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PRESIDENT ESTABLISHES TASK FORCES FOR SMALL BUSINESSES AND VETERAN-OWNED BUSINESSES

On April 26, President Obama established two interagency task forces to prepare proposals and recommendations on (1) increasing federal contracting opportunities for small businesses, and (2) improving capital, business development opportunities, and achievement of federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans. The task force for small businesses is to submit its proposals and recommendations to the president within 120 days of the date of the memorandum (that is, 120 days after April 26, or August 24, 2010), and the task force for veteran-owned small businesses is to submit its proposals and recommendations to the president within one year after the date of the executive order (that is, April 26, 2011).

■ **The memorandum titled “Establishing an Interagency Task Force on Federal Contracting Opportunities for Small**

Businesses,” sent to the heads of all agencies and departments, points out that the government has goals of awarding at least 23% of all prime contracting dollars to small businesses and, within that 23% goal are goals for awards to small businesses that are owned by women (5%), by socially and economically disadvantaged individuals (5%), and owned by service-disabled veterans (3%), or are located within Historically Underutilized Business Zones (HUBZones) (3%).

“In recent years, the federal government has not consistently reached its small business contracting goals... I am committed to ensuring that small businesses, including firms owned by women, minorities, socially and economically disadvantaged individuals, and service-disabled veterans, have fair access to federal government contracting. Indeed, where small businesses have the capacity to do more, we should strive to exceed the statutory goals.” To achieve this, the president is establishing an “Interagency Task Force on Federal Contracting Opportunities for Small Businesses,” made up of most of the cabinet-level departments in addition to the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), the Small Business Administration (SBA), and the Office of Management and Budget (OMB), to provide proposals and recommendations for:

“(i) using innovative strategies, such as teaming, to increase opportunities for small business contractors and utilizing and expanding mentorship programs, such as the mentor-protégé program;

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“(ii) removing barriers to participation by small businesses in the federal marketplace by unbundling large projects, improving training of federal acquisition officials with respect to strategies for increasing small business contracting opportunities, and utilizing new technologies to enhance the effectiveness and efficiency of federal program managers, acquisition officials, and the directors of Offices of Small Business Programs and Offices of Small and Disadvantaged Business Utilization, their managers, and procurement center representatives in identifying and providing access to these opportunities;

“(iii) expanding outreach strategies to match small businesses, including firms located in Historically Underutilized Business Zones and firms owned and controlled by women, minorities, socially and economically disadvantaged individuals, and service-disabled veterans of our Armed Forces, with contracting and subcontracting opportunities; and

“(iv) establishing policies, including revision or clarification of existing legislation, regulations, or policies, that are necessary or appropriate to effectuate the objectives of this memorandum.”

■ **Executive Order 13540, Interagency Task Force on Veterans Small Business Development**, directs the SBA administrator to establish an “Interagency Task Force on Veterans Small Business Development” consisting of SBA, OMB, GSA, the departments of Defense, Labor, Treasury, Veterans Affairs, and four representatives from a veterans’ service or military organization or association. The task force is to develop proposals relating to:

“(i) improving capital access and capacity of small business concerns owned and controlled by veterans and service-disabled veterans through loans, surety bonding, and franchising;

“(ii) ensuring achievement of the pre-established federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans through expanded mentor-protégé assistance and matching such small business concerns with contracting opportunities;

“(iii) increasing the integrity of certifications of status as a small business concern owned and controlled by a veteran or service-disabled veteran;

“(iv) reducing paperwork and administrative burdens on veterans in accessing business development and entrepreneurship opportunities;

“(v) increasing and improving training and counseling services provided to small business concerns owned and controlled by veterans; and

“(vi) making other improvements relating to the support for veterans business development by the federal government.”

Vivina McVay, Editor-in Chief

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FAR AMENDED TO ENCOURAGE PROJECT LABOR AGREEMENTS

Federal Acquisition Circular (FAC) 2005-41 amends the Federal Acquisition Regulation (FAR) to add FAR Subpart 22.5, Use of Project Labor Agreements for Federal Construction Projects, to implement Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects, which encourages federal departments and agencies to consider requiring the use of project labor agreements (PLAs) for federal construction projects where the total cost to the government is more than \$25 million. In addition, a new provision FAR 52.222-33, Notice of Requirement for Project Labor Agreement, and a new clause FAR 52.222-34, Project Labor Agreement, are required to be included in all solicitations and contracts associated with a project if the agency determines that a PLA will be required.

A PLA is a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. The executive order establishes requirements and standards that must be met by federal agencies when using PLAs, specifically that they:

- Bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;
- Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
- Contain guarantees against strikes, lockouts, and similar job disruptions;
- Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;
- Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
- Fully conform to all statutes, regulations, and executive orders.

Section 7 of Executive Order 13502 directed that the FAR be amended to implement the executive order. A proposed rule was published, and more than 700 respondents submitted comments on the proposed rule, approximately 650 of the responses were in the form of a form letter or short e-mails that expressed opposition to the use of PLAs but did not address the proposed rule. About half of the remaining 50 responses expressed support of PLAs, and the other half expressed opposition. These 50 comments focused on: (1) the exercise of agency discretion in deciding whether to require a PLA; (2) the content of PLA generally and the role of federal agencies in developing the terms of the PLA; and (3) the timing of entering the PLA. As a result of the comments, several changes were made to the final rule:

- FAR 7.103, Agency-Head Responsibilities [for acquisition plans], is amended to require to prescribe procedures for “encouraging agency planners to consider the use of a project labor agreement (see [FAR] Subpart 22.5).”
- Paragraph (b) is added to FAR 22.503, Policy, to clarify the policy for using PLAs: “An agency may, if appropriate, require that every contractor and subcontractor engaged in construction on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations if the agency decides that the use of project labor agreements will: (1) advance the federal government’s interest in achieving economy and efficiency in federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and (2) be consistent with law.”

- Paragraph (c) is added to FAR 22.503, Policy, which consists of the following non-exhaustive list of factors that agencies may consider in deciding whether a PLA is appropriate for use in a given construction project:
 - “(1) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.
 - “(2) There is a shortage of skilled labor in the region in which the construction project will be sited.
 - “(3) Completion of the project will require an extended period of time.
 - “(4) Project labor agreements have been used on comparable projects undertaken by federal, state, municipal, or private entities in the geographic area of the project.
 - “(5) A project labor agreement will promote the agency’s long term program interests, such as facilitating the training of a skilled workforce to meet the agency’s future construction needs.
 - “(6) Any other factors that the agency decides are appropriate.”

- The language in proposed paragraph (a)(2) of FAR 22.504, General Requirements for Project Labor Agreements, which stated that agencies have “complete discretion” to require or not require a PLA, has been deleted. In its place is language in paragraph (c) that “an agency may specify the terms and conditions of the project labor agreement in the solicitation and require the successful offeror to become a party to a project labor agreement containing these terms and conditions as a condition of receiving a contract award. An agency may seek the views of, confer with, and exchange information with prospective bidders and union representatives as part of the agency’s effort to identify appropriate terms and conditions of a project labor agreement for a particular construction project and facilitate agreement on those terms and conditions.”

- FAR 22.504(b)(6) is changed from requiring that PLAs “fully conform to all statutes, regulations, and executive orders” to stating that PLAs shall “include any additional requirements as the agency deems necessary to satisfy its needs.” This language change permits agencies to include requirements in PLAs that are in addition to those specified in the executive order.

- FAR 22.504(c) is added, which states, “As appropriate to advance economy and efficiency in the procurement, an agency may specify the terms and conditions of the project labor agreement in the solicitation and require the successful offeror to become a party to a project labor agreement containing these terms and conditions as a condition of receiving a contract award. An agency may seek the views of, confer with, and exchange information with prospective bidders and union representatives as part of the agency’s effort to identify appropriate terms and conditions of a project labor agreement for a particular construction project and facilitate agreement on those terms and conditions.”

- FAR 52.222-33, Notice of Requirement for Project Labor Agreement (FAR 52.222-XX in the proposed rule), is modified to require the offeror to submit a copy of the project labor agreement with its offer (paragraph (e)). FAR 52.222-XX(f) would have required the offeror to submit a copy of the PLA prior to contract award. FAR 52.222-XX(f) has become Alternate I of FAR 52.222-33.

For more on the proposed rule and PLAs in general, see the August 2009 *Federal Contracts Perspective* article “Prohibition on Project Labor Agreements Rescinded.”

LABOR ORGANIZING COSTS PROPOSED TO BE UNALLOWABLE

To implement Executive Order 13494, Economy in Government Contracting, FAR 31.205-21, Labor Relations Costs, would be amended to provide that “costs of any activities undertaken to persuade employees, of any entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees’ own choosing are unallowable. Examples of unallowable costs...include, but are not limited to, the costs of: (1) preparing and distributing materials; (2) hiring or consulting legal counsel or consultants; (3) meetings (including paying the salaries of the attendees at meetings held for this purpose); and (4) planning or conducting activities by managers, supervisors, or union representatives during work hours.” This proposed FAR change is consistent with government policy to remain impartial concerning any labor-management dispute involving government contractors.

Comments on the proposed rule must be submitted no later than June 14, 2010, identified as “FAR Case 2009-006,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

PRESIDENT ORDERS RECOVERY ACT REPORTING ENFORCEMENT

On April 6, President Obama issued a memorandum directing agencies to “further intensify their efforts to improve reporting compliance by prime recipients of Recovery Act funds, wherever authorized and appropriate, by terminating awards; pursuing measures such as suspension and debarment; reclaiming funds; and considering, initiating, and implementing punitive actions.”

The president went on to require agencies to “intensify efforts to timely report the identities of noncompliant prime recipients to the Office of Management and Budget (OMB) and specify to the OMB the detailed actions they have taken to respond to each instance of noncompliance.”

Contractors with contracts that are funded in whole or in part with Recovery Act funds (including Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, and agency indefinite-delivery/indefinite-quantity (ID/IQ) contracts) have FAR 52.204-11, American Recovery and Reinvestment Act – Reporting Requirements, in their contracts. This clause requires that the contractor use the online reporting tool at <http://www.FederalReporting.gov> to report eight items of information about their contracts, seven items about their subcontractors with subcontracts exceeding \$25,000, and requires the contractor to have its subcontractors report four items of information about their firms (see FAR 52.204-11(c) and (d)).

Because contractors receiving Recovery Act-funded contracts have not been very conscientious in reporting this information on a timely basis, the president has decided to crack the whip. It will be interesting to see how hard the president actually cracks that whip, and whether the government agencies will diligently check on their contractors’ compliance and go after noncompliant contractors with gusto. Only time will tell.

EXECUTIVE COMPENSATION BENCHMARK INCREASED TO \$693,951

Daniel Gordon, the Office of Federal Procurement Policy (OFPP) administrator, has decided to increase the “benchmark compensation amount” for senior executives by \$9,770, from \$684,181 to \$693,951 – an 1.4% increase, far less than the \$71,985 (11.8%) increase last year. This figure is “the median amount of the compensation provided for all senior executives of all benchmark corporations [those with annual sales in excess of \$50 million] for the most recent year...” It was determined based on commercially available surveys made available by the Securities and Exchange Commission and after consultation with the director of the Defense Contract Audit Agency.

The \$693,951 is the maximum amount of compensation (that is, wages, salary, bonuses, deferred compensation, and employer contributions to defined contribution pension plans) that is allowable under federal contracts for “the five most highly compensated employees in management positions at each home office and each segment of the contractor.” However, the benchmark compensation amount is not a limit on the compensation an executive may receive – \$693,951 is the maximum allowable amount the government will reimburse contractors for their senior executives’ compensation. See paragraph (p) of FAR 31.205-6, Personal Compensation.

The benchmark compensation amount applies to contract costs incurred after January 1, 2010, for contractor fiscal year 2010 and subsequent contractor fiscal years unless and until revised by the Office of Management and Budget (OMB), which is required to set the benchmark compensation amount annually. (OFPP is part of OMB.)

Questions concerning this may be addressed to Raymond Wong, OFPP, at 202-395-6805.

DOD ROLLS OUT MORE POLICIES AND REGULATIONS

The Department of Defense (DOD) can’t seem to help itself. In April, it issued four final rules amending the Defense FAR Supplement (DFARS), five proposed rules, two DFARS class deviations, one memorandum, and made one announcement.

■ **Export-Controlled Items:** This finalizes, with changes, the interim rule that added DFARS Subpart 204.73, Export-Controlled Items, which addresses requirements for complying with export control laws and regulations when performing DOD contracts. DFARS Subpart 204.73 implements Section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) by addressing requirements for DOD contractors to comply with export control laws and regulations, particularly the International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130) issued by the Department of State, and the Export Administration Regulations (EAR) (15 CFR Parts 730-774) issued by the Department of Commerce.

The interim DFARS Subpart 204.73 requires the requiring activity, prior to the issuance of a solicitation, to notify the contracting officer if: (1) export-controlled items are expected to be involved; (2) for research and development, the work is fundamental research only, and export-controlled items are not expected to be involved; or (3) for supplies or services, the requiring activity is unable to determine that export-controlled items will not be involved. If the contracting officer is notified that export-controlled items are expected to be involved or the work is fundamental research only, the interim rule required DFARS 252.204-7008, Requirements for Contracts Involving Export-Controlled Items, to be included in the solicitation and contract. This clause requires the contractor to comply with the ITAR and the EAR. If the contracting officer is notified that the requiring activity is unable to determine that export-controlled items will not be involved, the interim rule required DFARS 252.204-7009,

Requirements Regarding Potential Access to Export-Controlled Items, to be included in the solicitation and contract. This clause requires the contractor to notify the contracting officer if an export-controlled item will be generated or needed. Upon this notification, the contracting officer either (1) modifies the contract to include DFARS 252.204-7008; (2) negotiates a contract modification eliminating the work involving export-controlled items; or (3) terminates the contract for the convenience of the government.

Twelve (12) respondents submitted comments on the interim rule. In response to the comments, DFARS 252.204-7009 is eliminated because the two clause approach (DFARS 252.204-7008 and DFARS 252.204-7009) was an unnecessarily complicated way to remind contractors of their responsibilities under existing export law. Instead, DFARS 252.204-7008 will be required to be included in all solicitations and contracts. Requiring the use of DFARS 252.204-7008, which does not specifically state whether or not the parties expect performance of the contract to involve export-controlled items, makes the point that the contractor is responsible for understanding and complying with all applicable laws and regulations regarding export-controlled items.

Other differences between the interim and final version of the rule are:

- The definitions for “applied research” and “fundamental research” have been removed from DFARS 204.7301, Definitions.
- DFARS 204.7304, Procedures, which prescribed the procedures for requiring activities to notify contracting officers prior to the issuance of a solicitation, is removed. The use of the single clause obviates the need for these procedures.

For more on the interim rule, see the August 2008 *Federal Contracts Perspective* article “DFARS Addresses Export-Controlled Items.”

■ **Research and Development Contract Type Determination:** This adopts as final, without changes, the interim rule that amended DFARS Part 234, Major Systems Acquisition, and DFARS Part 235, Research and Development Contracting, to implement Section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), which required DOD to modify regulations regarding the determination of contract type for major development acquisition programs (MDAPs) to address assessment of program risk.

The interim rule amended DFARS 234.004, Acquisition Strategy, to require the Milestone Decision Authority (MDA) for an MDAP to select the contract type that is consistent with the level of program risk. The MDA may select a fixed-price type contract, including a fixed-price incentive contract, or a cost-type contract provided certain written determination requirements are satisfied. In addition, the interim rule amended DFARS 235.006, Contracting Methods and Contract Type, to require that research and development for MDAPs are to follow the procedures in DFARS 234.004.

Two respondents submitted comments on the interim rule, but DOD has chosen not to make any changes, so it finalizes the interim rule without changes. For more on the interim rule, see the February 2008 *Federal Contracts Perspective* article “Lots of DFARS Rules Saved for the New Year.”

■ **Acquisitions in Support of Operations in Iraq or Afghanistan:** This finalizes, with minor changes, the interim rule that added DFARS Subpart 225.77, Acquisitions in Support of Operations in Iraq or Afghanistan, and associated clauses, to implement Sections 886 and 892 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 886 gave DOD authority to limit competition when acquiring products or services in support of

military operations or stability operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities), and Section 892 addressed competition requirements for the procurement of small arms for assistance to the Army of Iraq or Afghanistan, the Police Forces of Iraq or Afghanistan, and other security organizations of Iraq or Afghanistan.

Four respondents submitted comments on the interim rule. In response to those comments, the final rule differs from the interim rule as follows:

- DFARS 225.401-71, Products or Services in Support of Operations in Iraq or Afghanistan, is amended to clarify the applicability of the trade agreements (“If using the procedure specified in [DFARS] 225.7703-1(a)(1) [Acquisition Procedures], the purchase restriction at FAR 25.403(c) [World Trade Organization Government Procurement Agreement and Free Trade Agreements] does not apply with regard to products or services from Iraq...If using a procedure specified in [DFARS] 225.7703-1(a)(2) or (3), the procedures of [FAR] Subpart 25.4 [Trade Agreements] are not applicable.”).
- In DFARS 225.7701, Definitions, the definition of “service from Iraq or Afghanistan” is revised to add “(including construction)” to “a service (including construction) that is performed in Iraq or Afghanistan...”
- DFARS 225.7703-2, Determination Requirements, is revised to add the Commander of the Joint Contracting Command – Iraq/Afghanistan as an official authorized to make a determination that applies to an individual acquisition with a value of \$78.5 million or more, or to a class of acquisitions.

For more on the interim rule, see the October 2008 *Federal Contracts Perspective* article “DFARS Implements 2008 Defense Authorization Act.”

■ **Service Contract Surveillance:** This final rule adds DFARS 237.172, Service Contracts Surveillance, to ensure that the requirement for a quality assurance surveillance plan is addressed for each contract with a dollar value above the simplified acquisition threshold (\$100,000), and that contracts for services have appropriate performance management or surveillance plans prepared for the work being performed under the contract.

DFARS 237.172 states, “Ensure that quality assurance surveillance plans are prepared in conjunction with the preparation of the statement of work or statement of objectives for solicitations and contracts for services. These plans should be tailored to address the performance risks inherent in the specific contract type and the work effort addressed by the contract. (See FAR Subpart 46.4 [Government Contract Quality Assurance].) Retain quality assurance surveillance plans in the official contract file. See <https://sam.dau.mil>, Step Four – Requirements Definition, for examples of quality assurance surveillance plans.”

In addition, DFARS 246.401, General, is added, which states, “The requirement for a quality assurance surveillance plan shall be addressed and documented in the contract file for each contract except for those awarded using simplified acquisition procedures. For contracts for services, the contracting officer should prepare a quality assurance surveillance plan to facilitate assessment of contractor performance, see [DFARS] 237.172. For contracts for supplies, the contracting officer should address the need for a quality assurance surveillance plan.”

■ **Organizational Conflicts of Interest in Major Defense Acquisition Programs:** This proposed rule would add DFARS Subpart 203.12, Organizational Conflicts of Interest, and associated clauses to implement Section 207 of the Weapons System Acquisition Reform Act of 2009 (Public Law 111-23), which requires DOD to provide uniform guidance and tighten

existing requirements for organizational conflicts of interest (OCIs) by contractors in major defense acquisition programs. The law sets out situations that must be addressed and allows DOD to establish such limited exceptions as are necessary to ensure that DOD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while ensuring that such advice comes from sources that are objective and unbiased.

The following are the significant provisions of the proposed rule:

- To DFARS 202.101, Definition, would be added the following definition of “organizational conflict of interest”: “a situation in which, with reference to a particular acquisition: (1) an offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another government contract, grant, cooperative agreement, or other transaction: (i) had access to non-public information that may provide it an unfair advantage in competing for some or all of the proposed effort; or (ii) was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or (2) the contract awardee or any of its subcontractors: (i) will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a government contract; (ii) may, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the government; or (iii) will be in a position to influence a future competition, whether intentionally or not, in its own favor.”
- DFARS 203.1201, Definitions (which would apply to DFARS Subpart 203.12 only), would include the following new definitions:
 - “Contractor,” which would clarify that the entire contractor organization, including all subsidiaries and affiliates, is included when protecting against OCIs.
 - “Firewall,” which would mean “a combination of procedures and physical security arrangements intended to restrict the flow of information either within an organization or between organizations.”
 - “Resolve,” which would mean “to implement an acquisition approach that will enable the government to acquire the required goods or services while adequately addressing any organizational conflict of interest.”
- DFARS 203.1202, Applicability, would state that the subpart applies to contracts (including task and delivery orders) with both profit and nonprofit organizations, including acquisitions of other commercial items, but not to the acquisition of commercially available off-the-shelf (COTS) items. This distinction is made because the acquisition of commercial services might not be free from OCI concerns.
- DFARS 203.1204, Types of Organizational Conflicts of Interest, would explain the three types of OCIs that are recognized by the Government Accountability Office (GAO) and the Court of Federal Claims: impaired objectivity, unfair access to non-public information, and biased ground rules.
- DFARS 203.1205, Contracting Officer Responsibilities, would consolidate all the contracting officer’s responsibilities currently spread throughout FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest.

- DFARS 203.1205-1, General, would set out the overarching responsibilities of contracting officers to identify and evaluate OCIs prior to contract award, using common sense and good judgment. Also, it stresses that the DOD preference for resolution of OCIs is through mitigation.
 - DFARS 203.1205-2, Identification of OCIs, would provide specific guidance on the identification of OCIs and introduces the differences between a potential OCI and an actual OCI.
 - DFARS 203.1205-3, Resolution of Organizational Conflicts of Interest, would cover the three methods of resolution: avoidance, limitation on future contracting (neutralization), and mitigation.
 - DFARS 203.1205-4, Waiver, would address the use of waivers, and make it clear that waivers should be for residual conflicts that exist after all the techniques of resolution have been attempted to lessen a conflict. It states that waivers cannot be used in a competitive situation unless the solicitation specifically informed offerors that the government reserves the right to waive the requirement to resolve an OCI.
 - DFARS 203.1205-5, Award, would establish that: (1) the contracting officer shall award the contract to the apparent successful offeror only if all OCIs are resolved (with limited exceptions); (2) establishes what specific actions shall be taken if a contracting officer determines that award should be withheld from the apparent successful offeror based on conflict of interest considerations; and (3) if an OCI is identified at the time of task or delivery order contract award, the contracting officer shall include a resolution plan (mitigation plan, or limitation on future contracting) in the basic contract.
- DFARS 203.1206, Solicitation Provision and Contract Clauses, would require the inclusion of: (1) DFARS 252.204-70XX, Notice of Potential Organizational Conflict of Interest, in solicitations and contracts when contractor performance of the work may give rise to OCIs; (2) DFARS 252.203-70YY, Resolution of Organizational Conflicts of Interest, when the contract may involve an OCI that can be resolved by an acceptable contractor-submitted mitigation plan prior to contract award; (3) DFARS 252.203-70YZ, Limitation on Future Contracting, when the resolution of the OCI will involve a limitation on future contracting; and (4) DFARS 252.203-70ZZ, Disclosure of Organizational Conflict of Interest after Contract Award, when the solicitation includes DFARS 252.203-70XX.
 - DFARS 203.1270, Implementation of Section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111-23), would address “Organizational Conflicts of Interest for Major Defense Acquisition Programs.”
 - DFARS 203.1270-5, Identification of Organizational Conflicts of Interest, would provide considerations of situations in which OCIs must be addressed.
 - DFARS 203.1270-6, Systems Engineering and Technical Assistance Contracts, would set forth the restrictions on systems engineering and technical assistance contracts, and provide exceptions for design and development work, the preparation of work statements, and for a contractor that is highly qualified with domain experience and expertise, if the OCI can be adequately resolved in accordance with DFARS 203.1205-3.

- DFARS 203.1270-7, Solicitation Provision and Contract Clause, would require that the following provision and clause be included in solicitations and contracts for systems engineering and technical assistance for major defense acquisition programs in addition to those required by DFARS 203.1206: (1) DFARS 252.203-70VV, Notice of Prohibition Relating to Organizational Conflict of Interest – Major Defense Acquisition Program, which would notify the offerors that the solicitation is for the performance of systems engineering and technical assistance for a major defense acquisition program; and (2) DFARS 252.203-70WW, Organizational Conflict of Interest – Major Defense Acquisition Program, which would define “major subcontractor” and repeats the prohibition Section 207 of the Weapons System Acquisition Reform Act of 2009 that “the contractor or any affiliate of the contractor is prohibited from participating as a prime contractor or major subcontractor in the development or construction of a weapon system under the major defense acquisition program.”
- DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, would require use of the provisions and clauses specified in DFARS 203.1206 and DFARS 203.1270-7 in contracts for the acquisition of commercial items (other than COTS items).

Comments on the proposed rule must be submitted no later than June 21, 2010, identified as “DFARS Case 2009-D015,” 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; or (4) mail: Defense Acquisition Regulations Council, Attn: Amy Williams, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Minimizing Use of Hexavalent Chromium:** This proposed rule would add DFARS Subpart 223.73, Minimizing the Use of Hexavalent Chromium, and corresponding contract clause DFARS 252.223-7XXX, Prohibition on Use of Hexavalent Chromium, to address requirements for minimizing the use of hexavalent chromium in defense items. This is in response to the memorandum issued by the Under Secretary of Defense (Acquisition, Technology and Logistics) establishing policy for the minimization of hexavalent chromium use throughout DOD (<https://www.denix.osd.mil/portal/page/portal/content/policy/DoD/Hex%20Chrome%20policy%20memo%20SIGNED.pdf>).

Hexavalent chromium is a significant chemical in numerous DOD weapon systems and platforms due to its corrosion protection properties. However, due to the serious human health and environmental risks related to its use, DFARS Subpart 223.73 would prohibit its use in any DOD specification or standard unless an exception applies (DFARS 223.7302, Prohibition). DFARS 223.7303, Exceptions, would list the following exceptions:

- If the use of hexavalent chromium is specifically authorized at a level no lower than a general or flag officer or a member of the Senior Executive Service from the Program Executive Office or equivalent level, in coordination with the component Corrosion Control and Prevention Executive.
- To legacy systems and their related parts, subsystems, and components that already contain hexavalent chromium. However, alternatives to hexavalent chromium shall be considered during system modifications, follow-on procurements of legacy systems, or maintenance procedure updates.

DFARS 252.223-7XXX would prohibit the contractor from providing “any deliverables under this contract, or use materials in performance of this contract, that contain hexavalent chromium in a concentration greater than 0.1% by weight in any homogeneous material” unless otherwise specified by the contracting officer. In addition, the contractor would be required to include this clause in all subcontracts for supplies, maintenance and repair services, or construction materials.

Comments on the proposed rule must be submitted no later than June 7, 2010, identified as “DFARS Case 2009-D004,” 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; or (4) mail: Defense Acquisition Regulations Council, Attn: Cassandra Freeman, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Government-Assigned Serial Number Marking:** This proposed rule would add DFARS 211.274-5, Policy for Assignment of Government-Assigned Serial Numbers, and an associated clause at DFARS 252.211-70XX, Use of Government-Assigned Serial Numbers, to require contractors to apply government-assigned serial numbers, such as tail numbers/hull numbers and equipment registration, in human-readable format on major end items, when required by law, regulation, or military operational necessity. In addition, DFARS 211.274-5 would require that the latest version of MIL-STD-130, Identification Marking of U.S. Military Property, be used for marking human-readable information. (Current DFARS 211.274-5, Contract Clauses, would be redesignated as DFARS 211.274-6.)

Comments on the proposed rule must be submitted no later than June 29, 2010, identified as “DFARS Case 2008-D047,” 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; or (4) mail: Defense Acquisition Regulations Council, Attn: Mary Overstreet, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Award-Fee Contracts:** This proposed rule would amend DFARS Subpart 216.4, Incentive Contracts, to incorporate DOD policy guidance on the use of objective criteria (DFARS 216.401-70, Objective Criteria), and to revise guidance for award-fee evaluations and payments (DFARS 216.405-2, Cost-Plus-Award-Fee Contracts). Also, new clause DFARS 252.216-70XX, Award Fee, would detail the use of award fees.

Comments on the proposed rule must be submitted no later than June 29, 2010, identified as “DFARS Case 2006-D021,” 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; or (4) mail: Defense Acquisition Regulations Council, Attn: Mark Gomersall, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Reporting of Government Property Lost, Stolen, Damaged, or Destroyed:** This proposed rule would amend DFARS Part 245, Government Property (particularly DFARS 245.102, Policy), and add an associated clause at DFARS 252.245-70XX, Reporting Loss, Theft, Damage, or Destruction of Government Property, to require contractors to report loss, theft, damage, and destruction (LTDD) of government property to the Defense Contract Management Agency (DCMA) “eTools” application. This would facilitate DOD’s migration from paper-based processes to a greater use of automation, and provide a single repository of all LTDD data to improve accountability and control of DOD assets and contractor oversight.

Comments on the proposed rule must be submitted no later than June 29, 2010, identified as “DFARS Case 2008-D049,” 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; or (4) mail: Defense Acquisition Regulations Council, Attn: Mary Overstreet, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

■ **Class Deviation on Safety of Facilities, Infrastructure, and Equipment for Military Operations:** This DFARS class deviation requires contracting officers to use DFARS 252.246-9999, Safety of Facilities, Infrastructure, and Equipment for Military Operations (Deviation), in solicitations and contracts (including task and delivery orders) for construction, installation, repair, maintenance, or operation of facilities, infrastructure, or for equipment configured for occupancy, planned for use by DOD military or civilian personnel during military operations performed outside the United States, Guam, Puerto Rico, and the Virgin Islands.

The deviation requires that subject contracts comply with the United Facilities Criteria standards, or equivalent, for the following: fire protection, structural integrity, electrical systems, plumbing, water treatment, waste disposal, and telecommunications networks.

The combatant commander may waive compliance with any standards when it is impracticable to comply under prevailing operational conditions.

■ **Class Deviation on Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel:** This DFARS class deviation requires contracting officers to use DFARS 252.216-7999, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (Deviation), in all solicitations and contracts (including task and delivery orders) with award fee provisions.

The deviation implements Section 823 of the National Defense Authorization Act of Fiscal Year 2010 (Public Law 111-84), which requires that the contractor's performance be evaluated during the award fee period to include consideration of actions that caused serious bodily injury or death to any civilian or military personnel of the government through the contractor's gross negligence or with the contractor's reckless disregard for government personnel safety. The prime contractor's (or its subcontractors') negligence or reckless disregard may be determined through criminal, civil, or administrative proceedings.

■ **Examining Use of Advance Payments When Making Small Business Awards:** This memorandum from the director of Defense Procurement and Acquisition Policy to the directors and senior acquisition executives of the DOD services directs contracting officers to "review the full realm of contract financing options (FAR 32.106 [Order of Precedence]) when making contract award to small firms. Contracting officers should examine the use of advance payments in appropriate circumstances when making small business awards. Among the options available, although advance payments are the least preferred method of contract financing, DOD may use this payment method when it is in the best interests to the taxpayer, the contractor, and the government, and when other types of financing are not reasonably available."

■ **Availability of the Fiscal Year 2008 Defense Threat Reduction Agency Services Contracts Inventory:** Section 807 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) requires DOD to prepare "an annual inventory of the activities performed during the preceding fiscal year pursuant to contracts for services for or on behalf of the DOD." This inventory is to be submitted to Congress and made available to the public.

In compliance with Section 807, the Defense Threat Reduction Agency (DTRA) has announced that it has prepared and published its Fiscal Year 2008 inventory of services. The DTRA inventory is available at <http://www.dtra.mil/Business/DoingBusiness/CurrentSolicitations.aspx>.

TACTICAL VEST NONMANUFACTURER RULE WAIVER PROPOSED

The Small Business Administration (SBA) is proposing to waive the nonmanufacturer rule for improved outer tactical vests and related accessories under North American Industry Classification System (NAICS) code 339113, Surgical Appliance and Supplies Manufacturing, Product Service Code (PSC) 8470, Armor Personal. SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources for these products by May 6, 2010, to Pamela McClam, 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 Section 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.

DIAR REWRITTEN

The Department of the Interior (DOI) has revised its Acquisition Regulation, the DIAR, to update references to other federal and departmental directives, remove obsolete material and references, and clarify and streamline internal policies and procedures. This rewrite does not impose any new requirements on DOI contractors, and no DIAR clauses are being changed, with the exception of the removal of obsolete clauses.

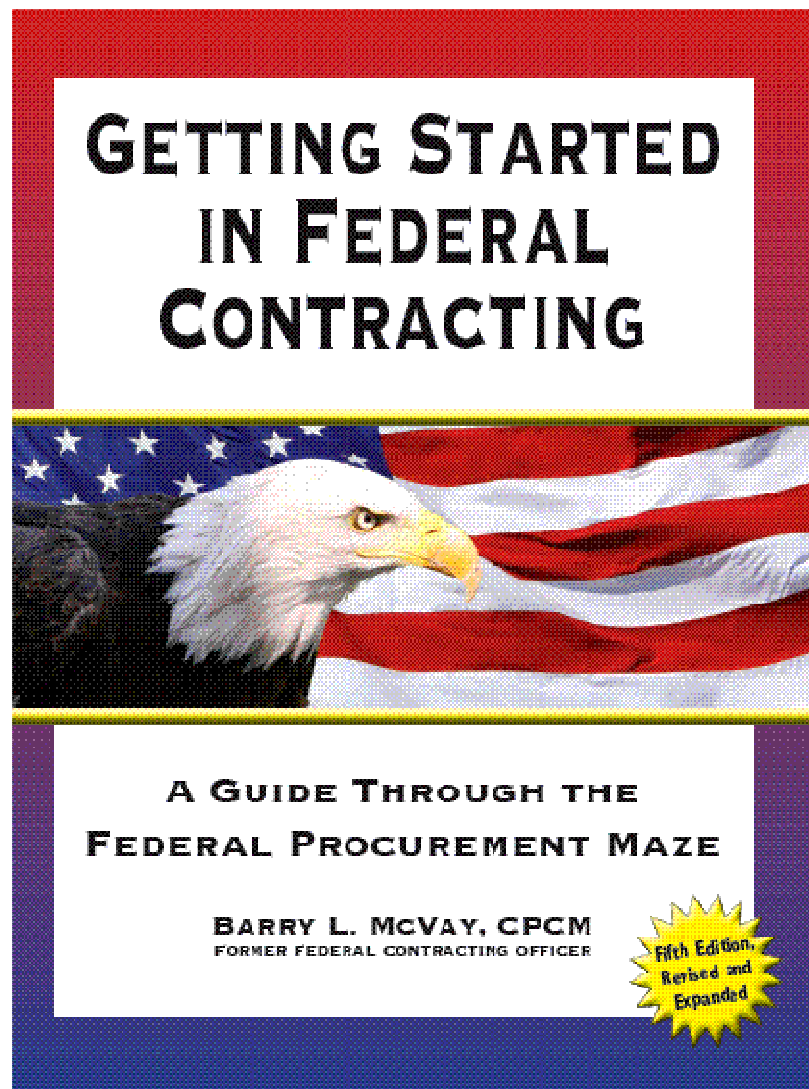
DOI is giving the public an opportunity to comment on this interim rule, and DOI will consider and respond to any comments that it receives. DOI has decided to publish this interim rule without prior proposal because it would be impracticable, unnecessary, and contrary to the public interest to delay publication of this rule in final form pending an opportunity for public comment.

Comments are to be submitted no later than June 14, 2010, through the Federal eRulemaking Portal at <http://www.regulations.gov>. Identify all comments identified as "Regulation Identifier Number (RIN) 1093-AA11." Follow the instructions on the website for submitting comments.

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