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DOD IMPLEMENTS RESTRICTION ON CONTRACTOR USE OF MANDATORY ARBITRATION AGREEMENTS

The Department of Defense (DOD) is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add DFARS Subpart 222.74, Restrictions on the Use of Mandatory Arbitration Agreements, to implement Section 8116 of the DOD Appropriations Act for Fiscal Year 2010 (Public Law 111-118). Section 8116 restricts the use of mandatory arbitration agreements when using funds appropriated by Public Law 111-118 to award contracts that exceed \$1,000,000 (including task or delivery orders and bilateral modifications adding new work), if the contractor restricts its employees or independent contractors to arbitration for claims “under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.” This rule does not apply to the acquisition of commercial items, including commercially available off-the-shelf items.

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Among the key provisions of DFARS Subpart 222.74 are the following:

- Paragraph (a) of DFARS 222.7401, Policy, explains the requirements and prohibitions in Section 8116. Paragraph (b) states that, after June 17, 2010, contractors are required to certify compliance with Section 8116 by their covered subcontractors (that is, those with subcontracts that exceed \$1,000,000 and are not for commercial items).
- DFARS 222.7402, Applicability, states that the subpart does not apply to the acquisition of commercial items.
- DFARS 222.7403, Waiver, states that the secretary of defense may waive the applicability of the subpart “to a particular contract or subcontract, if the secretary or the deputy secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm.”
- DFARS 222.7404, Contract Clause, requires the use of DFARS 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements, in all solicitations and contracts valued in excess of \$1,000,000 using funds appropriated or otherwise made available by Public Law 111-118, except in contracts for the acquisition of commercial

items, including commercially available off-the-shelf items. DFARS 252.222-7006 reiterates the explains the requirements and prohibitions in DFARS Subpart 222.74.

The following are examples included in the preface to the interim rule intended to provide help determining applicability of the rule:

- “A new order that exceeds \$1,000,000 using funds appropriated or otherwise made available by the FY10 DOD Appropriations Act, placed against an indefinite-delivery/indefinite-quantity contract for an applicable item or service, is covered by this restriction, regardless of whether the basic indefinite-delivery/indefinite-quantity contract was covered.
- “A funding modification adding more than \$1,000,000 of funds appropriated or otherwise made available by the FY10 DoD Appropriations Act to a contract that does not contain the clause at [DFARS] 252.222-7006 or [DFARS] 252.222-7999 (Deviation), is not covered. [NOTE: DFARS 252.222-7999 (Deviation) was a temporary clause for implementing Section 8116 until it was incorporated in the DFARS. DFARS 252.222-7006 consists of the same text as DFARS 252.222-7999 (Deviation), so DFARS 252.222-7999 is rescinded though it still applies to DOD contracts issued between the date of the deviation – February 17, 2010 – and the effective date of the interim rule – May 19, 2010. For more on the deviation, see the March 2010 *Federal Contracts Perspective* article “DOD Addresses Procurements on Its Behalf, Competition.”]
- “A bilateral modification adding new work that uses funds appropriated or otherwise made available by the FY10 DOD Appropriations Act in excess of \$1 million is covered.
- “The award of a new order using funds appropriated or otherwise made available by the FY10 DOD Appropriations Act with a value of \$700,000 is not covered, since the value is under \$1,000,000.
- “A contract valued at \$1,500,000 awarded today, and only \$10,000 in funds appropriated or otherwise made available by the FY10 DOD Appropriations Act will be obligated, with the remaining balance being FY11 funding, is not covered, because the total value of funds appropriated or otherwise made available by the FY10 DOD Appropriations Act is less than \$1,000,000.
- “An entity or firm that does not have a contract in excess of \$1,000,000 appropriated or otherwise made available by the FY10 DOD Appropriations Act is not affected by the clause. The term ‘contractor’ is narrowly applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected.
- “Contracting officers will modify existing contracts, on a bilateral basis, if using funds

Vivina McVay, Editor-in Chief

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appropriated or otherwise made available by the FY10 DOD Appropriations Act, when such funds will be used for bilateral modifications adding new work or orders that exceed \$1,000,000 and are issued after the effective date of this interim rule. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of funds appropriated or otherwise made available by the FY10 DOD Appropriations Act on such modifications or orders.”

Comments on the interim rule must be submitted no later than July 19, 2010, identified as “DFARS Case 2010-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: Julian E. Thrash, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060.

DOD PUBLISHES FIVE PROPOSED RULES, TWO DEVIATIONS

The Department of Defense proposed five changes to the Defense FAR Supplement (DFARS) during May, issued one FAR deviation and proposed another, and issued a memorandum regarding compliance with the Small Business Administration’s (SBA’s) regulations providing “parity” among small business programs. In addition, the Navy is proposing to implement a “preferred supplier program.”

■ **Preservation of Tooling for Major Defense Acquisition Programs:** This proposed rule would amend DFARS 207.106, Additional Requirements for Major Systems, to implement Section 815 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) by adding a paragraph (S-73). Paragraph (S-73) would state that “acquisition plans for major weapons systems shall include a plan for the preservation and storage of special tooling associated with the production of hardware for major defense acquisition programs through the end of the service life of the related weapons system. The plan shall include the identification of any contract clauses, facilities, and funding required for the preservation and storage of such tooling. Section 815 also allows USD(AT&L) [Under Secretary of Defense for Acquisition, Technology and Logistics] to waive this requirement if USD(AT&L) determines that it is in the best interest of DOD.”

Comments on the proposed rule must be submitted no later than July 6, 2010, identified as “DFARS Case 2008-D042,” 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.

■ **Marking of Government-Furnished Property:** This proposed rule would add a new DFARS 211.274-5, Policy for Tagging, Labeling, or Marking of Government-Furnished Property, to require contractors to tag, label, or mark items of government-furnished property identified in the contract when the government-furnished material and government-furnished property are subject to serialized item management [a “serially-managed item” means “an item designated by DOD to be uniquely tracked, controlled, or managed in maintenance, repair, and/or supply systems by means of its serial number”]. [NOTE: Current DFARS 211.274-5, Contract Clauses, would be redesignated DFARS 211.274-6.]

A new DFARS 252.211-70YY, Tagging, Labeling, and Marking of Government-Furnished Property, would be required in solicitations and contracts that contain either FAR 52.245-1,

Government Property, or FAR 52.245-2, Government Property Installation Operation Services. It would reiterate the policy enunciated in DFARS 211.274-5, but would provide the following exceptions:

- Government-furnished property that was previously marked;
- Contractor-acquired property;
- Property under any statutory leasing authority;
- Property to which the government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;
- Intellectual property or software; or
- Real property.

Comments on the proposed rule must be submitted no later than July 6, 2010, identified as “DFARS Case 2008-D050,” 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.

■ **Cost and Software Data Reporting System:** This proposed rule would add DFARS Subpart 234.71, Cost and Software Data Reporting, to establish DOD Cost and Software Data Reporting (CSDR) system requirements for major defense acquisition programs and major automated information system programs.

DFARS 234.7100, Policy, would provide the following:

- Paragraph (a) would state the CSDR requirement is mandatory for major defense acquisition programs and major automated information system programs as specified in the DOD 5000.04-M-1, CSDR Manual. The CSDR system is applied in accordance with the reporting requirements established in DOD Instruction 5000.02, Operation of the Defense Acquisition System.
- Paragraph (b) would require contracting officers to consult with the Defense Cost and Resource Center prior to contract award to determine that the offeror selected for award proposed a standard CSDR system. The proposed CSDR system would be described in the offeror’s proposal in response to DFARS 252.234-70XX, Notice of Cost and Software Data Reporting System.

DFARS 234.7101, Solicitation Provision and Contract Clause, would require the use of:

- DFARS 252.234-70XX in all solicitations for major defense acquisition programs and major automated information system programs that exceed \$50 million. The provision may be used on selected contracts below \$50 million but greater than \$20 million as determined by the DOD program manager with the approval of the Defense Cost and Resource Center.
- DFARS 252.234-70YY, Cost and Software Data Reporting (CSDR), in all solicitations and contracts for major defense acquisition programs and major automated information system programs that exceed \$20 million. The clause may also be used for the CSDR Software Resources Data Reporting requirement on selected contracts below \$20 million

as determined by the DOD program manager with the approval of the Defense Cost and Resource Center.

DFARS 252.234-70XX would require the offeror to:

- Describe the standard CSDR process that it intends to use to satisfy the requirements of DOD 5000.04-M-1; its DD Form 2794, Cost and Software Data Reporting Plan; and the related Resource Distribution Table (RDT) contained in the solicitation.
- Provide comments on the adequacy of the CSDR contract plan, and the related RDT contained in the solicitation.
- Submit DD Form 1921, Cost Data Summary Report, DD Form 1921-1, Functional Cost-Hour Report, and DD Form 1921-2, Progress Curve Report, with its pricing proposal.
- Identify the subcontractors, or the subcontracted effort if the subcontractors have not been selected, to whom the CSDR requirements will apply.

DFARS 252.234-70YY would require the contractor to:

- Use a documented standard CSDR process that satisfies the guidelines contained in the DOD 5000.04-M-1.
- Use management procedures that provide for generation of timely and reliable information for the Contractor Cost Data Reports and Software Resources Data Reports.
- As the basis for reporting, use the government-approved contract CSDR plan; DD Form 2794 and related RDT; and DD Form 1921-3, Contractor Business Data Report.
- Require subcontractors, or subcontracted effort if subcontractors have not been selected, to comply with the CSDR requirements.

In addition, DFARS 242.503-2, Postaward Conference Procedures, would require postaward conferences for contracts that include DFARS 252.234-70YY to include a discussion of the contractor's standard CSDR process, the DD Form 2794, and the DD Form 1921-3.

Comments on the proposed rule must be submitted no later than July 6, 2010, identified as "DFARS Case 2008-D050," 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.

■ **Restriction on Ball and Roller Bearings:** This proposed rule would modify DFARS 225.7009, Restriction on Ball and Roller Bearings, to revise the domestic source restriction on acquisition of ball and roller bearings in a manner similar to the domestic source restriction of the Buy American Act.

Currently, DFARS 225.7009 implements two statutory restrictions: 10 U.S.C. 2534(a)(5) and annual appropriations act restrictions. 10 U.S.C. 2534(a)(5) required that all ball and roller bearings and bearing components be wholly manufactured in the United States or Canada. The annual defense appropriations act restrictions require that all ball and roller bearings be produced by a domestic source and be of domestic origin (this restriction does not apply to the acquisition of commercial items unless the commercial bearings themselves are purchased as the end products). The Defense Acquisition Regulation (DAR) Council always interprets the term "domestic" to include Canada unless the statute specifically provides otherwise.

Since the 10 U.S.C. 2534(a)(5) restriction was considered to be more stringent than the annual defense appropriations act restriction, DFARS 225.7009 reflected the 10 U.S.C.

2534(a)(5) requirement that bearings and main bearing components must be 100% manufactured in the U.S. or Canada. However, 10 U.S.C. 2534(a)(5) expired on October 1, 2005, so this rule proposes to revise the restriction to implement the annual defense appropriations act restriction.

The DAR Council interprets the phrase “produced by a domestic source and of domestic origin” to mean that a ball or roller bearing must be manufactured in the U.S. or Canada (domestic source), and the cost of its U.S. and Canadian components must exceed 50% of the cost of all its components. This interpretation is comparable to that of the Buy American Act and to some of the other domestic source restrictions in the DFARS (for example, see DFARS 225.7007, Restrictions on Anchor and Mooring Chain). Therefore, DFARS 225.7009-2, Restriction [on ball and roller bearings], which currently states, “Do not acquire ball and roller bearings or bearing components unless the bearings and bearing components are manufactured in the United States or Canada,” would be revised to “Do not acquire ball and roller bearings unless: (1) the bearings are manufactured in the United States or Canada; and (2) for each ball or roller bearing, the cost of the bearing components mined, produced, or manufactured in the United States or Canada exceeds 50% of the total cost of the bearing components of that ball or roller bearing.” Also, DFARS 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, would be revised accordingly.

Comments on the proposed rule must be submitted no later than July 6, 2010, identified as “DFARS Case 2006-D029,” 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.

■ **Presumption of Development at Private Expense:** This proposed rule would amend DFARS Subpart 227.71, Rights in Technical Data, and related clauses to implement special requirements and procedures related to the validation of a contractor's or subcontractor's asserted restrictions on technical data and computer software, specifically with regard to two categories of items: commercial items, (including commercially-available off-the-shelf (COTS) items) (the “commercial rule”); and major systems (including subsystems and components of major systems) (the “major systems rule”).

The validation of asserted restrictions on technical data is based on statutory requirements, codified primarily at Title 10 of the U.S. Code, Section 2321, Validation of Proprietary Data Restrictions:

- Under the commercial rule, a contracting officer is required to presume that a commercial item has been developed entirely at private expense, unless shown otherwise in accordance with the procedures in 10 U.S.C. 2321(f). The procedures at 10 U.S.C. 2321(f)(1) require the contracting officer to presume that the asserted restrictions have been justified (on the basis that the item was developed exclusively at private expense), whether or not the contractor or subcontractor submits a justification in response to the challenge notice issued by the contracting officer. The contracting officer's challenge may be sustained only if information provided by DOD demonstrates that the item was not developed exclusively at private expense.
- Under the major systems rule (10 U.S.C. 2321(f)(2)), a contracting officer's challenge to asserted restrictions on technical data relating to a major system (or a subsystem or component) shall be sustained unless the contractor or subcontractor submits information demonstrating that the item was developed exclusively at private expense. While the major systems rule applies to commercial items used in major systems, there is an

exception for COTS items. This means that COTS items, even if used in a major system, are subject to the commercial rule.

This proposed rule would consolidate the current regulatory coverage of these two rules into paragraph (c) of DFARS 227.7103-13, Government Right to Review, Verify, Challenge and Validate Asserted Restrictions. Current DFARS 227.7102, Commercial Items, Components, and Processes, would be relocated to DFARS 227.7103-13(c)(2) and combined with new language in paragraph (c)(2)(ii) to address the major systems rule.

In addition, this rule would revise paragraph (k)(2) of DFARS 252.227-7013, Rights in Technical Data – Noncommercial Items, paragraph (e) of DFARS 252.227-7015, Technical Data-Commercial Items, and paragraph (l) of DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, to state that the statutory requirements in 10 U.S.C. 2320, Rights in Technical Data, and 10 U.S.C. 2321 apply to acquisitions of technical data related to commercial items regardless of whether that data is provided by the prime contractor or by a lower tier subcontractor.

Finally, this proposed rule would address the development at private expense of computer software. Although 10 U.S.C. 2320 and 10 U.S.C. 2321 apply to technical data only and not to computer software (which is expressly excluded from the definition of technical data), it is longstanding federal and DOD policy and practice to apply the same or analogous requirements to computer software because many issues are common to both technical data and computer software and, in such cases, conformity of coverage between technical data and computer software is desirable. For example, the policies and procedures in DFARS Subpart 227.71 and DFARS Subpart 227.72, Rights in Computer Software and Computer Software Documentation, are identical or analogous in most respects.

DOD has decided to adapt the technical data procedures for application to noncommercial computer software but not to commercial computer software. Therefore, the major systems rule would be applicable to the validation procedures for noncommercial computer software. These new procedures would be added as a new paragraph to DFARS 227.7203-13, Government Right to Review, Verify, Challenge and Validate Asserted Restrictions, and new paragraph (f) to DFARS 252.227-7019, Validation of Asserted Restrictions – Computer Software.

Comments on the proposed rule must be submitted no later than July 6, 2010, identified as “DFARS Case 2007-D003,” 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.

■ **Small Business Administration Parity Regulation:** This memorandum reiterates that it “continues to be the Executive Branch policy” to comply with the Small Business Administration (SBA) regulations that state the historically underutilized business zone (HUBZone) program, the service-disabled veteran-owned small business (SDVOSB) program, and the 8(a) program have “parity.” This is contrary to recent Government Accountability Office (GAO) and Court of Federal Claims (COFC) decisions that ruled the statutory language gives the HUBZone program precedence over the SDVOSB and 8(a) programs. (For more on the *Mission Critical Systems, Inc.* decisions by GAO and the COFC, see the August 2009 *Federal Contracts Perspective* article “OMB Issues Five Memos Providing Contracting Guidance”; the September 2009 *Federal Contracts Perspective* article “Department of Justice Reaffirms SBA’s Small Business Program Parity Regulations”; and the April 2010 *Federal Contracts Perspective* article “HUBZone Preference Upheld by Court of Federal Claims.”)

In a related development, the GAO once again ruled that the language of the applicable statutes regarding the HUBZone and 8(a) programs was “unambiguous” in giving the HUBZone program preference (*B-402494, DGR Associates, Inc.*, May 14, 2010). In its decision, GAO states, “We have clearly stated our view on the proper interpretation of the HUBZone statute, and we recognize that the Executive Branch has resolved to apply its own, contrary interpretation of the HUBZone statute. Accordingly, absent some change in the statutory scheme, Executive Branch policy, or a contrary decision by the United States Court of Appeals for the Federal Circuit in connection with the Justice Department’s appeal of the decision in Mission Critical Solutions v. United States, *supra*, we will decide future protests raising the issue here in an expedited and summary manner, in the interest of reducing the costs associated with filing and pursuing such protests.”

■ **FAR Class Deviation on Delegation of Approval for Use of Incentive-Fee Contracts:**

This class deviation grants the authority to approve the use of all incentive-fee contracts (other than award-fee contracts) to one level above the contracting officer. This is a deviation from paragraph (d) of FAR 16.401, General [for incentive contracts], which requires that the head of the contracting activity (HCA) approve the use of all incentive- and award-fee contracts.

In addition, this class deviation provides that award-fee contracts must be approved by the HCA or designee no lower than one level below the HCA.

■ **Defense Logistics Agency (DLA) Class Deviation from FAR 52.219-7:** The Defense Energy Support Center (DESC) of DLA is requesting DOD approval of a class deviation from FAR 52.219-7, Notice of Partial Small Business Set-Aside, to revise an existing class deviation to that clause.

Under the bulk petroleum program, DESC purchases, distributes, and manages millions of gallons of military specification fuel products for the military services. Domestic bulk fuel solicitations generally contain partial small business set-asides pursuant to FAR Subpart 19.5, Set-Asides for Small Business. These set-asides are solicited and awarded using the current deviation clause, DESC Clause I237.06, Notice of Partial Small Business Set-Aside (Deviation). The current deviation was approved on June 25, 1990, and established a methodology for partial small business set-aside evaluation and awards.

DESC is proposing revisions to the current deviation clause to clarify language in various portions of the clause, and in particular to clarify that a small business will not be awarded a set-aside portion at a price higher than its offer price under the non-set-aside portion.

Comments on the proposed deviation must be submitted no later than July 9, 2010, by any of the following methods: (1) mail: DLA, Attn: J-71 (Kerry Pilz), 8725 John J. Kingman Road, Fort Belvoir, VA 22060-6221; (2) telephone: 703-767-1461; or (3) e-mail: kerry.pilz@dla.mil.

■ **Navy Preferred Supplier Program:** The Deputy Assistant Secretary of the Navy, Acquisition and Logistics Management (DASN (A&LM)), is soliciting comments that the Department of the Navy (DON) may use in drafting a policy that will establish a Preferred Supplier Program (PSP). Under the PSP, contractors that have demonstrated exemplary performance, at the corporate level, in the areas of cost, schedule, performance, quality, and business relations, would be granted Preferred Supplier Status (PSS). Contractors that achieved PSS would receive more favorable contract terms and conditions in DON contracts. Upon approval of the policy by the Assistant Secretary of the Navy for Research, Development and Acquisition, DON will initiate the pilot phase of the PSP.

DASN (A&LM) will use the Contractor Performance Assessment Reporting System (CPARS) as the baseline data during the pilot phase of the PSP. The factors that DASN (A&LM)

will use to assess contractors during the pilot phase include, at a minimum, the following CPARS areas: technical (quality of product); schedule; cost control; management responsiveness; management of key personnel; utilization of small business; and other CPARS factors as appropriate. In addition, DASN (A&LM) shall assess energy efficiency as an “excellence factor” in addition to the areas above.

During the pilot phase, the DON will use CPARS data and, as appropriate, other sources of information and weighting factors to rate contractors using a 5-star system based upon the 5-color ratings used in CPARS, as follows:

Red	0
Yellow	1
Green	2
Purple	3
Dark Blue	4

Contractors must achieve at least a 3-star rating to be designated as a Preferred Supplier.

If a contractor provides documentation sufficient to establish that it has an Energy Efficiency Program, it will receive an additional star, up to a maximum rating of 5 stars. A 5-star rating can only be achieved if the contractor maintains an active Energy Efficiency Program, and otherwise has received a 4-star rating. Failure to demonstrate an active Energy Efficiency Program will not diminish the contractor's PSP rating.

In negotiating contracts with Preferred Suppliers, DON contracting officers will be authorized to offer some or all of the following more favorable contract terms and conditions:

- More favorable progress payments
- Recognition of PSS in the development of profit or fee based upon weighted guidelines
- Tailored contract reporting requirements
- Special award fee pools

PSS shall not be used as a factor or subfactor in any source selection. However, where the contracting officer has a reasonable belief that a Preferred Supplier may submit a bid or proposal, the solicitation shall contain terms and conditions that will be applicable, after award, only if the successful offeror is a Preferred Supplier.

These special terms and conditions, applicable to contracts with Preferred Suppliers, shall be consistent with the limitations specified in the FAR.

DON is inviting all interested parties to provide comments for consideration in the formulation of a policy letter establishing the PSP. In particular, DON seeks to better understand how to incentivize contractors, at the corporate level, to achieve sustained superior performance in the areas of cost, schedule, performance, quality, and business relations. Accordingly, DON welcomes feedback regarding the following questions:

1. What clauses are currently being used in government subcontracts, and commercial contracts and subcontracts, to incentivize superior performance, at the corporate level, in the areas of cost, schedule, performance, quality, and business relations?
2. What solicitation provisions, contract clauses, and performance incentives will provide contractors with the greatest motivation to achieve PSS?
3. Energy Efficiency is a critical DON requirement significantly impacting the successful achievement of DON's missions. How should a contractor's use of energy, as it relates to

the entire life-cycle of a product – design, manufacture, use, maintenance, and disposal – be considered in the designation of Preferred Suppliers?

4. Is there any other aspect of the proposed PSP on which the respondent wishes to comment?

Comments on the draft policy must be submitted no later than July 15, 2010, identified as “Proposed DON PSP Policy Letter,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) e-mail: preferredsupplier@navy.mil; (3) fax: 703-614-9394; or (4) mail: DASN (A&LM), ATTN: Clarence Belton, 1000 Navy Pentagon, Room BF992, Washington, DC 20350-1000.

FAR CHANGES PROPOSED ON TERMINATIONS, ID VERIFICATIONS

The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) have issued proposed revisions to the FAR that would clarify the use of the termination for convenience clause and reinforce the requirement of collecting identifications from contractor personnel once they are no longer supporting a contract.

■ **Terminating Contracts:** This proposed rule would amend paragraph (a) of FAR 49.502, Termination for convenience of the Government, which addresses fixed-price contracts that do not exceed the simplified acquisition threshold (\$100,000) to clarify when FAR 52.249-1, Termination for Convenience of the Government (Fixed Price) (Short Form), is used. The proposed rule would apprise contracting officers that there are alternative clauses that can be used for terminations up to the simplified acquisition threshold: FAR 52.212-4, Contract Terms and Conditions – Commercial Items (see paragraph (l) of the clause, “Termination for the Government’s Convenience”), or FAR 52.213-4, Terms and Conditions – Simplified Acquisitions (Other Than Commercial Items) (see paragraph (f) of the clause, “Termination for the Government's convenience”).

In addition, a reference to FAR 12.403, Termination, which contains the prescription for FAR 52.212-4, would be referenced in paragraph (a) of FAR 49.002, Applicability [of termination clauses] (FAR 13.302-5, which contains the prescription for FAR 52.213-4, is already referenced in FAR 49.002).

Comments on the proposed rule must be submitted no later than July 19, 2010, identified as “FAR Case 2009-031,” 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.

■ **Personal Identity Verification of Contractor Personnel:** This proposed rule would amend FAR Subpart 4.13, Personal Identity Verification, and FAR 52.204-9, Personal Identity Verification of Contractor Personnel, to reinforce the requirement of collecting from contractors all forms of government-provided identification once they are no longer needed to support a contract. This is considered important because a PIV card is required to gain access to a federal facility.

This proposed rule would add paragraphs (d)(1) and (d)(1) to FAR 4.1301, Policy [on PIV]:

- Paragraph (d)(1) would state that “agency procedures shall ensure that government contractors account for all forms of government-provided identification issued to government

contractors under a contract, *i.e.*, the Personal Identity Verification (PIV) cards or other similar badges, and shall ensure the contractors return such identification to the issuing agency as soon as any of the following occurs, unless otherwise determined by the agency: (i) when no longer needed for contract performance; (ii) upon completion of a contractor employee's employment; (iii) upon contract completion or termination."

– Paragraph (d)(2) would state that "the contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements."

In addition, this rule would amend FAR 52.204-9, Personal Identity Verification of Contractor Personnel, to be consistent with the additional language in FAR 4.1301, and to require that the substance of the clause be inserted in all subcontracts when the subcontractor is required to have routine physical access to a federally-controlled facility and/or routine access to a federally-controlled information system.

Comments on the proposed rule must be submitted no later than July 23, 2010, identified as "FAR Case 2009-027," 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.

INFORMATION ON ENHANCING TRANSPARENCY SOUGHT

The CAAC and the DARC are seeking information that will assist in determining how best to amend the FAR to enable public posting of contract actions without compromising contractors' proprietary and confidential commercial or financial information should such posting become a requirement in the future. This transparency effort is intended to promote efficiency in government contracting through an open acquisition process and improve federal spending accountability consistent with the president's January 21, 2009, memorandum to agency heads titled "Transparency and Open Government."

The two councils anticipate that, in the future, a requirement to post the text of contracts and task and delivery orders on-line will be instituted. The councils are considering how best to revise the FAR to facilitate such posting without violating statutory and regulatory prohibitions against disclosing protected information belonging to the government or contractors.

The councils are particularly interested in suggestions that will facilitate uniform, consistent processing methods that are fair and equitable as well as cost effective and efficient, while at the same time simplifying access to acquisitions once posted. The councils are mindful of the need to protect the government's classified information (see FAR Subpart 4.4, Safeguarding Classified Information Within Industry), the protections afforded contractor information under the Freedom of Information Act (FOIA) procedures (see FAR Subpart 24.2, Freedom of Information Act), and FAR 3.104-4, Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information, which addresses the marking of contractor information.

"It may not be practical to apply FOIA procedures before posting in every case. The councils are looking into methods for identifying the types of information that should not be posted or released to the public, as well as means for electronic processing and posting, and development of provision or clause requirements for successful offerors to provide a redacted copy of the contract. The councils are also requesting suggestions for how best to protect the types of

information through redacting, locating all such information in a standard place in the contract, or other possible methods to be considered.”

Comments on the proposed rulemaking must be submitted no later than July 12, 2010, identified as “FAR Case 2009-009,” 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, FAR Secretariat (MVCB), 1800 F Street, NW, Room 4041, Attn: Hada Flowers, Washington, DC 20405. Respondents are encouraged to address the benefits of this transparency effort as well as possible impacts on offerors’ and the government’s business systems, dollar thresholds for application, and other cost impacts, especially on proposal preparation. Also, responses to this notice should address whether a public meeting on this topic would be beneficial and, if so, what issues should be addressed.

ONE NONMANUFACTURER RULE WAIVER PROPOSED, ONE DENIED

The Small Business Administration (SBA) is proposing to waive the nonmanufacturer rule for herbicides, insecticides, and fungicides under North American Industry Classification System (NAICS) code 325320, Pesticide and Other Agricultural Chemical Manufacturing, Product Service Code (PSC) 6840, Pest Control Agents and Disinfectants. SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources for these products by June 3, 2010, to Amy Garcia, Program Analyst, Small Business Administration, Office of Government Contracting, 409 3rd Street, SW, Suite 8800, Washington, DC 20416.

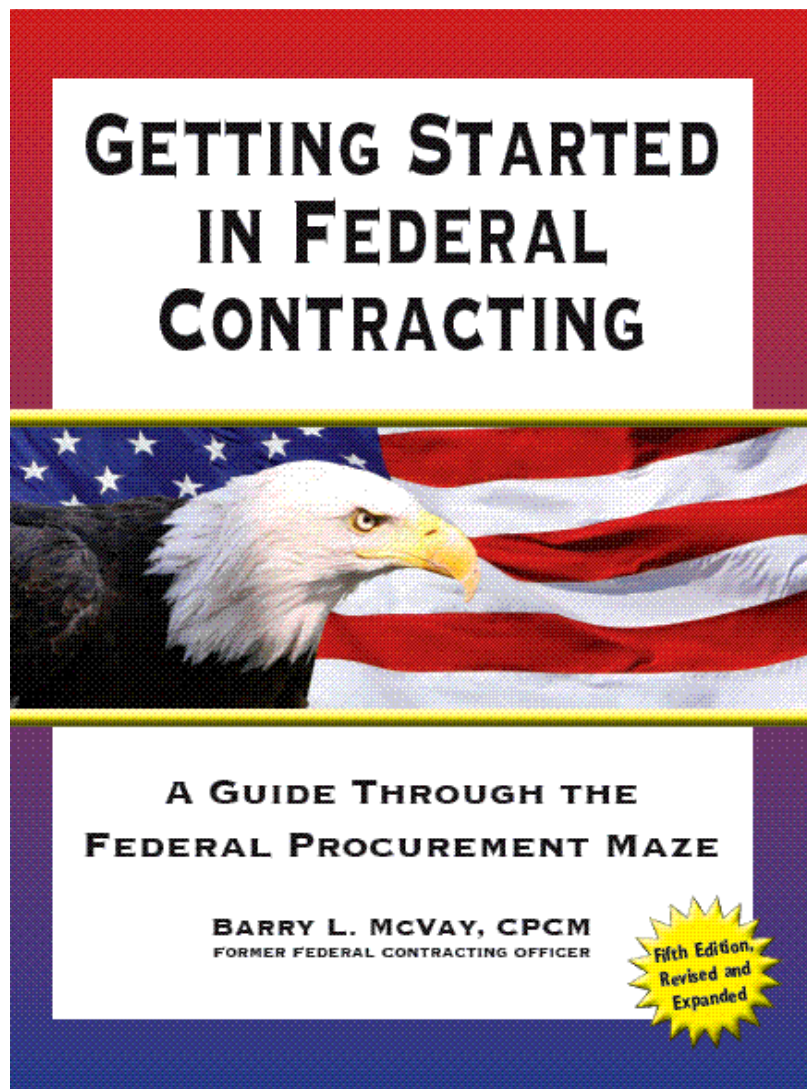
In addition, the SBA has decided not to issue a nonmanufacturer rule waiver for improved outer tactical vests and related accessories under NAICS code 339113, Surgical Appliance and Supplies Manufacturing, PSC 8470, Armor Personal, because SBA received multiple comments from small business manufacturers and distributors that have been awarded prime contracts or have submitted offers within the past 24 months (for more on the proposal to waive the nonmanufacturer rule for improved outer tactical vests, see the May 2010 *Federal Contracts Perspective* article “Tactical Vest Nonmanufacturer Rule Waiver Proposed”).

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.

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