added a new Part 74, Veterans Small Business Regulations, to Title 38, Pensions, Bonuses, and Veterans' Relief, of the Code of Federal Regulations (38 CFR Part 74). Part 74 requires veteran-owned small businesses (VOSB), including service-disabled veteran-owned small businesses (SDVOSB), to register in the VetBiz.gov Vendor Information Pages (VIP) database to be eligible to participate in set-asides for SDVOSBs and VOSBs issued by VA contracting officers. In addition, Part 74 requires VA contracting officers to verify ownership and control of VOSB and SDVOSB.

The final version of the rule differs in several ways from the interim final rule:

- To Section 74.1, What definitions are important for VetBiz Vendor Information Pages (VIP) Verification Program?, the following definition of “full-time” is added: “working at the business during the normal working hours, which equate to Monday through Friday, approximately 9 a.m. to 5 p.m.” (See the change to Section 74.4 below.)

In addition, the definition of “small business concern” is revised to merely reference the FAR definition of “small business concern” in FAR 2.101, Definitions.

Finally, the definition of “surviving spouse” is revised to add “or died as a direct result of a service-connected disability” to “The veteran must have had a 100% service-connected disability *or died as a direct result of a service-connected disability*” (emphasis added).

- A new paragraph (e) has been added to Section 74.2, What are the eligibility requirements a concern must meet for VetBiz VIP Verification?, which states that “any firm registered in the VetBiz VIP database that is found to be ineligible due to an SBA [Small Business Administraton] protest decision or other negative finding will be immediately removed from the VetBiz VIP database.”

- Paragraph (a) of Section 74.3, Who does the Center for Veterans Enterprise (CVE) consider to own a veteran-owned small business?, is modified to add the following regarding employee stock ownership plans (ESOPs): “For employee stock ownership plans where 5 or fewer persons who are individuals, estates, or trusts own 50% or more of the total combined voting power of the corporation, the employee plan will be determined to be ‘excluded stock’ and eligible parties must control 51% or more of the combined voting power of the corporation. For employee stock ownership plans where greater than 5 persons who are individuals, estates, or trusts own 50% or more of the total stock, eligible parties must control 51% or more of the combined voting power of the corporation, including the ESOP stock.”

- Paragraph (d) of Section 74.3 addresses profits and distributions by listing what “one or more veterans or service-disabled veterans must be entitled to receive” for the firm to be eligible. Subparagraph (d)(3) is amended to include a partnership or an limited liability corporation (LLC) to “At least 51% of the retained earnings of the concern and 100% of the unencumbered value of each share of stock owned in the event of dissolution of the corporation, *partnership, or LLC*” (emphasis added). In addition, subparagraph (d)(4) is added to state that an eligible individual’s ability to share in the profits of the concern should be commensurate with the extent of his or her ownership interest in that concern.

- Paragraph (c)(1) of Section 74.4, is modified to state that an eligible owner may have only one business in the program at one time and must work full-time in the business.

■ Paragraph (a) of Section 74.13, Can an applicant ask CVE [Center for Veterans Enterprise] to reconsider its initial decision to deny an application?, is amended to add the mailing address for requests to reconsider of application denial decisions (Director, Center for Veterans Enterprise (00VE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420). In addition, paragraph (b) is revised to reflect that the timeframe for the issuance of a decision has been extended from 30 days to 60 days to allow for a thorough consideration of the applicant's request.

■ Paragraph (e) is added to Section 74.22, What are the procedures for cancellation?, to provide that a participant may appeal a Notice of Verified Status Cancellation issued by the Director, CVE, to the Executive Director of the Office of Small and Disadvantaged Business Utilization. The Executive Director of the Office of Small and Disadvantaged Business Utilization and the Center for Veterans Enterprise must render a decision on such an appeal within 60 days after receipt.

For more on the interim final rule, see the June 2008 *Federal Contracts Perspective* article "New Regs Address Veterans' Employment, Ownership."

## **USDA PROPOSES ANOTHER NINE BIOBASED ITEMS**

The United States Department of Agriculture (USDA) is proposing to add nine more sections to Title 7 of the Code of Federal Regulations (CFR), Part 2902, Guidelines for Designating Biobased Products for Federal Procurement (7 CFR Part 2902), to identify nine more biobased products to be given preference in federal procurements as provided under Section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), and to specify the minimum level of biobased content to be contained in the procured products.

The following are the proposed new designated items and their Title 7 section numbers:

- 2902.52, Disposable tableware
- 2902.53, Expanded polystyrene (EPS) foam recycling products
- 2902.54, Heat transfer fluids
- 2902.55, Ink removers and cleaners
- 2902.56, Mulch and compost materials
- 2902.57, Multipurpose lubricants
- 2902.58, Office paper
- 2902.59, Topical pain relief products
- 2902.60, Turbine drip oils

As a general rule, procuring agencies must purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more, unless products within a designated item: (1) are not reasonably available within a reasonable period of time; (2) fail to meet the reasonable performance standards of the procuring agencies; or (3) are available only at an unreasonable price. The \$10,000 threshold applies to federal agencies as a whole and not to agency subgroups such as regional offices or subagencies of the larger federal department or agency.

For more information on the biobased program, all the products in the program, and those proposed for inclusion, go to <http://www.biopreferred.gov/>. Also see the February 2005 *Federal Contracts Perspective* article “USDA Publishes Biobased Products Guidelines,” the April 2006 *Federal Contracts Perspective* article “USDA Designates Six Biobased Products for Procurement,” the September 2006 *Federal Contracts Perspective* article “USDA Proposes 20 More Biobased Products,” the November 2006 *Federal Contracts Perspective* article “10 More Biobased Items Proposed,” and the June 2008 *Federal Contracts Perspective* article “USDA Adds 27 Items to Biobased Products List, Exempts DOD and NASA from Requirements,” and the November 2009 *Federal Contracts Perspective* article “USDA Adds Nine More Biobased Items.”

## **DOD ADDRESSES PROCUREMENTS ON ITS BEHALF, COMPETITION**

The Department of Defense (DOD) took it relatively easy during February, finalizing one interim Defense FAR Supplement (DFARS) rule, issuing another interim rule, and issuing two deviations.

■ **Limitation on Procurements on Behalf of DOD:** This rule finalizes, with changes, the interim rule that amended DFARS Subpart 217.78, Contracts or Delivery Orders Issued by a Non-DOD Agency, to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which places limitations on acquisitions made by non-DOD agencies on behalf of DOD.

The interim rule amended DFARS 217.7802, Policy, to provide that such acquisitions exceeding the simplified acquisition threshold may be made only if the head of the non-DOD agency has certified that the non-DOD agency will comply with defense procurement requirements for the fiscal year. However, this limitation does not apply to the acquisition of supplies and services during any fiscal year when there is in effect a written determination of the Under Secretary of Defense for Acquisition, Technology, and Logistics, that it is necessary in the interest of DOD to acquire supplies and services through the non-DOD agency during the fiscal year.

Two respondents submitted comments on the interim rule. As a result of these comments, the interim rule is finalized with the following changes:

- The following definition is added to DFARS 217.7801, Definitions: “Governmentwide acquisition contract’ means a task or delivery order contract that (1) is entered into by a non-defense agency; and (2) may be used as the contract under which property or services are procured for one or more other departments or agencies of the federal government.”
- Paragraph (a) of DFARS 217.7802, Policy, is amended to clarify that non-DOD agencies must certify that they will comply with DOD requirements including “applicable Department of Defense financial management regulations.” This brings the rule into compliance with the provisions of Public Law 110-181.

For more on the interim rule, see the August 2008 *Federal Contracts Perspective* article “Tidal Wave of DFARS Changes in July.”

■ **Acquisition Strategies To Ensure Competition Throughout the Life Cycle of Major Defense Acquisition Programs:** This interim rule implements Section 202 of the Weapon

Systems Acquisition Reform Act of 2009 (Public Law 111-23), which directs the Secretary of Defense (SECDEF) to ensure that the acquisition strategy for each major defense acquisition program (MDAP) includes: (1) measures to ensure competition at both the prime contract and subcontract level of the MDAP throughout its life cycle as a means to improve contractor performance; and (2) adequate documentation of the rationale for selection of the subcontractor tier or tiers.

To implement Section 202 of Public Law 111-23, DFARS 207.106, Additional Requirements for Major Systems, is amended to add a new paragraph (S-72), which requires that acquisition plans for MDAPs include measures that:

“(i) Ensure competition, or the option of competition, at both the prime contract level and subcontract level (at such tier or tiers as are appropriate) throughout the program life cycle as a means to improve contractor performance; and

“(ii) Document the rationale for the selection of the appropriate subcontract tier or tiers...and the measures which will be employed to ensure competition, or the option of competition.”

Among the measures to ensure competition are “(1) competitive prototyping; (2) dual-sourcing; (3) unbundling of contracts; (4) funding of next-generation prototype systems or subsystems; (5) use of modular, open architectures to enable competition for upgrades; (6) use of build-to-print approaches to enable production through multiple sources; (7) acquisition of complete technical data packages; (8) periodic competitions for subsystem upgrades; (9) licensing of additional suppliers; and (10) periodic system or program reviews to address long-term competitive effects of program decisions.”

In addition, to ensure fair and objective “make-or-buy” decisions by prime contractors, acquisition strategies and resultant solicitations and contracts are required to “(1) require prime contractors to give full and fair consideration to qualified sources other than the prime contractor for the development or construction of major subsystems and components of major weapon systems; (2) provide for government surveillance of the process by which prime contractors consider such sources and determine whether to conduct such development or construction in-house or through a subcontract; and (3) provide for the assessment of the extent to which the prime contractor has given full and fair consideration to qualified sources in sourcing decisions as a part of past performance evaluations.”

Finally, “whenever a source-of-repair decision results in a plan to award a contract for the performance of maintenance and sustainment services on a major weapon system, to the maximum extent practicable and consistent with statutory requirements, the acquisition plan shall prescribe that award will be made on a competitive basis after giving full consideration to all sources (including sources that partner or subcontract with public or private sector repair activities).”

Comments on the interim rule must be submitted no later than April 26, 2010, by any of the following means: (1) eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: [dfars@osd.mil](mailto:dfars@osd.mil); (3) fax: 703-602-0350; (4) mail: Defense Acquisition Regulations System, Attn: Meredith Murphy, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060; 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-D014.”

■ **Class Deviation on Reporting Requirement for Prime Vendor Contracts:** This class deviation prohibits contracting officers from awarding prime vendor contracts for depot-level

maintenance and repair of a weapon system or other military equipment until they are notified that the Secretary of Defense or the secretary of a military department has submitted, 30 days prior to the award of the proposed contract, the report to Congress required by Section 346 of the National Defense Authorization Act for Fiscal Year 1999 (Public Law 105-261).

The report contains information on (1) competitive procedures to be used; (2) cost/benefit analysis demonstrating savings over the life of the contract; (3) analysis of conformance with Title 10 of the U.S. Code, Section 2466 (10 U.S.C. 2466), Limitations on the Performance of Depot-Level Maintenance of Materiel; and (4) a description of measures taken to ensure 10 U.S.C. 2464, Core Logistics Capabilities, is not violated.

The deviation will remain in effect until incorporated into the DFARS or until it is rescinded.

■ **Class Deviation to Implement Additional Contractor Requirements and Responsibilities Restricting the Use of Mandatory Arbitration Agreements:** This deviation implements Section 8116 of the Defense Appropriations Act of Fiscal Year 2010 (Public Law 111-118) by directing contracting officers to use a new clause, DFARS 252.222-7999, Additional Requirements and Responsibilities Restricting the Use of Mandatory Arbitration Agreements, which prohibits the use of Fiscal Year 2010 funds for any contract (including task and delivery orders and bilateral modifications) in excess of \$1 million that is awarded after February 17, 2010, unless the contractor agrees not to: (1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or (2) take any action to enforce any provision of such an existing agreement.

In addition, the clause requires that no Fiscal Year 2010 funds be expended after June 17, 2010, unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of any such agreement, with respect to any employee or independent contractor performing work related to such subcontract.

The deviation does not apply to commercial off-the-shelf (COTS) items. Also, the Secretary of Defense may waive the applicability of the clause to a particular contract or subcontract if necessary to avoid harm to national security interests.

Contracting officers are to modify, on a bilateral basis, existing contracts if Fiscal Year 2010 funds will be used for bilateral modifications or orders that exceed \$1 million and are issued after the effective date of the deviation (February 17, 2010). If a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Fiscal Year 2010 funds on such modifications or orders.

The deviation will remain in effect until incorporated into the DFARS or until it is rescinded.

## **GSAR PART 512 REWRITTEN**

The General Services Administration (GSA) is adopting the proposed rewrite of GSA Acquisition Regulation (GSAR) Part 512, Commercial Items, as final with changes.

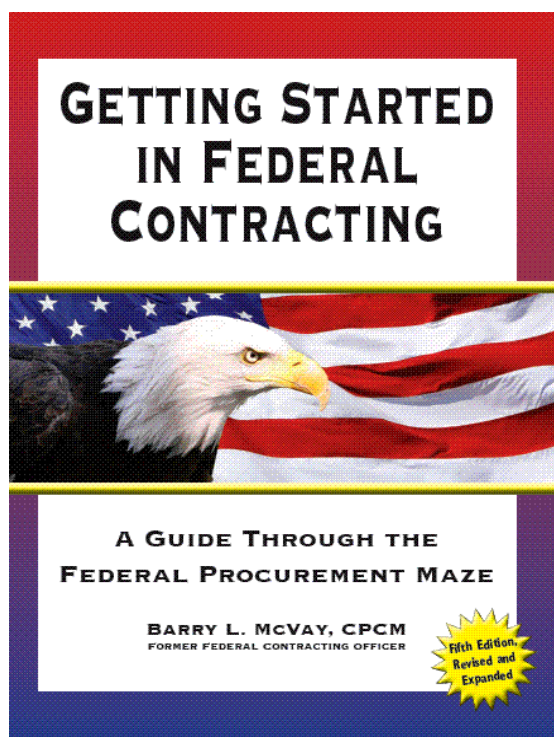
The proposed rule would have revised paragraph (a) of GSAR 512.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, to delete prescriptions for GSAR 552.212-70, Preparation of Offer (Multiple Award Schedule), and GSAR 552.212-73, Evaluation – Commercial Items (Multiple Award Schedule), both of which would be relocated to GSAR Part 538, Federal Supply Schedule Contracting, where they are more appropriate.

Based on comments, paragraph (b), “Use of Required Provisions and Clauses,” is deleted, and paragraphs (c) and (d) are redesignated as paragraphs (b) and (c), respectively. A new paragraph (d) requires that commercial item solicitations issued in conjunction with FAR Part 14, Sealed Bidding, or FAR Part 15, Contracting by Negotiation, include two notices (acquisitions of leasehold interests in real property, must include only the first notice):

“The information collection requirements contained in this solicitation/contract are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090-0163.”

“The General Services Administration's hours of operation are 8 a.m. to 4:30 p.m. Requests for preaward debriefings postmarked or otherwise submitted after 4:30 p.m. will be considered submitted the following business day. Requests for postaward debriefings delivered after 4:30 p.m. will be considered received and filed the following business day.”

For more on the proposed rule, see the September 2008 *Federal Contracts Perspective* article “GSAR Rewrite Begins to Show Results.”



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