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CONTRACTING OFFICERS TO CHECK FEDERAL AWARDEE PERFORMANCE AND INTEGRITY INFORMATION SYSTEM

Federal Acquisition Circular (FAC) 2005-40 amends the Federal Acquisition Regulation (FAR) to require contracting officers to consider the information in the Federal Awardee Performance and Integrity Information System (FAPIIS) when making a responsibility determination before awarding a contract over the simplified acquisition threshold (the FAPIIS website is available at <http://www.ppirs.gov/fapiis.html>). FAPIIS is designed to significantly enhance the government’s ability to evaluate the business ethics and quality of prospective contractors competing for federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources.

Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-181) requires the establishment of a data system containing specific information on the integrity and performance of covered federal agency contractors and grantees. The data system that was developed, FAPIIS, is intended to

significantly enhance the scope of information available to contracting officers as they evaluate the integrity and performance of prospective contractors competing for federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources.

Access to readily-available governmentwide information that a contracting officer would routinely consider when making a responsibility determination historically has been limited to debarment and suspension actions, which are maintained in the Excluded Parties List System (EPLS) (<https://www.epls.gov>). Since last summer, agencies have been required to submit electronic records of contractor performance into the Past Performance Information Retrieval System (PPIRS) (<http://www.ppirs.gov>) so the information can be reviewed and considered by contracting officers throughout the government (see the August 2009 *Federal Contracts Perspective* article “FAC 2005-34 Addresses Past Performance Information”).

FAPIIS is intended to enhance the scope of information available to contracting officers as they evaluate the integrity and performance of prospective contractors. In addition to providing one-stop access to EPLS and PPIRS, FAPIIS will also include contracting officers’ nonresponsibility determinations, contract terminations for default or cause, agency defective pricing determinations, administrative agreements entered into by suspension and debarment officials to resolve a suspension or debarment, and contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions. The system will collect this information on an ongoing basis from EPLS and PPIRS, contracting officers (for determinations of nonresponsibility and contract terminations), suspension and debarment officials (for

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information on administrative agreements), and contractors (for information related to criminal, civil, and administrative proceedings). Making this information readily available contracting officers before they award contracts will motivate better contractor performance and reduce the likelihood that taxpayer resources will go to contractors with poor track records.

FAC 2005-40 adds FAR 9.104-6, Federal Awardee Performance and Integrity Information System, a solicitation provision FAR 52.209-7, Information Regarding Responsibility Matters, and a contract clause FAR 52.209-8, Updates of Information Regarding Responsibility Matters. FAC 2005-40 requires contracting officers to:

- Check the FAPIIS website before awarding a contract over the simplified acquisition threshold, consider all the information in FAPIIS and PPIRS when making a responsibility determination, and notify the agency official responsible for initiating debarment or suspension action if the information appears appropriate for the official's consideration;
- Document the contract file to explain how the information in FAPIIS was considered in any responsibility determination, and the action that was taken as a result of the information; and
- Enter a nonresponsibility determination into FAPIIS.

FAC 2005-40 requires the contractor to:

- Confirm, at the time of offer submission, information pertaining to criminal, civil and administrative proceedings through which a requisite determination of fault was made, and report this information into FAPIIS; and
- Update the information in FAPIIS on a semi-annual basis, throughout the life of the contract, by entering the required information into FAPIIS via the Central Contractor Registration database (<http://www.ccr.gov>).

Contracting officers must give offerors an opportunity to provide additional information that demonstrates their responsibility before making a nonresponsibility determination based on information from FAPIIS if such information involves the following: criminal, civil, or administrative proceedings in connection with the award of a government contract, terminations for default or cause, or determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics, or comparable information relating to a grant.

An offeror submitting a proposal over \$500,000 and having more than \$10 million in active contracts and grants as of the time of proposal submission must report in FAPIIS information pertaining to criminal, civil, and administrative proceedings through which a requisite determination of fault was made.

The FAPIIS system will provide contractors with notification whenever the government posts new information to the contractor's record. The contractor will have an opportunity to post comments regarding information that has been posted by the government, including nonresponsibility determinations, and such comments will be retained as long as the associated information is retained (for a total period of six years) and will remain part of the record unless the contractor revises the comments.

Vivina McVay, Editor-in Chief

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Sixteen respondents submitted comments on the proposed rule, and the final rule was revised to:

- Removed “head of a subsidy” as one of the examples of “principal” in FAR 2.101, Definitions, because a subsidiary is not generally within the business entity, but is a separate and distinct legal entity.
- The discussion in proposed FAR 9.104-6(b) of responsibility determinations and past performance evaluations has been separated because the two are separate and distinct functions. Now, FAR 9.104-6(b) focuses just on responsibility determinations. For past performance evaluations, the contracting officer is referred to paragraph (a)(2) of FAR 15.305, Proposal Evaluation, which addresses how to evaluate the relevance of data and clearly states that this evaluation is separate from the responsibility determination required under FAR Subpart 9.1, Responsible Prospective Contractors.

For more on the proposed rule, see the October 2009 *Federal Contracts Perspective* article “Federal Awardee Performance and Integrity Information System Proposed.”

FAC 2005-39 EXTENDS FAR SUBPART 13.5 THROUGH 2011

Federal Acquisition Circular (FAC) 2005-39 contains six rule changes to the FAR, the most important being the extension of FAR Subpart 13.5, Test Program for Certain Commercial Items, for two years by extending the program’s expiration date from January 1, 2010, to January 1, 2012 in paragraph (d) of FAR 13.500, General. FAR Subpart 13.5 authorizes the use of simplified procedures for the acquisition of commercial items in amounts greater than the simplified acquisition threshold, but not exceeding \$5.5 million, if the contracting officer can reasonably expect that offers will include commercial items. This extension was in Section 816 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84) (for more on the acquisition-related provisions of Public Law 111-84, see the November 2009 *Federal Contracts Perspective* article “FY10 Defense Authorization Restricts A-76 Competitions”).

The other five FAR rule changes in FAC 2005-39 are:

- **Clarification of Submission of Cost or Pricing Data on Non-Commercial Modifications of Commercial Items:** This finalizes, with minor changes, the interim rule that amended FAR 15.403-1, Prohibition on Obtaining Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b), to harmonize the thresholds for cost or pricing data related to non-commercial modifications of commercial items with the Truth In Negotiation Act (TINA) threshold for cost and pricing data.

FAR 15.403-1(c)(3)(ii)(B) and (c)(3)(ii)(C) address acquisitions funded by the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard. Both of these subparagraphs had set \$500,000 as the threshold for the submission of cost or pricing data for non-commercial modifications of commercial items. However, the current Truth In Negotiation Act (TINA) threshold for cost or pricing data in FAR 15.403-4, Requiring Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b), is \$650,000.

Section 814 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) required the harmonization of the thresholds for cost or pricing data. The interim rule substituted a cross-reference to the cost or pricing data threshold in FAR 15.403-4 for the \$500,000 threshold, so when the TINA threshold is adjusted in the future the threshold for

obtaining cost or pricing data on non-commercial modifications of commercial items would be adjusted, too.

One respondent commented on the interim rule. However, the rule is finalized without changes except for changing “Coast Guard” to “the Coast Guard” in each subparagraph. For more on the interim rule, see the April 2009 *Federal Contracts Perspective* article “FAC 2005-31 Finalizes Size Rerepresentation Rule.”

■ **Use of Standard Form 26, Award/Contract:** This final rule modifies the instructions for use of the Standard Form 26, Award/Contract, at FAR 15.509, Forms, and FAR 53.215-1, Solicitation and Receipt of Proposals, to clarify that Block 18 of the form, “Award (Contractor is not required to sign this document),” is not to be used to award a negotiated procurement. Although Block 18 is intended for use with sealed bid procurements only, it is regularly (and improperly) used with negotiated procurements. This has resulted in negotiated procurements being awarded unilaterally. This error can create the potential for disputes in those situations where the government's intent was not to accept the terms of the offer in its entirety. (**NOTE:** Block 17, “Contractor’s Negotiated Agreement (Contractor is required to sign this document and return ____ copies to issuing office),” is to be used for negotiated procurements.)

To clarify this distinction, FAR 15.509 is amended to add the following sentence: “Note however, if using the SF 26 for a negotiated procurement, Block 18 is not to be used.” In addition, FAR 53.215-1(a) is amended to add the following sentence: “Block 18 may not be used for negotiated procurements.”

Changes to the SF 26 to reflect this distinction will be issued as a proposed rule, and the public will be asked to comment.

■ **Enhanced Competition for Task- and Delivery-Order Contracts:** This finalizes, with changes, the interim rule that amended FAR Subpart 16.5, Indefinite-Delivery Contracts, to implement Section 843 of the Fiscal Year 2008 National Defense Authorization Act (Public Law 110-181), which provided: (1) a limitation on single award task and delivery order contracts greater than \$100 million (subparagraph (c)(1)(ii)(D) of FAR 16.504, Indefinite-Quantity Contracts); (2) enhanced competition for task and delivery orders in excess of \$5 million (subparagraph (b)(1)(iii) of FAR 16.505, Ordering); and (3) protest on orders on the grounds that the order increases the scope, period, maximum value of the contract under which the order is issued, or on orders valued in excess of \$10 million (FAR 16.505(a)(9)).

Eight respondents submitted comments on the interim rule, and the following changes are made to the final rule:

– Paragraph (a) of FAR 16.503, Requirements Contracts, is amended to clarify that a requirements contract is awarded to one contractor. This change dispels the implication in FAR 16.503(b)(2) that a requirements contract may be awarded to multiple sources (“No requirements contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless a determination is executed in accordance with 16.504(c)(1)(ii)(D)”).

– Language is added to FAR 16.504(c)(1)(ii)(D)(3)(i) to state that the requirement for a determination for a single-award indefinite-delivery/indefinite-quantity (IDIQ) contract greater than \$100 million “is in addition to any applicable requirements of FAR Subpart 6.3 [Other Than Full and Open Competition].” This change is made to clarify that the determination for a single-award task- or delivery-order contract greater than \$100 million is required in addition to the justification and approval (J&A) required by FAR Subpart 6.3

when a procurement will be conducted as other than full and open competition. The language in the interim rule suggested that a J&A prepared in accordance with FAR Subpart 6.3 is required for all single awards greater than \$100 million, which is not true when the procurement provides for full and open competition (“The requirement for a determination for a single award contract greater than \$100 million applies in addition to the requirements of Subpart 6.3”). This change is merely a clarification of the interim rule.

- Language is added to FAR 16.504(c)(1)(ii)(D)(3)(ii) to clarify that the agency-head determination “is not applicable for architect-engineer services awarded pursuant to FAR Subpart 36.6 [Architect-Engineer Services].”

For more on the interim rule, see the October 2008 *Federal Contracts Perspective* article “FAC 2005-27 Requires ‘Enhanced Competition’ for Task and Delivery Orders.”

■ **Costa Rica, Oman, and Peru Trade Agreements:** This finalizes, without changes, the interim rule that amended FAR Part 25, Foreign Acquisition, and associated Buy American provisions and clauses in FAR Part 52, Solicitation Provisions and Contract Clauses, to implement the Dominican Republic – Central America – United States Free Trade Agreement with respect to Costa Rica, the United States-Oman Free Trade Agreement, and the United States-Peru Trade Promotion Agreement.

The following are the thresholds beyond which the Buy American Act is waived for products or services of these countries (see the table in paragraph (b) of FAR 25.401, General):

Costa Rica: \$67,826 for supplies or services; \$7,443,000 for construction

Oman: \$194,000 for supplies or services; \$8,817,449 for construction

Peru: \$194,000 for supplies or services; \$7,443,000 for construction

No comments were submitted in response to the interim rule, so it is finalized without changes. For more on the interim rule, see the July 2009 *Federal Contracts Perspective* article “FAC 2005-33 Addresses New Trade Agreements, Contractors' Progress Payments Request.”

■ **Payments Under Fixed-Price Architect-Engineer Contracts:** This finalizes, with changes, the proposed rule that revised the withholding-of-payment requirements under paragraph (b) of FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts. FAR 52.232-10(b) had required that the contracting officer to pay 90% of the amounts due on each voucher, while the proposal would have revised this to require the contracting officer to withhold “up to 10%” of the amounts due, but “only if the contracting officer determines that such a withholding is necessary to protect the government’s interest and ensure satisfactory completion of the contract.”

Seven respondents submitted comments on the proposed rule. While FAR 52.232-10(b) is finalized without changes, paragraphs (a) and (c) are revised as follows:

- In paragraph (a), the sentence “The estimates shall be prepared by the contractor and accompanied by any supporting data required by the contracting officer” is changed to “The estimates, along with any supporting data required by the contracting officer, shall be prepared by the contractor and submitted along with its voucher.”

- In paragraph (c), the word “design” is deleted from “design work” in two places because the retainage requirement is applied to all types of architect-engineer contracts, not just design work.

For more on the proposed rule, see the June 2009 *Federal Contracts Perspective* article “Two Changes to FAR Proposed.”

SBA REPROPOSES WOMEN-OWNED SMALL BUSINESS PROGRAM

The Small Business Administration (SBA) is proposing to revamp its regulations in Title 13 of the Code of Federal Regulations (CFR), Part 127, Women-Owned Small Business Federal Contract Assistance Procedures, to expand the number of industries in which women-owned small businesses (WOSBs) and economically-disadvantaged women-owned small businesses (EDWOSBs) would be eligible for set-asides.

On October 1, 2008, SBA published 13 CFR Part 127, but did not identify any industries that would be eligible for WOSB and EDWOSB set-asides because of problems in the methodology used to identify these industries. Therefore, also on October 1, 2008, SBA published a proposed rule that identified 32 industries in which it determined WOSBs and EDWOSBs were either underrepresented or substantially underrepresented, using Bureau of the Census data – the 2002 Survey of Business Owners (see the November 2008 *Federal Contracts Perspective* article “Women-Owned Business Assistance Program Instituted”).

SBA received 38 comments on the proposed rule. The majority of these comments generally opposed the use of the Census. Therefore, SBA is withdrawing the October 1, 2008, proposed rule and publishing this one instead, which relies on data from the Central Contractor Registration (CCR – <http://www.ccr.gov>) and the Federal Procurement Data System (FPDS – <https://www.fpds.gov>). Using this data, SBA has identified 45 industries in which WOSBs are underrepresented and 38 industries in which WOSBs are substantially underrepresented.

The following are the 45 industries in which WOSBs are considered underrepresented (preceded by the corresponding North American Industry Classification System (NAICS) code):

(NOTE: An industry is considered “underrepresented” if its “disparity ratio” – a measure comparing the utilization of WOSBs in federal contracting to their availability for such contracts – is between 0.5 and 0.8.)

- 2213 – Water, Sewage and Other Systems
- 2361 – Residential Building Construction
- 2371 – Utility System Construction
- 2381 – Foundation, Structure, and Building Exterior Contractors
- 2382 – Building Equipment Contractors
- 2383 – Building Finishing Contractors
- 2389 – Other Specialty Trade Contractors
- 3149 – Other Textile Product Mills
- 3159 – Apparel Accessories and Other Apparel Manufacturing
- 3219 – Other Wood Product Manufacturing
- 3222 – Converted Paper Product Manufacturing;
- 3321 – Forging and Stamping
- 3323 – Architectural and Structural Metals Manufacturing

- 3324 – Boiler, Tank, and Shipping Container Manufacturing
- 3333 – Commercial and Service Industry Machinery Manufacturing
- 3342 – Communications Equipment Manufacturing
- 3345 – Navigational, Measuring, Electromedical, and Control Instruments Manufacturing
- 3346 – Manufacturing and Reproducing Magnetic and Optical Media
- 3353 – Electrical Equipment Manufacturing
- 3359 – Other Electrical Equipment and Component Manufacturing
- 3369 – Other Transportation Equipment Manufacturing
- 4842 – Specialized Freight Trucking
- 4881 – Support Activities for Air Transportation
- 4884 – Support Activities for Road Transportation
- 4885 – Freight Transportation Arrangement
- 5121 – Motion Picture and Video Industries
- 5311 – Lessors of Real Estate
- 5413 – Architectural, Engineering, and Related Services
- 5414 – Specialized Design Services
- 5415 – Computer Systems Design and Related Services
- 5416 – Management, Scientific, and Technical Consulting Services
- 5419 – Other Professional, Scientific, and Technical Services
- 5611 – Office Administrative Services
- 5612 – Facilities Support Services
- 5614 – Business Support Services
- 5616 – Investigation and Security Services
- 5617 – Services to Buildings and Dwellings
- 6116 – Other Schools and Instruction
- 6214 – Outpatient Care Centers
- 6219 – Other Ambulatory Health Care Services
- 7115 – Independent Artists, Writers, and Performers
- 7223 – Special Food Services
- 8111 – Automotive Repair and Maintenance
- 8113 – Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance
- 8114 – Personal and Household Goods Repair and Maintenance

The following are the 38 industries in which WOSBs are considered substantially underrepresented:

(NOTE: An industry is considered “substantially underrepresented” if its “disparity ratio” is less than 0.5.)

- 2372 – Land Subdivision
- 3152 – Cut and Sew Apparel Manufacturing
- 3231 – Printing and Related Support Activities
- 3259 – Other Chemical Product and Preparation Manufacturing
- 3328 – Coating, Engraving, Heat Treating, and Allied Activities
- 3329 – Other Fabricated Metal Product Manufacturing
- 3371 – Household and Institutional Furniture and Kitchen Cabinet Manufacturing

- 3372 – Office Furniture (including Fixtures) Manufacturing
- 3391 – Medical Equipment and Supplies Manufacturing
- 4841 – General Freight Trucking
- 4889 – Other Support Activities for Transportation
- 4931 – Warehousing and Storage
- 5111 – Newspaper, Periodical, Book, and Directory Publishers
- 5112 – Software Publishers
- 5171 – Wired Telecommunications Carriers
- 5172 – Wireless Telecommunications Carriers (except Satellite)
- 5179 – Other Telecommunications
- 5182 – Data Processing, Hosting, and Related Services
- 5191 – Other Information Services
- 5312 – Offices of Real Estate Agents and Brokers
- 5324 – Commercial and Industrial Machinery and Equipment Rental and Leasing
- 5411 – Legal Services
- 5412 – Accounting, Tax Preparation, Bookkeeping, and Payroll Services
- 5417 – Scientific Research and Development Services
- 5418 – Advertising, Public Relations, and Related Services
- 5615 – Travel Arrangement and Reservation Services
- 5619 – Other Support Services
- 5621 – Waste Collection
- 5622 – Waste Treatment and Disposal
- 6114 – Business Schools and Computer and Management Training
- 6115 – Technical and Trade Schools
- 6117 – Educational Support Services
- 6242 – Community Food and Housing, and Emergency and Other Relief Services
- 6243 – Vocational Rehabilitation Services
- 7211 – Traveler Accommodation
- 8112 – Electronic and Precision Equipment Repair and Maintenance
- 8129 – Other Personal Services
- 8139 – Business, Professional, Labor, Political, and Similar Organizations

Acquisitions in these industries would be eligible to be set aside for WOSBs or EDWOSBs if:

- (1) Two or more WOSBs or EDWOSBs will submit offers for the contract;
- (2) The anticipated award price of the contract (including options) does not exceed \$5,000,000, in the case of a contract assigned an NAICS code for manufacturing; or \$3,000,000, in the case of all other contracts; and
- (3) Contract award may be made at a fair and reasonable price (see Section 127.503, When is a contracting officer authorized to restrict competition under this part?).

The following are two changes that would be made by this proposed rule:

- SBA would presume that a woman is *not* economically disadvantaged if her yearly income averaged over the past two years exceeds \$200,000 (see Section 127.203, What

are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?, paragraph (c)(2)(i)).

- In paragraph (b) of current Section 127.501, How will SBA and the agencies determine the industries that are eligible for EDWOSB or WOSB requirements?, the requirement for an agency-by-agency determination of discrimination before setting aside the acquisition for WOSBs or EDWOSBs would be removed.

Comments on the proposed rule must be submitted no later than May 3, 2010, identified as “3245-AG06,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail, hand-delivery, or courier to: Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

LIQUID PROPANE GAS NONMANUFACTURER WAIVER PROPOSED

The Small Business Administration (SBA) is proposing to waive the nonmanufacturer rule for liquid propane gas (LPG), North American Industry Classification System (NAICS) code 325120, Product Service Code (PSC) 6830, Compressed and Liquefied Gases. SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources for these products by April 7, 2010, to Amy Garcia, Program Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street, SW, Suite 8800, Washington, DC 20416.

This is the second request for comments on this proposed waiver. The first request was made on January 12, 2010 (see the February 2010 *Federal Contracts Perspective* article “Nonmanufacturer Rule Waiver Proposed for Liquefied Gases”), but it stated the nonmanufacturing rule waiver was being considered for “compressed and liquefied gases.” After reviewing the responses to the January 12, 2010, request, SBA has concluded that it should have been more specific. Therefore, SBA is issuing this request for comments on the proposed waiver of the nonmanufacturing rule for LPG.

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.

HUBZONE PREFERENCE UPHeld BY COURT OF FEDERAL CLAIMS

The United States Court of Federal Claims has ruled that the Small Business Administration’s (SBA’s) Historically Underutilized Business Zone (HUBZone) program has priority over the 8(a) program because “the mandatory language of the HUBZone statute requires that a contracting officer first determine whether the specified criteria [that is, the contracting officer has a reasonable expectation that offers will be received from two or more HUBZone small business concerns and award will be made at a fair market price] are met before

awarding a contract under another small business program or on a sole-source basis” (*No. 09-864C, Mission Critical Solutions v. the United States*, February 26, 2010). In doing so, the Court of Federal Claims concurs with the Government Accountability Office (GAO) protest decision that the Office of Management and Budget (OMB) directed be ignored by contracting officers (*B-401057, Mission Critical Solutions, Inc.*, May 4, 2009), and enjoins the Army “from awarding the information technology support services contract at issue in a manner that is not in compliance with the Small business Act as the court here interprets it.”

Mission Critical Solutions (MCS), a HUBZone small business, protested to the GAO an Army contract award to an Alaska Native corporation under the 8(a) program, arguing that the Army should have competed the requirement among HUBZone small businesses because the HUBZone statute – Title 15 of the U.S. Code, Section 657a (15 U.S.C. 657a) – requires that the procurement be set aside for competition among HUBZone small businesses. MCS pointed out that paragraph (b)(2)(B) of 15 U.S.C. 657a states, “***Notwithstanding any other provision of law***...a contract opportunity ***shall*** be awarded pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price” (emphasis added).

In contrast to the HUBZone statutory language is the 8(a) program statutory language in paragraph (a)(1)(A) of 15 U.S.C. 637: “In any case in which the [Small Business] Administration [SBA] certifies to any officer of the government having procurement powers that the [SBA] is competent and responsible to perform any specific government procurement contract to be let by any such officer, such officer shall be authorized ***in his discretion*** to let such procurement contract to the [SBA] upon such terms and conditions as may be agreed upon between the [SBA] and the procurement officer” (emphasis added).

GAO’s agreed with MCS’ interpretation that the word “shall” in the HUBZone statute takes precedent over “in his discretion” in the 8(a) statute, and sustained MCS’ protest.

This decision caused quite a bit of consternation in the federal contracting community because the Small Business Administration’s (SBA’s) regulations give the HUBZone, 8(a), and service-disabled veteran-owned small business (SDVOSB) programs parity. Paragraph (b) of Title 13 of the Code of Federal Regulations (CFR), Section 126.607 (13 CFR 126.607), states, “The contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVOSB contracting before setting aside the requirement as a small business set-aside.” In response, the Office of Management and Budget (OMB) issued a very unusual memorandum directing contracting agencies to disregard the GAO decision. Subsequently, the Department of Justice (DOJ) reaffirmed SBA’s regulations as correct in providing for parity among the HUBZone, 8(a), and SDVOSB programs. In response to the DOJ opinion, the SBA decided not to remove the contract from the 8(a) program and the Army decided not to follow GAO’s decision. MCS then appealed to the Court of Federal Claims.

“The court interprets the language of the HUBZone competition provision – ‘shall be awarded’ – to be mandatory, such that a contract opportunity must be set aside for competition among qualified HUBZone small business concerns whenever the rule of two is met.

“The court has examined the language of the Small Business Act, in particular the HUBZone and 8(a) statutes, to determine whether the statutory language provides for the prioritization of the HUBZone program over the 8(a) program or provides for parity between the programs. The court agrees with both parties in this case that Congress’s statements of policy and goals do not appear to distinguish between the programs or

prioritize one over the other. However, the statutory language implementing the HUBZone and 8(a) programs indicate that the HUBZone program takes priority over the 8(a) program whenever the specified criteria found in 15 U.S.C. § 657a(b)(2)(B) are met. The court has concluded that the phrase ‘notwithstanding any other provision of law’ encompasses provisions found within the Small Business Act, including the provisions implementing the 8(a) program. The operative language of the HUBZone statute combines the phrases ‘notwithstanding any other provision of law’ and the directive that the ‘contract opportunity shall be awarded’ on the basis of competition among qualified HUBZone small business concerns whenever the specified criteria are met. The combination of these two phrases supports the conclusion that the statutory language is mandatory and that the plain meaning of the HUBZone statute requires a contract opportunity to be competed among qualified HUBZone small business concerns whenever the specified criteria are met, notwithstanding other provisions of law – including those found within the Small Business Act itself.”

Though this case only applies to this Army contract, the decision could have an effect throughout the government. No directions from OMB have been issued on whether the rest of the government is to comply with the decision or not. The DOJ has not announced whether it will appeal the decision. *If allowed to stand, the operations of these two programs (and the SDVOSB program) will be drastically altered.*

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.”

MULTITUDE OF DOD REGULATIONS AND DEVIATIONS ISSUED

The Department of Defense (DOD) was busy in March amending the Defense FAR Supplement (DFARS) with three interim rules. In addition, DOD issued two class deviations, one memorandum, and one proposed rule with a public meeting to discuss it.

■ **Additional Requirements Applicable to Multiyear Contracts:** This interim rule amends DFARS 217.172, Multiyear Contracts for Supplies, to implement Section 811 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181), which requires the Secretary of Defense to certify in writing, by no later than March 1 of the year in which the Secretary requests legislative authority to enter into a multiyear contract with respect to Major Defense Acquisition Programs (MDAPs), that the Secretary of Defense has made certain cost savings determinations with regard to such contract. Section 811 deletes one requirement previously applicable to multiyear contracts but adds six new requirements that the Secretary of Defense must certify.

Comments on the interim rule must be submitted no later than April 30, 2010, identified as “DFARS Case 2008-D023,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: dfars@osd.mil; (3) fax: 703-602-0350; (4) mail: Defense Acquisition Regulations Council, 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 Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

■ **Payment of Costs Prior to Definitization:** This interim rule amends DFARS 217.7401, Definitions [for undefinitized contract actions], to implement Section 812 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), which makes the limitations on payment of costs prior to definitization of unpriced change orders applicable to all categories of undefinitized contractual actions, “including undefinitized task orders and delivery orders.” It does this by adding “task orders and delivery orders” to the definition of “contract action” in paragraph (a).

Comments on the interim rule should be submitted no later than May 4, 2010, identified as “DFARS Case 2009-D035,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: dfars@osd.mil; (3) fax: 703-602-0350; (4) mail: Defense Acquisition Regulations Council, 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 Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

■ **Continuation of Essential Contractor Services:** This interim rule adds DFARS Subpart 237.76, Continuation of Essential Contractor Services, and a new clause DFARS 252.237-7023, Continuation of Essential Contractor Services, to ensure that essential contractor services, as determined by the requiring activity, are not interrupted.

DFARS 237.7601, Definitions, defines “essential contractor service” as “a service provided by a firm or individual under contract to DOD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program, that are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services, as determined by the appropriate functional commander or equivalent.”

DFARS 237.7602, Policy, requires that “contractors providing services designated as essential contractor services by a requiring activity shall be prepared to continue providing such services, in accordance with the terms and conditions of their contracts, during periods of crisis. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service functions that have been specifically identified as essential contractor services by the functional commander or equivalent...Contractors who provide government-determined essential contractor services shall have a written plan to ensure the continuation of these services in crisis situations.”

DFARS 252.237-7023, which is to be included in solicitations and contracts for services that are in support of mission-essential functions (“organizational activities that must be performed under all circumstances to achieve DOD component missions or responsibilities, the failure of which would significantly affect DOD’s ability to provide vital services or exercise authority, direction, and control”), implements DFARS Subpart 237.76 by requiring the contractor provide a written plan that addresses, at a minimum, the following:

“(i) Challenges associated with maintaining essential contractor services during an extended event, such as a pandemic that occurs in repeated waves;

“(ii) The time lapse associated with the initiation of the acquisition of essential personnel and resources and their actual availability on site;

“(iii) The components, processes, and requirements for the identification, training, and preparedness of personnel who are capable of relocating to alternate facilities or performing work from home;

“(iv) Any established alert and notification procedures for mobilizing identified ‘essential contractor service’ personnel; and

“(v) The approach for communicating expectations to contractor employees regarding their roles and responsibilities during a crisis.”

In addition, the contractor must participate in training events, exercises, and drills associated with government efforts to test the effectiveness of continuity of operations procedures and practices as directed by the contracting officer.

Finally, “the government reserves the right in such crisis situations to use federal employees of other agencies or contract support from other contractors or to enter into new contracts for essential contractor services.”

Comments on the interim rule should be submitted no later than May 4, 2010, identified as “DFARS Case 2009-D017,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: dfars@osd.mil; (3) fax: 703-602-0350; (4) mail: Defense Acquisition Regulations Council, Attn: Julian Thrash, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060; or (5) hand delivery/courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

■ **Safeguarding Unclassified Information:** DOD has announced it is seeking comments on a potential new DFARS Subpart 204.7X, Safeguarding and Cyber Intrusion Reporting of Unclassified DOD Information Within Industry, and associated clauses to provide adequate security measures for safeguarding DOD information on unclassified industry information systems from unauthorized access and disclosure, and to prescribe reporting to the government with regard to certain cyber intrusion events that affect DOD information resident or transiting on contractor unclassified information systems. Presently, the DFARS does not address these issues.

DFARS Subpart 204.7X and two new clauses, DFARS 252.204-7XXX, Basic Safeguarding of Unclassified DOD Information Within Industry, and DFARS 252.204-7YYY, Enhanced Safeguarding and Cyber Intrusion Reporting of Unclassified DOD Information Within Industry, would address:

- Basic safeguarding requirements that apply to any unclassified DOD information that has not been cleared for public release in accordance with DOD Directive 5230.9, Clearance of DOD Information for Public Release; and
- Enhanced safeguarding requirements, including cyber incident reporting, that apply to information subject to the following:
 - Critical Program Information protection.
 - Export control under the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR).
 - Withholding from public release under DOD Directive 5400.07, DOD Freedom of Information Act Program, and DOD Regulation 5400.7-R, DOD Freedom of Information Program.
 - Controlled access and dissemination designations (*e.g.*, For Official Use Only, Sensitive But Unclassified, Limited Distribution, Proprietary, Originator Controlled, Law Enforcement Sensitive).
 - Limitations in accordance with DOD Directive 5230.24, Distribution Statements on Technical Documents, and DOD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure.

- Personally Identifiable Information (PII) protection including, but not limited to, information protected under the Privacy Act and the Health Insurance Portability and Accountability Act.

DOD is interested in receiving information regarding “best practices” for protecting networks and data, experience with any of the proposed safeguards, and an evaluation of its value. In particular, DOD invites comments in the following areas:

- What is not addressed in the draft clauses that could potentially help industry to feasibly comply with the intent of the clauses?
- What part of the draft clauses are viewed as potentially being the most burdensome?
- What are the potential ways to mitigate burden?
- Are there any important information safeguarding aspects that the clauses omit that should be addressed?
- Do the clauses as written provide clear and adequate guidance to perform safeguarding of DOD information?
- What impact will the reporting requirement in DFARS 252.204-7YYY have on small businesses?
- In what ways could DOD minimize the burden of the reporting requirements on respondents, including the use of automated collection techniques or other forms of information technology?
- What are industry best practices for cyber security?
- Should the government establish standard information assurance criteria for all contractors as a condition of award (*e.g.*, strong passwords, virus protection)? If so, are there existing international/national standards that should be cited or considered in building the criteria and what impediments exist to achieving this goal?
- Would it reduce the burden without reducing effectiveness for contractors and subcontractors if the “basic” clause were replaced with an Online Representations and Certifications Application (ORCA) certification?
- Would it result in a more accurate cost management strategy if the “enhanced” clause were split into a safeguarding plan/program clause and a reporting clause?
- If a contractor believes it would have significant difficulty implementing these requirements in-house, could it out-source its information technology to a firm with specific competency in this area? If not, what are the barriers to doing so?
- Are there any additional safeguarding or restrictions that should be implemented to protect information reported or otherwise provided to the government under the “enhanced” clause?

A public meeting will be held on April 22, 2010, from 8:00 a.m. to 4:00 p.m. at National Aeronautics and Space Administration’s (NASA) James E. Webb Memorial auditorium, NASA HQ, 300 E Street SW, Washington, DC 20546. Attendees should register for the public meeting at least two weeks in advance to ensure adequate room accommodations. Interested parties may register by faxing the following information to DPAP(DARS) at 703-602-0350, or e-mail to julian.thrash@osd.mil by April 8, 2010: (1) company or organization name; (2) names of persons attending; and (3) identity, if desiring to speak; limit to a 10-minute presentation per company or organization. Interested parties are encouraged to arrive at least 30 minutes early. Attendees wishing to make a presentation should submit a copy of the presentation by April 8, 2010, to Mr. Julian Thrash, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20302-3060; or by fax: 703-602-0350. Cite “Public Meeting, DFARS Case 2008-D028” in all correspondence related to this public meeting.

Comments on the proposed rule should be submitted no later than May 3, 2010, identified as “DFARS Case 2008-D028,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: dfars@osd.mil; (3) fax: 703-602-0350; (4) mail: Defense Acquisition Regulations Council, Attn: Julian Thrash, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060; or (5) hand delivery/courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

■ **Immediate Cessation of the Use of Price Evaluation Adjustment for Small Disadvantaged Businesses (SDBs):** This FAR deviation prohibits DOD contracting officers from using FAR Subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, in response to the U.S. Court of Appeals for the Federal Circuit decision in *Rothe Development Corporation v. Department of Defense and Department of the Air Force* (2008-1017). In the *Rothe* case, the Court of Appeals ruled that Title 10 of the U.S. Code, Section 2323 (10 USC 2323), which is implemented by FAR Subpart 19.11 by providing a 10% evaluation preference to offers submitted by SDBs, was unconstitutional on the grounds that it violates the right to equal protection by basing preferential treatment on race.

For more on *Rothe*, see the January 2009 *Federal Contracts Perspective* “Court Strikes Down DOD’s Small and Disadvantaged Business Contract Goal,” and the April 2009 *Federal Contracts Perspective* article “DOD Ordered to Cease Giving Preference to SDBs.”

■ **Class Deviation for Notification Requirements for Awards of Single-Source Task- or Delivery-Order Contracts:** This class deviation requires that DOD agency heads notify the Congressional defense committees (that is, the Committee on Armed Services of the Senate, the Subcommittee on Defense of the Committee on Appropriations of the Senate, the Committee on Armed Services of the House of Representatives, and the Subcommittee on Defense of the Committee on Appropriations of the House of Representatives) within 30 days when it is determined that it is in the public interest to award a task- or delivery-order contract estimated to exceed \$100 million (including options) to a single source due to exceptional circumstances (see paragraph (c)(1)(ii)(D)(I)(iv) of FAR 16.504, Indefinite-Quantity Contracts). In addition, if the task- or delivery-order contract relates to tactical intelligence and intelligence-related activities, the Permanent Select Committee on Intelligence of the House of Representatives must be notified, and if the contract relates to non-tactical intelligence and non-tactical intelligence-related activities, the Select Committee on Intelligence of the House of Representatives must be notified.

■ **Purchases from Federal Prison Industries – Updated List of Federal Supply Classification (FSC) Codes to be Competed:** This memorandum contains an updated list of product categories for which the Federal Prison Industries’ (FPI) share of the DOD market is greater than 5% based on Fiscal Year 2009 data from the Federal Procurement Data System (FPDS). This is required by Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181).

Products on the list must be procured using competitive procedures in accordance with DFARS 208.602-70, Acquisition of Items for which FPI has a Significant Market Share. “In conducting such a competition, contracting officer shall consider a timely offer from FPI for any of the products on the list. FPI must be included in the process even if the procurement opportunity otherwise would have been set aside in accordance with FAR Part 19 [Small Business Programs]... When the FPI item is determined to provide the best value to the government as a result of FPI’s response to a competitive solicitation, follow the ordering procedures at <http://www.unicor.gov>.”

FPI must be allowed to compete in acquisitions for the following FSCs:

5995	Cable, cord, wire assemblies; communications equipment
7230	Draperies, awnings, and shades
8410	Outerwear, women's
8415	Clothing, special purpose
8420	Underwear and nightwear, men's
8470	Armor, personal
P100	Disposal of surplus property

SBIR AWARD LIMITATIONS INCREASED

The Small Business Administration (SBA) has increased the Small Business Innovative Research (SBIR) limitation on Phase I awards from \$100,000 to \$150,000, and on Phase II awards from \$750,000 to \$1,000,000. These limitation increases are intended to offset the effect of inflation that has occurred since the amounts were last set in 1992.

These increases were proposed in 2008 (see the September 2008 *Federal Contracts Perspective* article "Increased Limits Proposed for SBIR Awards"). Two respondents expressed their agreement with the proposed increases, so the limitation on SBIR awards are adopted as final.

The purpose of the SBIR Program is to: (1) stimulate technological innovation; (2) use small business to meet federal research or research and development (R/R&D) needs; (3) foster and encourage participation by socially and economically disadvantaged small businesses and women-owned businesses in technological innovation; and (4) increase private sector commercialization of innovations derived from federal R/R&D to increase competition, productivity and economic growth.

To be eligible to participate in the SBIR program, a small business must have no more than 500 employees and be at least 51% owned by American citizens.

The SBIR program is not addressed in the FAR. The regulatory guidelines for the SBIR program award amounts can be found in the SBIR Policy Directive that was published in the *Federal Register* on September 24, 2002 (see the October 2002 *Federal Contracts Perspective* article "SBA Revising SBIR Program Policies"). The SBA's SBIR website is <http://www.sba.gov/aboutsba/sbaprograms/sbir/index.html>.

The SBIR program consists of three phases:

- **Phase I.** Phase I involves a solicitation of contract proposals or grant applications to conduct feasibility-related experimental or theoretical R/R&D related to agency requirements. These requirements, as defined by agency topics contained in a solicitation, may be general or narrow in scope, depending on the needs of the agency. The object of this phase is to determine the scientific and technical merit and feasibility of the proposed effort and the quality of performance of the small business with a relatively small agency investment before consideration of further federal support in Phase II. This "relatively small agency investment" is now limited to \$150,000 for an effort of no more than six months.
- **Phase II.** The object of Phase II is to continue the R/R&D effort from the completed Phase I. Only SBIR awardees in Phase I are eligible to participate in Phases II and III. Phase II awards are now limited to \$1,000,000 for an effort of no more than two years.

- **Phase III.** SBIR Phase III refers to work that derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements, but is funded by sources other than the SBIR Program. Phase III work is typically oriented towards commercialization of SBIR research or technology.

All agencies with R&D budgets of more than \$100,000,000 are required to set aside 2.5% of their R&D budgets for the SBIR program. There are currently 11 agencies taking part in the SBIR program:

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Transportation
- Environmental Protection Agency
- National Aeronautics and Space Administration
- National Science Foundation

POLICY ON INHERENTLY GOVERNMENTAL FUNCTIONS PROPOSED

The Office of Federal Procurement Policy (OFPP) has published a proposed policy letter to provide guidance on circumstances when work must be reserved for performance by federal employees. The proposed policy letter would:

- Clarify what ***functions are inherently governmental*** and must always be performed by federal employees. The definition of “inherently governmental function” from Section 5 of the Federal Activities Inventory Reform Act (FAIR Act) (Public Law 105-270) would replace all other existing definitions in regulation and policy. The FAIR Act defines an activity as inherently governmental when it “is so intimately related to the public interest as to require performance by federal government employees.” The proposed policy letter would retain the list of examples of inherently governmental functions that is currently in FAR Subpart 7.5, Inherently Governmental Functions, particularly paragraph (c) of FAR 7.503, Policy.
- Help agencies identify when other functions (or portions of functions) need to be performed by federal employees. Existing guidance addressing ***functions closely associated with inherently governmental functions*** would be strengthened to ensure that performance of such functions does not expand to include performance of inherently governmental functions or otherwise interfere with federal employees’ ability to carry out their inherently governmental responsibilities.
- A new category, “***critical function***,” would be defined to help agencies identify and build sufficient internal capacity to effectively perform and maintain control over functions that

are core to the agency's mission and operations (“a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. A function that would not expose the agency to risk of mission failure if performed entirely by contractors is not a critical function”).

- Outline a series of agency management responsibilities to strengthen accountability for the effective implementation of these policies. Agencies would be required to take specific actions, before and after contract award, to prevent contractor performance of inherently governmental functions and overreliance on contractors in “closely associated” and critical functions.
- Agencies would be required to develop agency-level procedures, provide training, and designate senior officials to be responsible for implementation of these policies.

Comments on the proposed policy letter must be submitted no later than June 1, 2010, identified as “Proposed OFPP Policy Letter,” by any of the following methods: (1) e-mail: **OFPPWorkReserved@omb.eop.gov**; (2) facsimile: 202-395-5105; or (3) mail: Office of Federal Procurement Policy, Attn: Mathew Blum, New Executive Office Building, Room 9013, 724 17th Street, NW, Washington, DC 20503.

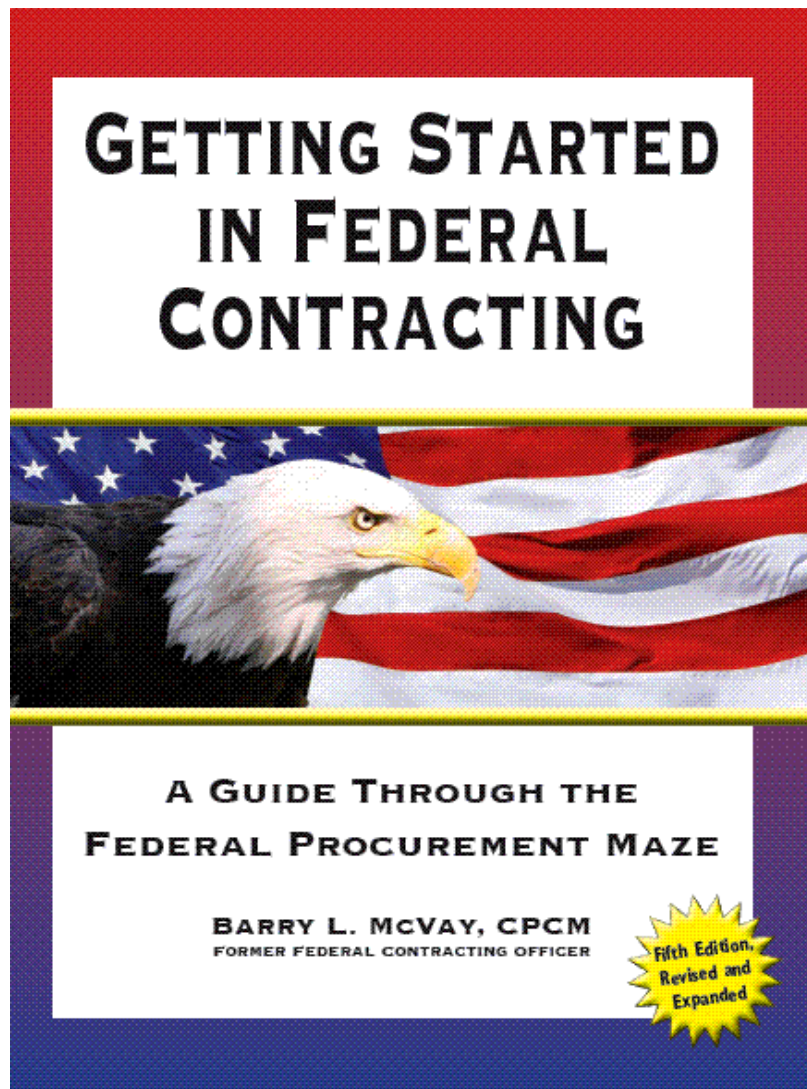
COMMERCE ACQUISITION REGULATION REWRITTEN

The Department of Commerce (DOC) has rewritten its FAR supplement, the Commerce Acquisition Regulation (CAR), to bring its policies and procedures in alignment with the FAR through FAC 2005-21 (see the December 2007 *Federal Contracts Perspective* article “FAC 2005-21 Rewrites FAR Part 27 in Plain English”). The CAR was last updated on September 12, 1995.

The following is a summary of the overall changes made to the CAR:

- To bring the CAR into alignment with the provisions of the FAR through FAC 2005-21, DOC added several new provisions to address those instances where the FAR indicates that agency procedures are required or need to be developed, and to provide guidance on DOC’s policy and procedures for accountable personal property, inherently governmental functions, emergency acquisitions, small business programs, environmental programs, foreign acquisitions, contract financing, protests, disputes, and appeals, major system acquisitions, research and development contracting, security processing, value engineering, and termination of contracts. In addition, DOC added numerous new clauses that correspond to the new procedural requirements added to the CAR.
- Various sections of the CAR had to be renumbered and/or renamed to align with the FAR through FAC 2005-21.
- Many references to chapters of the Commerce Acquisition Manual (CAM) (http://oamweb.osec.doc.gov/capps_cam.html) have been added to provide further information on the delegations of authority for specific provisions. In particular, the references to the CAM help clarify the roles and responsibilities across the agency and within DOC’s five Operating Units authorized to operate contracting offices: National Institute of Standards and Technology (NIST), National Oceanic and Atmospheric Administration (NOAA), Office of the Secretary, U.S. Census Bureau, and Patent and Trademark Office (PTO).

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